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THE
CLASSICS OF INTERNATIONAL LAW

EDITED BY

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DE JURE NATURAE ET GENTIUM
LIBRI OCTO

BY SAMUEL PUFENDORF

- VOL. I. A Photographic Reproduction of the Edition of 1688, with an Introduction by Walter Simons, a List of Errata, the Text of the Quotations from Greek Authors, and a portrait of Pufendorf.
- VOL. II. A Translation of the Text, by C. H. and W. A. Oldfather, with a translation of the Introduction of Walter Simons, List of Classical Authors and Translations, and Indexes.

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**TRANSLATION
OF THE
INTRODUCTION
OF WALTER SIMONS**

energies of European peoples, and had to a great extent consumed them. After the Peace of Westphalia the attention of scholars and the public opinion of the cultured nations was more and more attracted to the mathematical and physical sciences. It was, more particularly, mathematics which ruled the spiritual life of the time. Since René Descartes (Cartesius, 1596-1650) had instilled a new life into this science, there had hardly been a superior mind which did not further develop the mathematical method in its own special field, or apply it to other branches of knowledge. This statement holds good not only of men like Isaac Newton (1642-1727) and Gottfried Wilhelm Leibniz (1646-1716), whose controversy concerning the priority of infinitesimal calculus is well known, but likewise of other contemporaries of Pufendorf. I mention here only Baruch Spinoza (1632-77), who attempted to teach philosophy according to the mathematical method. Thus it is not surprising that Pufendorf also was affected by the spirit of his time.

Samuel Pufendorf was born 8 January 1632 in the hamlet of Flöha, near Chemnitz, Saxony, and was a son of the local clergyman. His father had decided upon a theological career for him. Pufendorf, therefore, studied theology in Leipzig, but did not continue with this science and soon turned to jurisprudence. In Jena he studied not only natural law but also mathematics. These two branches of science which, according to our valuation, seem so far apart, were then both taught simultaneously by a distinguished mathematician, Professor Erhard Weigel. Throughout his life Pufendorf remained gratefully devoted to this eminent teacher. We meet occasional quotations of Weigel's sayings even in the later writings of Pufendorf. The teacher's method was decisive as regards the form of the first important work from the disciple's pen.

The origin of this work is due to peculiar conditions. Since Germany, after the Thirty Years' War, was economically disintegrated, the chances for a young scholar were poor. Pufendorf could not hope to find a congenial position in his circumscribed fatherland, Saxony. Thus he had to look towards foreign countries. He secured an engagement as tutor in the family of the Swedish minister, Coyet. This gentleman, who at that time represented the interests of the Swedish Crown at the court of Denmark, in 1658 called Pufendorf to Copenhagen. But it was not in the decrees of destiny that he should enjoy a long period of useful activity there. Although the Peace of Westphalia, which put an end to the Thirty Years' War, had really attempted to give to Europe a new and durable order of the component States, it could not prevent the turmoil of warfare on the many and various battle-fields of Europe during the following decades. Shortly after the arrival of Pufendorf in Copenhagen, war broke out between Denmark

and Sweden. Without regard to diplomatic privilege and immunities, the suite of Coyet, and among them the tutor Pufendorf, was imprisoned. During his captivity, which lasted more than eight months, he wrote his first and probably most original work, *Elementorum Jurisprudentiae Universalis Libri Duo*. It goes without saying that during this time he was deprived of scientific intercourse and had no access to libraries. This work, which was reissued as No. 15 of the 'Classics of International Law', is formally based on the mathematical method of Weigel. In subject-matter it follows largely the doctrine of Grotius. Its significance was made clear, in a learned manner, by Dr. Hans Wehberg (Geneva) in the introduction to the new edition above mentioned.

This work was published by Pufendorf at the Hague in 1660, after his liberation from captivity in Denmark. He had not returned immediately from Copenhagen to Germany but had betaken himself to the Netherlands, where he matriculated at the University of Leiden. The book was dedicated to Elector Palatine Karl Ludwig. At one stroke, Pufendorf thus achieved an enviable reputation, and the Elector Palatine in 1661 called him to the University of Heidelberg. This appointment was epochal in the history of jurisprudence, as it meant the establishment of the first public chair of international law.

In Denmark and the Netherlands Pufendorf availed himself of the occasion to observe the confused conditions of his fatherland with less prejudice, and to arrive at a more impartial estimate than would have been possible in Germany under the dire after-effects of the Thirty Years' War. Considering his lively interest in all questions of constitutional and international law, we may assume that he had familiarized himself with the pamphlet literature which appeared abundantly during and after that European war. Then the centuries-old struggle between the imperial power and the territorial princes had been decided by the Peace of Westphalia to the disadvantage of the imperial power. Former vassals of the Emperor had now become sovereign princes. Theoretically, however, the contention was by no means ended. Under such circumstances it was not easy to write anything about these conditions without incurring the suspicion of partisanship. For this reason Pufendorf decided to publish under a pseudonym his observations on the status of the German Empire and his suggestions of reform. In 1664 he published at Heidelberg his book *De Statu Imperii Germanici* under the name of Severinus de Monzambano. He introduced himself to his readers as a 'nobleman from Verona' who undertook to enlighten his brother Laelius on these matters. This book at once attracted the greatest attention and achieved fame which was of long duration. Here Pufendorf points out the faults committed in the reorganization of the Empire through the Treaty of Westphalia.

In fact, the weakening of the imperial power by means of the system of states of central Europe which was then founded contributed largely to that general unrest which in later years shook the whole continent. But our author does not confine himself to criticism; he also makes proposals towards a better regulation of German conditions. Some of these ideas came to fruition through the interference of Napoleon I in German politics, and later through the foundation of the German Empire by Bismarck.

In 1670 Pufendorf resigned his chair at Heidelberg in response to a call from the King of Sweden, Charles XI, who appointed him professor *primarius* of jurisprudence at the University of Lund. This university, which had been recently founded, soon, through Pufendorf, became famous in Europe. Only two years after accepting this professorship Pufendorf published in Lund his principal work: *De Jure Naturae et Gentium Libri Octo*. Its contents we shall later discuss in more detail. In this work Pufendorf separated himself formally from the mathematical method, although to be sure one is often reminded of it by his system of definitions and conclusions. As ample compensation for this slight defect he created a new system covering the entire field of jurisprudence from the standpoint of natural law. This system was applied a century later, at least in part, in the arrangement of the 'preussisches Landrecht' of Frederick the Great.

With this work also Pufendorf achieved an extraordinary success. It was not only widely read in the original Latin text (more so than the formal and somewhat too precise *Elementa*), but in the course of time it was translated into French, English, and Italian, and it elicited many commentaries. On account of the great size of the work, and in order to make his doctrine more accessible to tirots and laymen, Pufendorf, who in the meantime had been granted a title of nobility, published an abridgement of his system of natural law entitled *De Officio Hominis et Civis Libri Duo*. Thus we may say that, just as the *Elementa* was a preparatory work to the book *De Jure Naturae et Gentium*, so the work *De Officio Hominis et Civis* offers an epitome of it. After all, even this abridgement is of independent value. Therefore it was eminently fitting that it should be reissued by James Brown Scott as No. 10 of the 'Classics of International Law', together with an introduction by Professor Walther Schücking, at present a member of the Permanent Court of International Justice at The Hague. There are several translations of this book. The title of the French translation by Jean Barbeyrac is *Les devoirs de l'homme et du citoyen*. It is significant of the often truly revolutionary ideas of Pufendorf that this title, with one term changed, meets us again in the heading of the famous declaration of the French National Assembly of 1789 concerning the rights of the man and the citizen ('Déclaration sur les *droits* de l'homme et du citoyen').

Pufendorf did not confine himself to a scholarly treatment of constitutional and international law; for in connexion therewith he made a comprehensive use of history, and also continued to show a practical interest in politics. For this reason he was called to Stockholm by the King of Sweden in the year 1667 to act as State Historiographer. In this position he published several works on the history of Sweden. He also wrote a refutation of the numerous attacks which had been directed against his main work. His reply had the title *Eris Scandica*.

But fate did not condemn him to spend his extraordinary energy exclusively in foreign countries. In 1686, at the age of 54 years, he went to Berlin at the call of Frederick William, the Great Elector of Brandenburg. During the last years of his life he did not publish any further writings in the field of natural and international law. In conformity with his new vocation he devoted his time to historical and political treatises; and, indeed, he finally returned to the elaboration of theological controversial questions with the study of which he had begun his career as a scholar. Held in high esteem by the republic of letters of Europe, he died at Berlin, October 26, 1694.

The principal source of his fame is and remains his work concerning natural and international law, which is now reissued by the Carnegie Endowment. It reminds us by its form of the scholarly and diffuse diatribes of the humanistic period. Pufendorf takes great pains, just as did Grotius and others of his predecessors, to corroborate the truths which he discovered by multitudinous quotations from the Holy Scriptures, classical literature, and contemporary writers. But between his method of quotation and, let us say, that of Hugo Grotius, we discover after all, upon closer comparison, a considerable difference. Grotius, as a Dutchman, lays far greater stress on the law as it has positive value, and on law as it is practically applied in history, than on the opinions of scholars. His quotations are more in the sense of cases of precedent and *res judicata*, as Anglo-Saxon law knows these practices. Pufendorf, on the other hand, relies more on the opinions of famous scholars for supporting his views. Hugo Grotius also supplements the abundance of his quotations by independent exposition and systematic elaboration of ideas bearing on natural law; by the combination of these two methods he became the founder of the positivistic as well as the natural law school of international law. Probably we are justified in classifying him with the positivists, but Pufendorf is undoubtedly to be counted among the theorists of the law of nature. In this respect Pufendorf finds support in those authors who more than a century before substituted for the scholastic deduction of all law from the revealed commandments of God, a rational method in the style of the Spanish School. Our time stands closer to the orientation of the seventeenth and eighteenth centuries in matters concerning

philosophy of law than does the nineteenth century. Humanity, giving up the exaggerated worship of historical bases and positivism which characterized the last century, now resolutely takes hold of absolute values, without which the safe conduct of life becomes impossible for the individual as well as for States. Even in the Anglo-Saxon countries, the domain of case law, there is noticeable a marked change from the unconditional cult of precedent judgement to a more systematic foundation of jurisprudence in accordance with the philosophy of law. Thus the doctrine of Pufendorf, in our day, claims greater interest. In this connexion it is remarkable that some of his expositions remind us of the works of modern Catholic authors. He himself, however, was always emphatic in his profession of pure Lutheranism and never appealed to the views of Catholic authors.

His religious views may account for the fact that he apparently was hardly acquainted with the works of the Spanish school, which at present are more and more appreciated; at least he took no notice of the representatives of the school. He occasionally quotes Suarez, but I could not find in his works any allusion to Vitoria. This is the more surprising as he shows some knowledge of Spanish literature. His illustrations concerning conditions of natural law are often based on Spanish works which speak of the exploits of the conquistadores and give descriptions of the countries which they conquered. First among these is the book by Garcilasso de la Vega on voyages in Central and South America. From Pufendorf's quotations it is plain that he considered the communal forms of the natives of these countries in every respect as State organizations; he attributed to them a measure of independent life from the standpoint of international law, just as Vitoria had done. When we think of his aloof attitude towards Catholic and especially theological writers, it is well to remember that his work appeared in Sweden, a strictly Lutheran country. Lutheran orthodoxy of those times with reference to contemporaneous authors was, to say the least, just as intolerant as was the Catholic Church.

With special precaution Pufendorf also treats in his work the constitutional law of his epoch. Now we should not forget that he lived in the age when the power of princes was absolute; monarchs could resort to very severe procedure when they thought fit to make an obnoxious writer feel their displeasure. Nevertheless, he exhibits in his appreciation of political conditions a magnificent freedom from prejudice. In this respect he was in advance of his age. We shall see this clearly in discussing the contents of his work.

In this work, international law proper claims only an insignificant part, nor does he present it in systematic form. We have to gather the tenets bearing on this subject from the various chapters in which they are incidentally treated. The reason for this is that Pufendorf, in

formulating the norms for the juridical community of 'moral beings', does not differentiate between physical and juridical subjects, nor between private subjects and those which come under public law. Thus it happens that the special rules which he posits for conditions of international law are only instances of more general principles of natural law which are also valid for individuals.

It is only in the eighth book that we find a connected presentation of matters of international law, especially the law of war and the doctrine concerning change of government in the State and the extinction of States. This book I shall later on discuss in more detail.

Notwithstanding the peculiar arrangement of the subject-matter a thoroughgoing study of all the parts of the great work from the point of view of modern international law cannot fail to prove fruitful, for the time in which Pufendorf wrote resembles, in many respects—both political and economic—our own time. A war, tremendous in scope and duration, had not only transformed the condition of power within the sphere of European culture, but had also destroyed immense economic values, at least in central Europe. Here, as well as in northern Europe, numerous currencies had become unstable. No wonder, then, that he concerns himself at great length with certain problems of public and private international law which at the present hour are of absorbing interest for us, as for example the settlement of international debts in depreciated currency.

To these problems, in my opinion, belongs also that of the equality of individuals and of States. Pufendorf, as a matter of principle, opposes all privileges; he rejects a mystic foundation for such institutions as nobility and kingship. In juxtaposition to the duties of man and citizen he also recognizes rights of man and citizen, which belong equally to every one in a definite State organization. Pufendorf would severely condemn any oppression of minorities as such, which an exaggerated nationalism in the Europe of our days, in opposition to minority treaties, claims as its vested right for the so-called 'people of the State'. He resolutely stands up for the principle of international equality of all independent States without regard to size of territory, population, or power. That in a League of Nations organized on this basis, a condition of inequality of the members in matters of vital sovereign rights could be permanently maintained, Pufendorf, mindful of his conception of the natural law of the States, could never have admitted. As a matter of course, he recognizes a limitation of sovereign power by treaty. Without this, a federation of States is just as unthinkable as a community of individuals without restrictions on natural human liberty. But such a limitation, he holds, must be voluntary, otherwise it would not be compatible with the dignity of a State as *summa potestas*. Thus, for joint resolutions of federated States, as a matter of

principle, he demands unanimity; the same rule that is postulated in the Covenant of the League of Nations of 1919.

Concerning the aim and arrangement of his work the author gives us detailed information in the dedication to King Charles XI of Sweden, which is prefixed to the treatise, and also in the prefaces addressed to the reader. He points out in the dedication that the science of natural law which he (Pufendorf) professes was egregiously honoured by the King, who had endowed public chairs for this branch of law at the universities in his realm. Following the desire of the King, he explains, it is his endeavour, in the first place, to ascertain and lay down the commandments of God in the field of law for individuals as well as for States. These must be observed by rulers and citizens. With this he combines the study of human morals and customs, as well as of the means which States employ in order to preserve internal tranquillity and external security. As examples he adduces the great deeds of the rulers, especially the predecessors of the King. He takes great pains in order to elucidate the reciprocal rights and duties of human beings, the laws obtaining among the different nations, the form of civic society and princely power, and likewise the relations between prince and subject with respect to rights and duties. Ironically he points out the contradiction existing in the fact that the auditoriums of all the universities reverberate with the dicta of Ulpian and Papinian while the commandments of God and the natural laws of the human community are neglected.

In the preface to the first edition of the work Pufendorf admits that he had written his youthful work, the *Elementa*, in return for the care taken by his patrons on behalf of his welfare; now it must be his endeavour to replace it by a more mature work. Taking up the question whether such a work be still desirable in view of the achievements of his predecessors, he mentions with expressions of veneration the name of Hugo Grotius; he adds, however, that the great man had either entirely omitted some matters or bestowed on them only perfunctory treatment and that, furthermore, some of Grotius's sayings prove that he was no more than a fallible mortal. It is characteristic of Pufendorf that he points out as shortcomings of the work of his predecessor chiefly those passages where Grotius deviates from the doctrine of the Christian Church. After a succinct allusion to the commentators on Grotius, he turns to those authors who have chosen to treat the entire subject-matter from a fundamentally new point of view. Of these he mentions Thomas Hobbes and John Selden. He praises the acumen and originality of Hobbes while he criticizes his deviations from the teachings of the Church. As to Selden, he regrets that this erudite author has not bestowed on the common natural law the same care which is so conspicuous in his presentation of the positive law of the Hebrews. In contrast to the mere commentators on Grotius, Pufendorf assigns to

himself a place among the independent writers. He protests against a possible charge of innovation: considering the amazing progress registered in the fields of medicine, physics, and mathematics, he asserts that the claim to introduce reforms must also be conceded to jurisprudence. He does not claim to belong to those who imagine themselves to have grasped the whole truth and who are therefore unwilling to admit error. In support of his views, he says, he has often appealed to the recognized writers of antiquity. On the other hand, he rejects an all-inclusive consideration of recent authors as superfluous. He is explicit in his statement that he has paid no attention to the writers of the 'Romish sect' whom Grotius quoted so frequently. Pufendorf's severe criticism of the scholastic method and of juristic clericalism impresses us as the first bar of the tune which dominated the century of Enlightenment, that is, the eighteenth century. He defines his position as regards his literary opponents who do not recognize the principle of human *socialitas* as a sufficient basis of natural law. The latter base their negative attitude on the supposed arbitrariness of the concept *socialitas*, which, in contradistinction to the teachings of Christian morality, they hold to be either without obligatory power or inadequate for the fulfilment of the duties of man towards God and towards himself. The author emphasizes the fundamental conception of his work to be that God Himself has created men as social beings and that therefore the laws of human society so far as they flow from the nature of man are likewise in accordance with the commandments of God, so that they cannot be traced back to an arbitrary agreement among men. Thus Pufendorf asserts that his system of natural law is valid for all human beings without regard to differences of religion.

This system is then presented in his main work, as follows:

In the first book, as premisses of his system, some fundamental legal concepts are offered, namely, in the first chapter, the origin, the various categories and qualities, as well as the extinction of 'moral beings'. Such beings, to be sure, stand conceptionally in a contrast to physical ones because they are not, like the latter, material beings but only modalities (*modi*). They are, however, to a considerable extent, classified and judged by analogy with physical beings. As moral beings Pufendorf characterizes those which are not created by Nature, but are elevated by the Spirit above the natural beings. To these belongs man himself, in so far as he orders and regulates his life and actions by the power of his spirit, in contrast with the instinctive life of animals. To the same category belong also human communities which are held together by the bond of a common moral purpose. The two kinds of moral beings, the simple as well as the composite, are subdivided conformably to the character of their purpose. They are private beings if they pursue their own advantage, public beings if they aim at improving

positive, while the divine law belongs in part, Pufendorf holds, to the natural, and in part to the positive law.

The seventh chapter bears the title 'On the qualities of moral actions' and is largely devoted to the examination of the concept of justice and injustice (*justitia* and *injuria*). Pufendorf here defines his own position as against the ideas of Aristotle, Grotius, and Hobbes on the philosophy of law. He opposes the view of Hobbes that justice is grounded only on the will of the State, and that it consists in nothing but the fulfilment of obligations assumed by agreement. This view, which even in our time counts eminent protagonists, is of ominous significance for the interpretation of international law. Pufendorf argues against it that justice demands also the observation of those rights which belong to man by nature regardless of any State regulation or obligation by contract.

In the eighth chapter Pufendorf, in conformity with his system, analyses the quantitative aspects of moral acts, i.e. their relative value. This depends essentially on the kind of intention (*intentio*) underlying the act and also on the extent to which the act realizes the intention. Here the author denies the Stoic tenet of the equality of all misdeeds.

In the ninth and last chapter he concerns himself with the various manners in which the effect of moral acts (good or evil), as well as omissions, can be imputed, either as merit or guilt, to the person who commits such actions or to a third person.

Not until he begins his second book does the author broach his main subject. In the first chapter he sets forth the contradiction which seems to exist between man's freedom of will and his being bound by right and law. The freedom of animals knows nothing of such restrictions. Pufendorf finds the explanation of this subjection of man to law partly in the greater dignity which God has conferred on man and which requires that he shall subject his actions to a definite norm and rule; partly on the fact that the multitude, force, and variety of his passions stand in need of the curb of reason; and partly in man's helplessness during his early years which makes him to a greater degree and longer than any other creature dependent on social protection and thus on the social order of natural law as a limitation to natural freedom.

In the second chapter the natural state of man is delineated in two ways: first, the state of the uncultured individual is pictured, and second, that of a member of an uncultured human community, always under the abstract presupposition that a human status devoid of culture may have existed. But Pufendorf annihilates this figment by pointing out that not even Adam and Eve in Paradise enjoyed such a state of natural freedom, since God had enjoined on them the state of marriage. Hereupon he scourges the pessimistic presentation which Hobbes and Spinoza had given of the original social state of humanity as a war of

all against all. He endeavours to show that natural reason has taught man the great advantage of arriving at an amicable arrangement with respect to the means offered by nature for the satisfaction of the requirements of life, instead of constant wrangling. The morbid pugnacity of some individuals is not to be construed as the natural state for all. Rather, man is by nature a social being, and within the community not a foe to his fellow men even when he faces them in natural freedom; that is, when he has neither to obey nor command them. Pufendorf rejects likewise the view of Hobbes that while there may never have been an individual who was the enemy of all other individuals, the holders of sovereign power in human society have always been enemies among themselves. Such a view contradicts Holy Scripture which teaches that the natural state of man is rather that of peace than of war, and that the reciprocal relation is rather friendship than enmity. This may be deduced from the very fact of man's common descent from the first parents. If a man has lost this consciousness of relationship and looks upon his fellow men as enemies, he has, our author thinks, deserted the original and natural state. The employment of natural reason likewise induces us to prefer peace. The experience of the evils which man, within or without the community of the State, suffers when he has to wage battles, provoked or not, makes towards the same goal.

Pufendorf expressly denies that the natural state of peace between human beings is based on an agreement, or that an agreement is required in order to bring about the obligation of peaceful behaviour among human beings. Such a general treaty (as, for instance, the Briand-Kellogg Pact, we might add to-day) cannot give to the duty of peace, which results from natural law, any higher obligation. This state of peace, it must be admitted, will, however, always be precarious, in view of the lust after power and possession which, in Pufendorf's opinion, is so strong in man that even the teaching of Jesus, which inculcates peace, loving-kindness, forgiveness, benevolence, readiness to reconciliation, humility, and contempt of earthly superabundance and power, was not able to hold back the Christian nations from unrighteous intrigues, wars, and oppression. Pufendorf therefore recommends a peaceable and friendly attitude towards neighbours, but at the same time he intimates the political duty of unceasing vigilance, with an eye on the possible martial aspirations of these neighbours. He is in perfect harmony with the opinion of Dio Chrysostom that the State which is best prepared for war will be in the most advantageous position for the maintenance of peace. He is not aware, it seems, how often warlike preparedness has involved the States in war. The successor of Pufendorf's Swedish sovereign (we are speaking of Charles XII) strikingly exemplified this principle which is based on experience.

In the following eight chapters the author endeavours to present

the origin of natural law. His starting-point is the idea that God in creating man with the nature of a rational and social being has assigned to him simultaneously the rights and duties predicated on that nature. Nevertheless he protests against the attempt to derive the contents of natural law from the relation of man to God. And he refuses likewise to concede that the rules of natural law may be deduced from the consensus of opinion of all human beings, or of all nations, or at least of the majority and most cultured of them. The demonstration of such a view as that, he thinks, is both difficult and unreliable, in the first place because the customs and laws of the various nations rarely agree, nay, are plainly contradictory; and in the second place because there exists no nation which draws its norms exclusively from natural law. On the contrary, they all adopt numerous positive norms of customary and statutory law. Under these circumstances it is difficult to distinguish in the respective legal systems between natural and positive law. The multiformity of positive law, Pufendorf points out, is no reason for denying the existence of a natural law which is binding for all human beings; nor does it constitute a reason for attributing the origin of law to the advantage of various human communities at a particular period. He shows that such a materialistic and utilitarian interpretation of law is opposed to the true welfare of individuals as well as of States; it leads not only to unfair but also to pernicious consequences. On the other hand, the recognition and consideration of the natural equality of right of human beings and States is bound, in the long run, to prove advantageous. The short-lived success of a ruthless policy of conquest yields no argument to the contrary. Did the Romans not pay for their dominion over the then known globe with internal decadence, and later on with the collapse of their exhausted empire? Therefore, it is evident that natural law does not arise from considerations of contingent expediency, as do the majority of positive laws, but from the unchanging dictates of human reason. Yet with this theory Pufendorf does not mean to say that every human being is distinctly conscious of the natural commandments and their foundation. The majority decide between right and wrong according to the sentiment which God has implanted in their souls. Whether, in fine, such a decision really corresponds to natural law or flows from misguided human judgement can only be ascertained by a careful examination and logical conclusion from the first and true principles of natural reason. One of the clearest and most certain commandments of natural law is the golden rule which teaches us to behave towards our neighbour as we desire him to behave towards us. But this rule itself is to be deduced from a higher principle of natural law, to wit, the equality of human rights. The best way of investigating the natural law, our author infers, consists in carefully observing the nature of man

and the conditions of his existence, as well as his inclinations and desires. The essential characteristics of man are: a strong instinct for self-preservation; the inability to attain this aim without the co-operation of his fellows; a great gift for useful community work, but also, frequently, a propensity for malice, arrogance, irritability, and destructiveness. Such a being is by nature social but stands in need of a check for his harmful instincts. Hence Pufendorf lays down the following as a fundamental principle of natural law: everything which is necessary for the aim of society (*socialitas*) is to be considered as required by law, while everything that disturbs or frustrates *socialitas* is to be treated as prohibited by law. In this connexion our author defines his position with respect to those writers who, under the influence of Hobbes's doctrine, hold that every human community is an institution opposed to the state of nature, since by nature discord reigns between human beings. He condemns this attitude as an exaggerated conclusion from the principle of Hobbes that all rules of natural law inhere in the egoism of man. The egoism of the individual and the egoism of the community, if well understood, Pufendorf thinks, are not mutually exclusive. But wherever consideration of the common good or of the rights of our fellows serves, at the same time, our own advantage, Pufendorf, in opposition to Hobbes, bases the corresponding rule not on egoism but on the natural law which is binding for the individual, and on ethical duty. From this universal duty to the *socialitas* which is incumbent on man towards all human beings as such, Pufendorf distinguishes the special relations of law which join the individual within narrower community spheres with the members of that community. In such cases egoism may, without impairing that universal duty, be the primary factor; but even then it is understood that the common good must not be injured. At any rate it is not a proposition of natural law that all communities of this type owe their origin to mutual benevolence. Pufendorf concedes that all propositions of natural law may be reduced to considerations of utility, even those which demand of the individual the utmost sacrifice. Thus, for instance, the soldier is expected to suffer death, fighting for his fatherland, or the citizen has to renounce his prosperity in favour of the requirements of the State. Even here, if we rightly consider the matter, the advantage of the individual coincides with that of the community. On the other hand, our author opposes the view that utilitarian considerations of this kind can bestow on the rules of natural law the force of binding laws. For this, a belief in God is indispensable. We must firmly hold on to the conviction that God, who has created man as a rational social being, has endowed him with these commandments which correspond to his nature. In order to be bound by them it is not necessary to have them first fused into positive laws.

Pufendorf then proposes the question: what sanctions ensure the observation of the norms of natural law, and what reward or punishment will be meted out for obedience or disobedience? Like Job, he does not arrive at any clear result. He cannot get round the fact that in this world it is often enough the righteous who suffer while the evil-doer is permitted to enjoy his ill-gotten goods. Nevertheless, disregarding the inner spiritual consequences of good and evil deeds, he emphasizes the strong probability that even in external things obedience to the commandments of natural law pays, while disobedience will bring retribution. Finally, he refers us to the teachings of Holy Scripture concerning retribution in the life to come.

The first three chapters of the second book have seemed to deserve an extensive recapitulation, as they contain Pufendorf's fundamental doctrines concerning natural law. The rest of this book and the additional six books embody the application of these doctrines to specific conditions of human life. It is clear that the application mainly refers to institutions of positive law. The author defines these likewise as rules of natural law. He points out, however, a distinction between those natural rules proper which are immediately given to man in the state of nature, and those which he terms mediate measures of natural law, in that they may be deduced from the immediate ones. The mediate measures he considers as belonging exclusively to positive law which is based on temporal and local conditions. Since the relation obtaining between States stands far closer to the state of nature than that between citizens of a State, it is easier to gather Pufendorf's conception of international law from the second book than from the later ones. Not until the eighth book does he approach the separate problems of international law more closely.

According to his peculiar system the author first of all treats of the natural obligations of man towards himself, including the development of mind as well as of body (chapter iv of Book II). In this connexion Pufendorf offers us a complete compendium of the wisdom and art of life. This chapter closes with a severe condemnation of suicide in any form, in contrast to the honourable sacrificing of one's life for aims approved by God. One of the natural rights of the individual is that of self-defence (chapter v); Pufendorf examines the question to what extent self-defence may amount to a duty, and reaches the conclusion that self-defence may become a duty in the event that, by refraining from it, one gives to the evil-doer the opportunity to do further harm to the community. In the considerations touching this point, Pufendorf comes very close to the position taken in Jhering's famous writing *Der Kampf ums Recht*. But he is on his guard against the one-sidedness whereof Jhering is guilty by warning against unnecessary employment of force and recommending readiness for reconciliation in

minor difficulties, as well as leniency towards a repenting aggressor. But his attitude towards the man who persists in his affront and violation of law is different. In the interest of the common welfare Pufendorf here demands energetic action even to the point of annihilating the culprit, or at least weakening him enough to render him innocuous. This to be sure refers only to the status of law in man's natural state (and thus also to international law). Even here Pufendorf warns us against the exaggeration of the right of self-defence. This, he holds, does not allow any one to attack a presumed adversary from fear of a possible but not actual aggression. Therein lies the condemnation of preventive wars.

Noticeably severer are the limitations which Pufendorf imposes on the members of a civic commonwealth. Here the question of self-defence arises only after the assistance of the authorities whose duty it is to avert wrong-doing has been invoked in vain or is inaccessible. In such a case he thinks the state of nature is re-established. It is incumbent upon the authorities, in his opinion, not only to avert injury, but also to bring about retribution and the safeguarding of the endangered person for the future. Thus Pufendorf likewise makes a distinction between the natural and civic state when he answers the questions whether in self-defence one may go beyond what is required for warding off the aggression, or whether one must betake oneself to flight when one may thereby withdraw from the aggression, without trouble and danger. For the civic state, the first question is answered in the negative, the second in the affirmative. But in considering these questions with reference to the state of nature, and expressly as regards international law, Pufendorf decides to the contrary. For in the state of nature the aggressor is the enemy, pure and simple; and even supposing the aggression involves only a lesser lawful interest than the life of the person attacked, it is the right, nay it may be the duty, of the person in point to defend himself against the aggressor to the utmost.

In concluding this chapter the author raises a question which is of great importance for international law, namely, whether the party which has become guilty of an illegal aggression may forcibly avert the counter-attack of the injured party? His affirmative answer applies to the case in which the party originally attacked refuses to accept appropriate satisfaction for the injury inflicted.

The sixth chapter treats of the condition of emergency. Pufendorf here examines the foundation of the proverb that 'necessity knows no law'. He makes a distinction: does an emergency give a right to violate the laws? Or does it only supply an excuse for the law-breaker? The first alternative, it seems, he accepts for the norms of natural, the other for positive law. He nevertheless admits that in both domains absolute commandments are conceivable which must be fulfilled, even at the

cost of life. In this connexion he elucidates the problem whether dire necessity gives to the poor man the right forcibly to take what he needs for the support of life, if the rich do not let him have it of their own free will. Such an action, he observes, contradicts the mediate proposition of natural law concerning the inviolability of property. Pufendorf assumes, however, that with this proposition there is a concurrent obligation on the part of the rich, equally natural and derived from humane principles, to give from their superabundance to the needy what these require. This obligation may, from its imperfect form in natural law, be transformed through positive law into a more perfect form, so that it can be enforced by courts and authorities. This was really the situation under the law of the Hebrews, as Pufendorf, appealing to the authority of Selden, narrates. Only where such positive regulations are in force, he thinks, is it fair to punish larceny and robbery induced by distress. We cannot avoid the inference that in our own day Pufendorf would advocate the public relief of the unemployed. He, however, impugns the doctrine of Grotius that in such a state of distress the derived legal concept of private property gives way to the original state of communism founded on natural law, so that the needy may appropriate what they require, since these things would be without a master.

The third book analyses the law of obligations from the point of view of natural law. In the first chapter Pufendorf enters upon the discussion of obligations resulting from delicts and expounds the doctrine of damages. In chapter ii, in frequent opposition to Hobbes, Pufendorf develops a series of conclusions on the equality of human beings, based on natural law, which equality exists notwithstanding all physical and psychological differences. He points out that in human intercourse every act must have its corresponding compensation; that the individual, in the distribution of goods and services among several parties, must, as a matter of principle, treat them equally; that no person shall haughtily exalt himself above his fellows, or refuse to them the same personal honour, and especially that he must not violate this honour by outward distinctions. Pufendorf sharply attacks the interpretation of antiquity that some human beings are by nature predestined for slavery. This form of inequality as well as any other that is not predicated on the natural differences of age, sex, or physical and spiritual power, he claims to be a product of positive law. Even the inequality of power, without which a commonwealth is inconceivable, Pufendorf treats as a positive deviation from the principle of natural law that all human beings are of equal power, because they are equal in freedom. Inequality of wealth, as such, should not, according either to natural or positive law, be allowed to play a conspicuous part as opposing the equality of human beings.

We are aware that in this chapter Pufendorf is far in advance of his time; he anticipates ideals of the century of Enlightenment, nay of the nineteenth and twentieth centuries. It is well to remember that in his time citizens of the same commonwealth faced each other in a great number of narrowly circumscribed, sharply separated associations, guilds, and classes. This epoch, more than almost any other, was excessively rich in privileges. Considering all this, Pufendorf's emphasis on natural equality was, indeed, revolutionary. Imbued with an equally progressive spirit is the third chapter of the book on the various duties of humanity. As a basis for human intercourse the requirement is laid down that it is a human duty to take care of the welfare of one's neighbour. From this principle Pufendorf evolves the emergency right to pass over another's land, and the right of commerce in transit over foreign territory. He derives from the same source the authorization of the master of a vessel, in case of emergency, to land on foreign shores; and in the same manner the duty to extend to strangers hospitable treatment. Foreigners who are ready to subject themselves to the laws of the country are to be permitted to settle and to have recourse to the courts of the land. To other nations free commercial relations are to be granted; these are subject to limitation only in exceptional cases. He goes so far as to advocate international marriages. But he opposes the opinion of Grotius that from the principle of equality a universal right to most favoured treatment may be derived. Whoever claims such a right, according to Pufendorf, must base his claim upon a special agreement.

The fourth chapter treats of the general rules governing the law of obligations. The author maintains the validity of the doctrine *pacta sunt servanda* as an axiom of natural law, and grounds it on the social nature of man whose God-given purpose would be frustrated if treaties were not religiously observed. He then classifies obligations as innate and as subsequently contracted. In the first category he places the worship of and obedience to God. Therefore he pronounces against the view of Hobbes, who holds that impiety is an indication of stupidity and ignorance, and thus not subject to punishment. Neither is he inclined to look upon the impious, as it were, as legitimate foes of God, whose punishments we, as neutrals, could leave to God; rather he thinks it is right and just for us to punish them as rebels against divine and human order. Further on, he distinguishes between natural and civic legal obligations. As a matter of principle the former can only be enforced by amicable means, while as for the latter the State may compel their fulfilment. Pufendorf, moreover, distinguishes between temporary and permanent, unilateral and reciprocal, obligations.

In the fifth chapter the author discusses the problem: how a person may transfer his right to another by way not of an innate but

of an acquired obligation. Here he sets forth his view in opposition to that of Hobbes, who held that on the basis of natural law every human being has a right to everything and thereby is the competitor of everybody else in the exercise of that right. According to Hobbes the transfer of right consists simply in the renunciation by one person in favour of another with regard to making use of this competitive right. The other party acquires no new right, but is merely freed from the burden of a specific competitor in the exercise of his universal right. Transfer of right consists in non-resistance—this is the formula of Hobbes. It goes without saying that Pufendorf, the proclaimer of the natural *status socialis* of man, cannot but reject this formula, which rests on the assumption of a natural state of war of everybody against everybody. In the state of nature he sees only an equal opportunity for all men to avail themselves, for the satisfaction of their requirements, of the animate and inanimate bounties of nature. A right to exploit specific gifts of nature is established only when the status of individual utilization is approved, either expressly or tacitly, by the members of the community. Pufendorf denies entirely a natural right of sovereignty which authorizes a man to demand services of others. Such rights can only arise from an agreement, since they contradict the natural equality of men. But assuming that a right in things or persons has come into existence in this manner, the situation is as follows: by such transfer one party loses a positive advantage which he possessed, while the other gains one which he did not possess. The mere non-exercise of a universal right cannot transfer that right to another, since such non-exercise does not free the person assumed to acquire it, from the competition of all other persons who have the same right. Subtle as this controversy may appear to us with regard to positive civil law, it will become highly significant in connexion with the acquisition and transfer of rights between States. From the point of view of modern international law, I think the interpretation of Pufendorf is in every respect to be preferred to that of Hobbes.

In examining the various kinds of unilateral or multilateral contractual obligations Pufendorf also takes up the moot question whether informal contracts (*nuda pacta*) and informal promises (*nudae pollicitationes*) must be kept. The Anglo-Saxon law, as is well known, does not recognize such an obligation, but insists either on a definite form of agreement or promise, or, on the other hand, on a modification in the right possessed by the one party, i.e. a consideration, which modification is made in reliance on the promise of the other party. In opposition to this doctrine Pufendorf upholds the basic validity of the rule *pacta sunt servanda*, which plays such a considerable part in international law. He proceeds to refute one after the other the arguments in favour of the more material doctrine. He points out that faith and confidence

demand that in human society we must live up to our promises. This applies—and here Pufendorf agrees with Grotius—with special force to the relations between States. These relations would be gravely disturbed by mutual distrust if agreements informally made and not yet fulfilled by either side need not be kept at all.

In the sixth chapter our author discusses consent as a preliminary requirement for a valid pact. Here he inquires in detail whether, according to natural and international law, an agreement arrived at under compulsion and threats has binding force. Pufendorf does not share the opinion of Grotius that such agreements are binding because there occurred between the contracting parties some kind of consensus, it does not matter on what grounds. Upholding the contrary view, Pufendorf denies to such a pact from the outset all intrinsic binding force from the natural law standpoint. He argues that in case such an arrangement had been made by individuals within a State organization the judge would hold it to be void, as brought about by compulsion. On the same grounds he rejects the interpretation of Hobbes, who attributed binding force to compulsory treaties from the consideration that the origin of all laws of human communities may, without exception, be traced back to the pressure of distress and fear of the greater evils involved in the original state of nature. Rightly he asserts here that Hobbes in this connexion employs the concept of compulsion with two different connotations.

In the eighth book Pufendorf, as we shall see later on, modifies his stand as to treaties imposed by force of war. Generally speaking, he thinks, they cannot be invalidated.

The seventh chapter takes up the subject-matter of promises and pacts. More in detail it treats of provisions whose fulfilment is impossible, illegal, or immoral, and of the consequences of such provisions in relation to the binding force of promise and pact. Pufendorf likewise examines to what extent one may obligate himself by disposing of the goods of another, or of things and services which one had already promised to another party. Of importance for international law, at this point, is the opinion voiced by our author that nobody may validly change his nationality without the consent of the sovereign to whom he owes allegiance, for any legal transaction is null and void whereby we promise to one what we owe to another.

In the eighth chapter Pufendorf analyses the importance of conditions and limitations of time which may be attached to legal transactions. In the ninth chapter he adverts to agencies in the transaction of business. In this connexion we encounter certain observations concerning the position of ambassadors which are of some importance from the point of view of international law. He mentions the case of an ambassador who possesses simultaneously full credentials which

he presents to the other party, and secret credentials which limit his liberty of action more than do the full credentials. Under such circumstances the ambassador obligates his sovereign by agreement within the limitations of the full credentials, even if he exceeds thereby his secret instructions.

In the subsequent books the author speaks of the institutions which man has established by express or tacit agreement, in order to enlarge and organize the rights granted him by nature. Among these he enumerates language, property, the prices of things, and the relations of sovereignty (*sermo, dominium, pretium, potestas*). It is in accordance with this scheme that he subdivides the rest of this work. Chapters i-iii of Book IV treat of language and the obligations originating therefrom, Chapters iv-xiii of property. Book V is concerned with prices, and in conjunction therewith we find a discussion of the various kinds of contracts which presuppose the price of things. Book VI treats of the relations of sovereignty with respect to the right of the family; Book VII discourses on the origin, the forms, and the acquisition of the power of the State; Book VIII, in chapters i-v, deals with the substance of the power of the State, chapters vi-x with the law of war, with the conclusion of peace, and with alliances and other treaties between States. In chapters xi and xii the loss of citizenship and the change in and dissolution of the State are discussed.

The starting-point for his observations concerning the binding power of language Pufendorf finds in a proposition of Aristotle to the effect that many animals are able to indicate by sounds their feelings of pleasure and pain, but that only to man is it given to communicate also, by sounds which have been agreed upon, thoughts bearing on what is useful, injurious, good, evil, just, or unjust, and that this gift alone is the basis of the human community in the home and in the State. Pufendorf then turns his attention to the different theories concerning the origin of language. He maintains that the combining of definite notions with definite sounds is not based on the nature of man, or on inner necessity of whatsoever description, but on voluntary decision and arrangement by man. Otherwise it would be inexplicable that the same idea or concept, with different peoples, may be expressed in such numerous and deviating linguistic forms. He attacks the opinion voiced by Socrates in Plato's *Kratylos* that everything has by nature its due name. He reduces this opinion *ad absurdum* through examples of etymological explanation of words which necessarily hold good only for a specific language (Book IV, chapter i). The linguistic expositions of the author are of interest as instances of a strictly rationalistic interpretation. They adduce a quantity of erudite material concerning the general and special signification of words and concerning ambiguity, the change of the concepts underlying the words, and

their legal consequences. To this exposition Pufendorf adds, speaking from the standpoint of the philosophy of law, explanations concerning the concept of ethical and logical veracity, concerning the extent of the duty of veracity, and the limitation of the concept of falsehood. He likewise defines the right of receiving true information and the contrary right of observing silence concerning the truth. He emphatically rejects ambiguity of speech and secret reservations (*reservatio mentalis*). Special mention, on account of its importance for international law, should be made of the fact that Pufendorf, in agreement with Plato in his *Republic*, recognizes the right of rulers, in the interest of the State, to deceive not only their subjects, but also other rulers. In the case of physicians and lawyers he also recognizes the professional right to deviate from the truth.

The second chapter of Book IV undertakes a detailed treatment of the oath and its nature, its varieties and effects, as well as the violation of oaths. The third chapter, which considers the right of man to make use of the animal and vegetable kingdom, is preparatory to the doctrine of property. The development of property from the original possession in common he defines, in the fourth chapter, not as an immediate but as a derivative institution of natural law. Herein he is in harmony with the doctrine of Grotius, but in opposition to numerous writers of his time. He does not look upon property as an order sanctified by God, but as a human institution based on express or tacit agreement. God, to be sure, has given to man, as to the animals, the earth and all that grows and lives on it, for use; but the limitation of this utilization, its internal and external measure, is left to the discretion of man. Man can just as well ordain that all or some things remain in common as, on the other hand, he can distribute the things in the form of property among a few individuals, to the exclusion of the others. But even where this distribution is introduced there occur cases where human regulation has to give way to the state of nature. In case of extreme distress a needy person may make use of what he requires without regard to property rights. In time of war the treaty provisions between enemy States are suspended, and thus one party has the right to appropriate the property of the other. The acquisition of property by occupation Pufendorf likewise considers as derivative and not in accordance with the state of nature. Natural law, for instance, cannot explain why in international law the first taking of possession should establish a better legal title than the first discovery. The principle that only actual occupation, and not mere discovery, is the basis for the right of sovereignty belongs rather to positive international law.

In the fifth chapter the various things which are subject to property rights are discussed. As such the author reckons only those things which can be of use to man and from whose enjoyment the

individual can exclude others. As a mark of such exclusion no artificial barriers are required; the mere fact that the boundaries of these things are marked in any manner is sufficient. For this reason (and to that extent differing from Grotius) Pufendorf thinks that property rights in rivers (but not in the flowing water thereof) are legally possible. Under the term 'property', as he here uses it, is also to be understood the sovereign right of the State.

This right of sovereignty is considered only when he speaks of *dominium maris*. He maintains a property right in the sea to be in every respect possible, and in some respects to be incontestable in international law. *In extenso* he sets forth the rights of sovereignty in harbours, coastal waters, isthmuses, and bays, the rights of exclusive exploitation in fishing waters, including such parts of the ocean and high seas as are adapted for oyster, pearl, coral, and sponge fishing. All these rights he deduces from positive human regulations and not from the original law of nature. That the high seas are open to the peaceful common use and especially to the free navigation of all nations is, according to Pufendorf, no doctrine of natural law but is derived from the fact that so far the privilege has been granted to no individual to exclude the other nations from the use of the high seas. Moreover, a claim to such a privilege would be difficult to enforce; and furthermore it should be rejected from the moral standpoint as the result of senseless ambition or contemptible greed. Thus Pufendorf practically supports the doctrine of Grotius concerning the *mare liberum*. It is not contradictory to this attitude when he recognizes as permissible in international law certain restrictions of liberty of commerce which individual maritime States have enjoined on, or arranged with, other maritime States in connexion with navigation along the coast.

The sixth chapter treats of the differences between original and derivative acquisition, and particularly of original acquisition by occupation. Of the very thorough explanations of this topic the last section is of extraordinary interest. It treats of the *occupatio bellica*, the acquisition of property through warlike occupation, or the right of booty. Pufendorf here, as he has done before, explains the right of booty as follows: by the state of war it is not exactly the property right of the enemy which is suspended, but it is rather the treaty obligation between the contending parties for the recognition of property which ceases. The final acquisition of property Pufendorf does not date from the capture of enemy goods, but from the renunciation of the right of reacquiring them which the enemy makes in the treaty of peace. As a particular characteristic of *occupatio bellica* Pufendorf mentions that in this way not only property in things but also sovereignty over men can be acquired. At this point he opposes the doctrine of Grotius that property and sovereignty may be equally the object of occupation; for,

as he thinks, the normal case of occupation, that is the occupation of a thing without an owner, is out of the question for the acquisition of sovereignty over men. A man without a master is his own master, and thus cannot be placed on the same level as *res nullius*. Thus, when the acquisition of sovereignty over inhabitants is connected with the occupation of their territory, such acquisition is a secondary phenomenon and not an original acquisition in the proper sense. It is in harmony with this interpretation that Pufendorf looks upon territorial sovereignty as a kind of dominion, while he tends to restrict the concept *imperium* to personal sovereignty.

In the seventh chapter, which treats of the acquisition of accessions or appurtenances, only Pufendorf's exposition of alluvial land (*alluviones*), so far as it concerns the territorial sovereignty of the State, has importance for international law. Here likewise he declines to appeal to original principles of natural law, but refers to the positive law systems of the individual nations. Notwithstanding this he formulates some rules which are capable of deciding the controversies which, owing to changes in the courses of rivers serving as boundaries, are likely to arise between the States which they separate. In this case he distinguishes as follows: whether the river-bed itself is divided between the neighbouring nations and the boundary lands are clearly marked by surveying or a system of measurements; whether the river up to the other shore belongs only to one of the neighbouring peoples, or whether it is open for common use between them. In the first case, a change in the course of the river does not give rise to any change in sovereignty or property rights. In the second case, the alluvium falls to the State that owns the shore, while islands arising in the river belong to the owner of the river. In the third case, both belong to the first occupant, with this proviso, however, that the right of occupation for alluvial land is a prerogative of the State which owns the thus enlarged shore; as for newly arisen islands this right belongs to the State to whose shore they lie closest. In general there is a presumption, according to Pufendorf, that the sovereignty and property rights of both parties extend to the middle of the river. He, on the other hand, does not withhold his opinion that a gradual change of the course of a river, which eats away one shore and deposits solid matter on the other, affects also the territorial and property boundaries. But when a river suddenly digs for itself a new bed, then the centre line of the deserted bed remains the boundary of territory and property.

The eighth chapter is dedicated to the doctrine of the rights in the property of others. Pufendorf treats this question only from the point of view of civil law and pays no attention to the much-contested concept of State servitudes.

The ninth chapter treats of the transfer of property. Under this

heading the author also expounds the legal significance of possession; for he is compelled to define his attitude with respect to the old controverted question whether, in order to effect the transfer of property, the accord of the wills of the buyer and seller is sufficient, or whether the actual transfer must accompany it. Pufendorf decides this moot point as follows: that for the transfer of property as such (i.e. in a moral sense) the consensus of will is sufficient, but that the exercise of physical power over the object sold requires the actual transfer of the property. The transfer in question, it is clear, cannot any longer be an act based on property right—for this has already passed over to the other party—but is simply an act based on contractual obligation, to give the acquirer the physical possession of the property. Pufendorf here strains the regulations of Roman law in such a manner that he comes closer to the interpretation of the Anglo-Saxon and more recent French law. His attitude, it must be said, is diametrically opposed to the present German law.

In the tenth chapter the author discusses the question of wills and donations in the case of death. His position is opposed to that of Grotius. The latter author was of opinion that, while the different forms of wills are creations of positive law, the right of the owner to dispose of his possessions after his death is a consequence of the concept of property from the standpoint of natural law. Pufendorf, on the contrary, holds that only the disposal of objects of property which occurs among the living is in conformity with natural law, and that any legal arrangement which makes a disposition to be effective in the case of death, and is of obligatory power only after death, is to be exclusively attributed to positive human regulation. It is deserving of note, and can only be explained as an after-effect of the partiality of the Roman law for testamentary dispositions, that Pufendorf does not trace back to natural law the transfer to the natural heirs of the property of a man who died intestate, but rather traces it back to the presumptive wish of the deceased which applies in the absence of a will. This interpretation is absolutely contradictory to Germanic law. Pufendorf, moreover, is not blind to the disadvantages of the Roman liberty of bequeathing by testament, which, it is said, was based on a law of Solon. In agreement with Bodin (*De Republica*, Bk. V, chapter ii) he criticizes especially the possibility of likewise disposing by testament of real property. He would, beyond doubt, have energetically protested against the procedure of his later sovereign, the Great Elector of Brandenburg, who did unhesitatingly dispose, by testamentary partition, of his dominion as if it were movable property.

The twelfth chapter treats of usucapion. Our author presents the Roman legal doctrine. Then he proposes the question whether usucapion is an institution of natural law, as Grotius propounds, or

whether it stands in contradiction to natural law, and thus owes its origin to positive regulation, as Cujacius holds. Pufendorf inclines to the view of Grotius, since the introduction of usucapion serves the same purpose as that of property, viz. to maintain peace in human society. From the same consideration he claims that usucapion is likewise an institution of international law, the more so as disputes of States concerning territorial sovereignty are affairs of greater weight than private litigation for property rights. Pufendorf, basing his view on a great number of authors and examples from history, rejects the claims of sovereigns for territories which once belonged to their predecessors but which, for a long time, have been under the uncontested sovereignty of another power. To invalidate such claims, it is not even required to appeal to prolonged prescription, if one can point to a title for this territorial sovereignty which is based on international law, as, for instance, conquest by war.

To be sure, no permanent right of possession is achieved by conquest, during the state of war; for here we are confronted by the possibility of forcible reacquisition which is recognized in international law. It is only the treaty of peace which confirms the title. The very fact that over a long period no legal claim for a certain territory was advanced by another party constitutes in itself, for a nation which by peaceful ways has obtained sovereignty over this territory, a strong presumption of legitimate possession.

In the thirteenth chapter the various relations of indebtedness which result from the dominion of property are enumerated and discussed. Pufendorf begins with the general obligation of all non-owners not to interfere with the owner's peaceful enjoyment and use of his property, and he closes with the special obligations of the *bona fide* or *mala fide* possessor of things belonging to another towards the owner. He mentions here among other instances the case in international law where a sovereign who had been previously expelled and later reinstated in his realm registers a claim for the funds which the usurper had withdrawn from the territory of the said sovereign and deposited out of the country. He approves such a claim (in opposition to the view of Polybius) provided that the intermediate reign was founded on unjust violence.

Book V treats of the theory of contract law. Pufendorf's starting-point is price as the standard for the value of the things to which the contract refers. The amount of the price of a commodity is not, as Grotius declares, regulated according to the degree to which it can satisfy human requirements, since the most necessary things, like air and water, have no price when they exist in abundance, and really unnecessary things, as certain luxuries, are often the costliest. The criterion of price is rather the rarity, preciousness, or artistic perfection

of things. After illustrating the manner in which the general value of things was ascertained in barter, Pufendorf turns to the origin of metallic coin as a common measure of value. Even though the value of metallic money rests on human regulations and agreement, Pufendorf warns the sovereigns against fixing this value too arbitrarily. For domestic trade they might be able to introduce a compulsory valuation, but for foreign commerce overvalued money is not practical. Neither is the sovereign authorized to debase the currency except when the requirements of the State make this course imperative. Even fluctuations of the value of money which arise from natural causes, without any interference by law, are injurious to the economic system of the States. In this respect it is immaterial whether a superabundance of goods depresses or a superabundance of metallic money raises the prices. Each of these phenomena frequently occurred in the two centuries between the discovery of America and Pufendorf's day. Such fluctuations, however, as they occur slowly and imperceptibly do not, in the opinion of Pufendorf, destroy the character of money as a standard of value. They leave untouched the legality of prices agreed upon in this fluctuating currency, while arbitrary and sudden changes in currency shake their very foundations. Pufendorf touches here upon a problem which was in his day, after the Thirty Years' War, not less vital than in our time after the World War.

In the second chapter of this book our author, guided by the Roman law, distinguishes the various kinds of contracts. In the third chapter he treats of the principle of equality of performance and compensation as a natural consequence of the purpose of onerous contracts. The same holds good also for compulsory contracts which are concluded by the State authorities with permanent as well as temporary subjects, as it likewise holds good for requisitions and expropriations. Here it is incumbent on the State also to pay a fair equivalent. In the following chapters an elucidation of the different kinds of contracts is undertaken. In the fourth chapter Pufendorf speaks of contracts without money consideration, such as those relating to mandates, deposits, and loans of goods. In chapters v-vii he surveys the contracts that carry a money consideration, especially contracts of exchange, sale, rental and lease, and loan of money. Under the heading of loan of money he reverts to the problem involved in a change of currency, and by means of an extensive exposition he endeavours to find a solution for all the various cases which are bound to result from the debasement of coin. He agrees with the then prevailing opinion that the amount of a loan paid in coin of full value, when repaid in arbitrarily debased coin of the same denomination, is to be correspondingly raised (i.e. revaluated). Of interest from the point of view of the history of law are the explanations he offers in the seventh chapter concerning the prohibition of interest.

This prohibition, he thinks, is nothing else than a norm of positive law for the Jewish people, whereas according to natural law a rate of interest may be agreed upon for a loan in proportion to the gains expected from the loaned money.

After treating the social contract, in chapter viii, Pufendorf speaks in the ninth of contracts subject to chance. He recognizes a kind of wager in the decision of two States to go to war over a point at issue which they have not succeeded in settling amicably. From this element of chance in the war he deduces the proposition of international law that the defeated nation upon which an unfavourable peace treaty has been imposed has no right to protest against the enforcement of the conditions of peace on the grounds of compulsion. Pufendorf later on reverts to this same proposition.

The tenth chapter concerns the so-called accessory pacts (*pacta adjuncta sive accessoria*) which may from the outset cause a variation in the main contracts, or may subsequently supplement or modify such contracts, as in the case of suretyship and trust. In this connexion Pufendorf also explains the doctrine referring to hostages.

The various means of fulfilment of obligations arising from debt are presented in the eleventh chapter. The form of fulfilment in natural law is the payment in kind of the things promised, and not in the form of indemnification by an amount of money. The other forms of liquidation of claims Pufendorf describes in the usual manner. He emphasizes that an obligation of debt is not fulfilled, but rather annulled, when in a bilateral contract one party maliciously neglects his payments. In such a case the other party is liberated from his obligation. This, as everywhere in Pufendorf's writings, is a tenet of natural law which is just as valid for international as for private law.

The same is to be said concerning the comprehensive rules for the interpretation of pacts which the author sets forth in the twelfth chapter. He gives a series of historical examples of treaty stipulations which had become objects of dispute. For every one of these cases he attempts to give a solution based on nature. Of special relevancy here are the observations on that clause which since time immemorial has been frequently imposed in peace treaties on the defeated State, namely that without the victor's consent the defeated State is not allowed to wage any war in the future. According to Pufendorf's interpretation this clause has reference only to wars of aggression and not of defence proper.

In the thirteenth chapter he scrutinizes the means which seem indicated in order to prevent the outbreak of warlike complications. Here likewise Pufendorf places the mutual relationship of States on the same level as that of men in the state of nature. For both cases he finds the rule in natural law that even where authority for employment of force may be presumed, an attempt is first to be made to reach an

amicable agreement. At this point Pufendorf discusses in detail the subject of arbitration. He lays stress on this feature, namely, that arbitral decision concerning a verdict of arbitration is impossible, but that the matter is definitely settled by the verdict of arbitration. He admits, however, exceptions: for instance, when the arbiter was bribed or manifestly proceeded unfairly. In cases of doubt he imposes on the arbiter the duty to decide according to principles of law, and not mere equity.

Furthermore, our author examines the question whether in a dispute between States subject to arbitration an intermediary decision concerning the status of possession may be handed down. Grotius had argued in the negative on this question, since between rulers no common positive laws obtain, but only norms inherent in natural law, to which legal means of possession did not pertain, and since the arbiters are appointed for the purpose of deciding the main issue, their competence is limited. Disagreeing with these views, Pufendorf declares it to be a command of natural law that the court of arbitration shall first regulate the question of possession in order to distribute the burden of evidence correctly, and in order that the question at issue may not be modified during the procedure.

He distinguishes mediation (*amica compositio*) and intervention from the procedure of arbitration. He eulogizes these means of preventing or shortening wars without reserve, and even considers such friendly offices to be a duty for Christian peoples. Even the Koran, which he generally holds to be the work of an impostor, prescribes, he points out, a similar procedure when two Mohammedan powers are contending. The procedure advocated by Pufendorf reminds us of certain articles of the Covenant of the League of Nations. The States to whose common interest it is that the dispute be settled may agree upon joint mediation; they may, at the same time, stipulate to what extent each shall intervene in the war that has broken out. In the same manner they may, after examining the dispute, decide what conditions of peace may, according to justice and equity, be imposed on the contending parties. These conditions they jointly suggest as friends to both sides, with the notification that they are ready to assist by war the party that accepts them against the party which would decline them. Such a procedure cannot be construed into an obtrusive arrogation of the office of arbiter, nor a demonstration of super-State sovereignty. In view of the sensitiveness of sovereign States still in evidence against any form of intervention we realize how far Pufendorf was in advance of his time. Even The Hague Conventions for Pacific Settlement of International Disputes, as late as 1899 and 1907, contain the clause that no signatory State should look at an attempt at mediation as an unfriendly act. Nay, the Covenant of the League of

Nations could not but found its regulations for mediatory actions of the organs of the League expressly on the common interest of the members in the preservation of peace.

For the procedure of arbitration, chapter xiii contains only a few fundamental rules. The same may be said about the enforcement of verdicts of arbitration. For obstinate refusal by the party under condemnation of payment, natural law has at its disposal only one remedy, to wit the employment of force, that is war. In contrast with civil law, international law authorizes the victorious party to indemnify itself by sequestering other objects or territory than those due, in case it cannot compel the due payment. Such measures may be used as an instrument of pressure to obtain the overdue payments, or failing that, the property seized may be permanently retained. But in both cases after the seizure the creditor State must allow the debtor State an opportunity to repossess itself, by payment of what it owes, of the things which have been seized as a substitute.

The sixth book treats in the first chapter of the law on matrimony, in the second of parental authority, in the third of the power of the master over the slave. Neither for public international law nor for private international law do we find here much material. It may be mentioned that, besides that form of matrimony where the husband wields authority over his wife, Pufendorf is aware also of another, where the relationship is reversed. He calls this 'Amazonian marriage' and declares it to be unnatural. He does not derive the matrimonial authority of man over woman from natural law, since the natural purpose of marriage may be attained without such a relationship of force. It is, in his opinion, a positive regulation. Conformably to his Lutheran beliefs he states that according to natural law marriage may be dissolved on the grounds of adultery, malicious desertion, and obstinate refusal of the matrimonial duty. He condemns the canonical principle of the indissolubility of marriage. In the chapter on parental power Pufendorf, following Hobbes, mentions also matriarchal relations. The matriarchate, he thinks, corresponded to the state of nature as long as the union of the sexes was not permanent. Since the introduction of marriage the exercise of the parental power by the father has become the rule, by the mother the exception. It would not be fruitful to analyse in detail the lengthy discourse in the sixth book on the relations of the family. As to slavery, he denies that it conforms to the state of nature. It originated, he intimates, from voluntary subordination of the weaker to the stronger, and later from capture in war. He charges Hobbes with error when the latter considers slavery, as a concomitant phenomenon of war, to be an institution of nature.

More fruitful for our purposes is Book VII. Its nine chapters, together with the first five chapters of Book VIII, contain Pufendorf's

doctrines concerning political law. In the first chapter he analyses the origin of the State and he finds it in the fear of hostile aggression which haunts mortals and has induced them to combine for mutual protection. It is obvious that neither respect for the laws of nature, nor the activity of arbiters, nor compromise agreements are powerful enough to preserve peace among men. Peace is constantly disturbed by the differences of opinion which are caused by the differences of judgement in human beings. A firmer rein is required to hold the pugnacity of the human race in curb. This is to be found in the power of the State.

The second chapter presents Pufendorf's doctrine on the contractual nature of the State. In opposition to Hobbes who acknowledges only one single *contrat social* (as Rousseau named it) as forming the State, our author assumes several contracts in succession: in the first place an agreement of a number of human individuals to unite themselves for common protection; then a resolution of the group so formed defining how it wishes to be governed; and finally a contract concerning the appointment of persons to whom the government of the State is entrusted. This contract between governors and governed is required not only in monarchies and aristocracies, but also in democracies, although in the latter the power of command is vested in the people. For the people are something different from the sum total of the individuals. Therefore, a contract between the sovereign people and the individuals who are subject to power is entirely conceivable. Hobbes, it is known, denies the possibility of such a contract, even in a monarchy. It is, however, plain that the tendency of his book *Leviathan* to reject the claim of a nation for revolution against an illegally ruling sovereign has led him astray. Such a claim, we are well aware, was in that time often advanced as a pretext for rebellion. While it is, indeed, highly important for the welfare of the human race that the royal power should be held sacrosanct, and should be protected from attacks by dissatisfied persons, on the other hand it is beyond doubt that between prince and citizen there exists a bilateral contract. On the strength of this agreement the prince owes the citizen protection, and the citizen owes obedience to the prince. Without such a contract, neither of the two obligations in question could exist. This idea Pufendorf unswervingly pursues, always carefully refuting the arguments of Hobbes. Therewith he applies the axe to the roots of the absolute power of princes whom he had served all his life.

Although in the third chapter he traces the power of the prince, like any form of sovereignty, back to God, he has not in mind a mystic institution 'by the grace of God', as if God Almighty had established it by an immediate act. Instead he sees therein a result of God-given human reason. He is on his guard against the ultra-utilitarian view of Grotius that the State power was introduced by mortals for the pro-

tection of their security and had only been approved by God. Its author, after all, is God, but only mediately. With far greater severity he condemns the doctrine of servants and flatterers of princes who, at that time, frequently inveigled rulers into the belief that God himself had conferred on them, as his vicegerents on earth, part of his power. In truth, he thinks that the power of the ruler is nothing else than the combined power of all the individuals who, organizing into a State, bestowed on the incumbent of the sovereign office a part of their power, which they held on account of their natural freedom. Here Pufendorf appears as the direct precursor of the theory concerning the origin and extent of human authority which forms the basis of the Constitution of the United States of America.

Of importance for the law of nations is the concluding (9th) paragraph of this chapter. Pufendorf shows here that only to the totality of the citizens belongs the right to grant to the individual person, on whom it bestows the sovereignty, the title of ruler. If, then, a ruler with the assent of the citizens of the State assumes the title of king, he does not need for this the approval of the other states, any more than for his accession to power. If another sovereign denies him the title of king, this constitutes, from the standpoint of international law, no less an injury than if the foreign prince were to deny his claim to the sovereignty itself. Only when the ruler is not a full sovereign, but a vassal of a liege lord, is the consent of the latter required for the assumption of the royal title. In this case royal dignity of the lesser prince is derivative. In general, however, the approval of the acceptance of the royal title by a ruler who was formerly dependent coincides with the recognition of his future complete sovereignty and independence. These propositions were written by Pufendorf before the successor of the Great Elector, the Elector of Brandenburg (Frederick III), who in this quality was a vassal of the Emperor, assumed the title of King in Prussia, as Frederick I. We may even say that they seem not to have been without influence on this historic event. An echo of the interpretation of Pufendorf is probably to be recognized in a later historic occurrence. When William I of Prussia, at the death of his insane brother Frederick William IV, became king, after having been regent, he took the crown, it is true, from the altar of the Lord, but received homage as king from the representatives of the entire nation.

Pufendorf's doctrine of the division of the highest power of the State, which he presents in chapter iv, anticipates to a certain extent the famous theory of Montesquieu on the division of power. Pufendorf's doctrine lacks only the clear threefold classification. The author enumerates in succession the legislative power, the punitive power, the judicial power, the power of war and peace, the constituent power (distribution of offices), and the power to levy taxes. Although a

comprehensive concept of executive power is not yet achieved, in compensation for this (in § 11) the coherency of powers is much more fully elaborated. The author shows to what confusion of the life of the State it would lead, if the bearers of the separate titles of authority were to discharge their offices in absolute mutual independence. He holds that all of them must be subject to the supreme will. This, according to Pufendorf, is valid also for the teaching function. It would really be unbearable and likely to bring about sedition if the teachers of the people were free to threaten citizens with eternal condemnation for acts which the wielder of punitive power would have enjoined on them under the threat of the death penalty. Our author would never have recognized an absolute liberty of teaching. He refrains from discussing in detail the interrelation of Church and State. But he tries to refute the views of those who, on the basis of certain misunderstood doctrines of Aristotle, advocate a more far-reaching division of power. Among these he impugns Grotius.

In connexion with this he takes issue with the doctrine of Grotius that by the State constitution the power could be divided between king and people in such a way that it would be possible to subject the king to compulsion or punishment. Wherever such regulations are met with in a constitution, then it would not be the king who is sovereign, butt he people. The power, therefore, would not be divided at all. If we assume such a condition, exercise of pressure is conceivable only in two ways. If we consider the legal way, this is impracticable, for people and king do not recognize a common judge above them. If we think of employing force, this presupposes the state of nature and thus destroys the essence of the State. We perceive in these expositions an echo of the trial by which Cromwell rushed King Charles I of England to the scaffold.

The fifth chapter gives a very thoroughgoing discussion concerning the form of the State. Following Aristotle, Pufendorf assumes three fundamental forms: monarchy, aristocracy, and democracy. Here the criterion is whether an individual man, or a council of selected men, or the entire citizenship in possession of the right to vote, is invested with the highest power. In what manner the power is put into practice seems to him indifferent. A democracy may be administered in a monarchic manner by a leader of the people, and a monarchy in an aristocratic manner by a camarilla. Besides this, there are numerous varieties of those fundamental forms which result partly from their combination within a State and partly from more or less close relationship among several States. The author takes pure democracy to be the oldest form of State, as it is the form which is nearest to natural liberty and equality. But he expressly wards off the inference that he considers it, for this reason, the best. This form, he thinks, in agreement with

Plato, is only adapted to a community of homogeneous citizens who, belonging to the same tribe and being sons of the same mother, feel like brethren. If Aristotle saw in monarchy the oldest form of the State, he mistook the position of the head of the family for that of the incumbent of the ruling office of the State. He also overlooks the fact that the so-called kings of heroic times were rather counsellors and leaders than rulers of their countrymen, and therefore must be looked upon as holders of an office delegated to them by the sovereign community of the people.

In describing the characteristics of democracy, Pufendorf among other matters takes account of the principle of majority. According to him it is contradictory to natural liberty that the will of a majority of equals should override the will of the minority. Thus, whenever a number of free men come together for the foundation of a State, those who withhold their assent to the resolution of organization remain outside the State in their natural freedom. If, however, all, in agreeing to the foundation, have resolved upon a democracy based on majority rule as the form of the State, then all are bound to the second resolution. They must subject themselves to the decision of the majority, for this represents constitutionally the entire people.

The aristocratic form of State, according to Pufendorf, originates when, in accordance with the contract for the organization of the State, the constituent resolution provides that the supreme power in the State is to be exercised by a corporation consisting of a small number of citizens organized conformably to definite rules. By the acceptance of the mandate by the said corporation there arises a relation of contract between it and the entirety of the individual citizens. To this interpretation our author adheres in opposition to Hobbes, just as he did with regard to democracy and monarchy. Owing to this relationship of contract the bearer of the supreme power owes legal protection to the individuals under his rule, while these owe him obedience. On the other hand, Pufendorf approves the view of Hobbes that in a monarchy the holder of the supreme power personally does wrong in issuing laws contradictory to natural law; but that in a democracy or aristocracy such laws are not to be considered as transgressions committed by the aforesaid corporations which are invested with the supreme power, but as transgressions committed by those physical persons who by their actions have brought about the enactment of the unjust law.

The author, following the theories of Aristotle, then passes to the unsound varieties of the regular forms of government and to the mixed forms. The term 'mixed forms' he thinks is really misleading. Here we have to do either with a regular form where the unified supreme power is exercised indirectly through representatives, or, on the other

hand, with absolute irregular forms which lack a unified organ of sovereignty. Such forms of government are always threatened with an early collapse owing to internal disintegration. Among these Pufendorf includes also, as he had done in his anonymous tractate previously mentioned, the then so-called 'Roman Empire of the German Nation'.

On the other hand, he distinguishes these forms from federations of States. Clearly, to this category there do not belong, as Hobbes maintains, the provinces annexed to the Empire under separate administration, for these possess no sovereignty of any description; rather the category comprises several States united either by personal union or a permanent alliance. Pufendorf presents in detail the differences between these two cases, and also shows how one may pass into the other. In the case of a personal union in which the component parts have different constitutional laws regulating the succession to the throne, the death of the common ruler may lead to dissolution. This, for instance, takes place when in one of the States in such a union a male heir, in the other a female heir, has the nearest claim to the throne. (This brings to mind the dispute concerning the succession in the so-called Elbe grand duchies which led to the Danish war in 1863.) In order to avoid such an eventuality it is necessary to have a covenant of the interested States regulating the order of succession to the throne, or a solemn decree of the last common ruler, which must be accepted by these States jointly and severally. Henceforth only one and the same order of succession is valid. Such a step may, it is to be admitted, reduce the formerly independent States to provinces of a unified State, and thus their relationship of federation would become extinct. Pufendorf here anticipates the history of the Austrian hereditary lands. These were originally brought together by marriages of the Hapsburg rulers and formed independent units with different rights of succession to the throne. The last of the Hapsburgs, the Emperor Charles VI, by means of the 'pragmatic sanction' welded them into a consolidated inheritance for his daughter, the great Maria Theresa. In the end they were only provinces of the Austro-Hungarian dual monarchy. But the famous Empress had in the beginning to fight for the recognition of this phase of her rights in the War of the Austrian Succession.

In the regular federation of States, according to Pufendorf, the majority principle is out of place, as it eliminates sovereignty; for the appropriate principle is unanimity, such as is the rule in the Covenant of the League of Nations. He holds that the obligation of the several federated States not to exercise certain rights of sovereignty without the assent of the other members is not contrary to the liberty of the individual component States of the federation. To-day, for instance, he would characterize the Little Entente with regard to its present closer alliance, according to which the members may not perform any

act of external politics without the assent of the other members, as a federation of States, but not as a federated State. The latter form does not arise until the individual members have agreed on a common constitution wherein they subject themselves expressly to the decision of the majority in all federal matters. By so doing, however, according to Pufendorf, they have ceased to be fully sovereign. From this it may be deduced in what class Pufendorf would, for example, have included the German Empire under Bismarck, or the American Union.

In the sixth chapter we find ingenious ideas concerning the meaning of sovereignty and the competency of its holder. Its essential characteristic is the non-responsibility of the sovereign to any earthly authority. He is accountable to God alone. Therefore Pufendorf holds with Grotius against Aristotle and some recent authors, that, the monarch, as sovereign, is not responsible to his people, and that the absolute power of princes is in itself not contradictory to the law of nature, since it is by no means identical with tyranny, as republicans believe. Our author none the less inclines towards a constitutionally limited monarchy. This is even superior, in his opinion, to democracy, as the tyranny of the majority of the people cannot be restricted by laws, since it may change them at its pleasure. In opposition to Hobbes he holds that the sovereign monarch is nevertheless morally bound, not only by the norms of natural law, but also by the constitution which he has agreed upon with the people, although juridically he cannot be brought to account. Wherever there exists in the State a corporation which may demand an account of him, then this corporation, and not the monarch, possesses the sovereignty.

Chapter vii treats of the different ways of acquiring sovereignty, especially in monarchies. The principal methods, election and succession, are also found in aristocracies. Besides the legitimate methods Pufendorf also discusses the illegitimate acquisition realized by force. Here he mentions not only the forcible subjection of a people by a monarch, but also the forcible deposition of a ruler by the people. In the first case the acquisition may become legalized as the result of good government if the people in question formerly lived under the constitution of a free State, or as the result of the extinction of the legitimate dynasty if the people were ruled by a monarch. Both of these instances, however, are contingent upon a certain period of undisturbed rule by the new monarch. In the second case, that of the deposition of a ruler, an agreement with the former ruler and the recognition of the new constitution is required, or conclusive evidence that the former prince has been rightfully deprived of his government, or, in fine, a long lapse of time during which the former prince has not advanced his claim.

It is not necessary, at this juncture, to enter into detail concerning Pufendorf's discussion of elective and hereditary kingship and the

various kinds of succession to the throne. Only his exposition on the settlement of disputes concerning the throne is of importance, because these touch international law closely. From their very nature they cannot be decided by a national court, nor by an authoritative pronouncement of the executive power, either when the dispute concerns the relationship between the different candidates for the throne or when it concerns the relationship between the individual pretenders and the people who are to be ruled. The parties to such disputes have neither a common judge nor a common sovereign. From the standpoint of natural as well as international law there exists no other alternative than either force—that is, a war of succession—or arbitration.

Chapter viii has the title: 'On the Sanctity of Supreme Sovereignty in States'. Here Pufendorf discusses, among other things, the question of the right of resistance against gross injuries by the prince—which, with Grotius, he answers in the affirmative. A duty of obedience towards the conqueror he denies as a matter of principle, although he affirms it in case the government of the conqueror proves permanent. Chapter ix enumerates the various duties of a ruler and offers for his guidance an abundance of wise instructions. Deserving of note in our own day is Pufendorf's warning against too heavy taxation, for he holds that the most reliable treasury for the ruler is the money-safe of the citizen. At the same time he advises the rulers of the State against unequal taxation of the subjects, and against the pernicious method of imposing so-called freewill offerings on their subjects that they may gain favour by rich donations.

The eighth Book opens with the theory of legislation. Pufendorf takes issue with the doctrine of Hobbes that positive laws can never contradict natural law, for the former alone defines what is right or wrong in the specific case. According to Pufendorf the legislator is bound by those norms which, originating from God, are in conformity with human nature and reason. They really represent the standard for examining laws in order to determine whether they are in accordance with right or are contradictory to it. Thus Pufendorf would have approved the decisions of the Anglo-Saxon courts, namely that laws which, they are bound to state, violate the natural order of right and reason are not to be employed by them.¹ Also at this point he attacks the view of Macchiavelli and Hobbes, who hold that there is no law outside the State, and that the State is the sole creator of law. He propounds the question how States could have been founded if the men who sought by contract to make a transition from the state of nature to an organized government had not known beforehand that it

¹ Cf. Lord Coke's decision in *Bonham's case*, 8 Coke's Rep. 107 A *et seq.*; 6 K.B. 638 *et seq.* See also William M. Meigs, *The Relation of the Judiciary to the Constitution* (New York, 1919), pp. 31 *et seq.* p. 50.

is right to live up to contracts, and wrong to break them. And how, he asks, could one maintain, in case there be right only within the State, that the rulers do wrong in breaking treaties, or by robbing each other of their respective possessions, for do they not live among themselves in the state of nature, not bound by norms of civil law?

Furthermore, the author analyses the question which even after the World War was discussed with animation and which has resulted in a much contested decision of the German Supreme Court (*Deutsches Reichsgericht*). This question is whether an individual who has committed an illegal act can plead the binding command of his ruler or of his legitimate superior in order to escape punishment. Pufendorf here introduces a distinction between divine and natural law on one hand and positive civil law on the other. The command of the ruler relieves every citizen of responsibility for the violation of civil law, but not for the violation of divine and natural law. Here also Pufendorf opposes the views of Hobbes, who declares such an attitude to be seditious. Yet Pufendorf warns us against using any scruple concerning the legality of a command given by the State as a pretext for refusing obedience. In case of doubt the presumption is in favour of the legality of the commands in question. The subordinate is often not in a situation to scrutinize the reasons for the command. Moreover, Pufendorf concedes that in cases of compulsion and emergency, when the person executing the order is only a blind tool of the commander, the latter and not the former is to be held exclusively responsible for the illegal act.

In chapter ii the author describes a particular attribute of the power of the ruler: the authority to dispose of the lives of the citizens in defence of the State in war. This authority he holds to be unqualified and all-inclusive. While, according to positive law, exceptions in favour of persons who, on account of their youth, old age, vocation, or religion, are incapable of fighting have been allowed, all such exceptions become negligible when distress and extreme danger demand the exertion of the ultimate strength of the State. Pufendorf would not approve the demand of the conscientious objector to be freed as a matter of principle from war service, because, from the point of view of international law, he maintains that war is a permissible procedure for the settlement of differences between States. In regard to public law he recognizes the priority of the common welfare over the scruples of the individual.

For the same reason the author also rejects the view of Grotius that a citizen must not participate in a manifestly unjust war of his State because by doing so he would become an accomplice in the crime of his sovereign. In this case he distinguishes between voluntary and legally compulsory military service. Only under the first heading is the

rule of Grotius applicable; as to the second, the citizen should follow the command of his sovereign, and with serene conscience leave to his ruler the responsibility for the war, in regard to which the latter must answer to God.

Two further remarks in this chapter are relevant for international law. The one refers to the case in which a prisoner of war is set free under the obligation not to bear arms against the enemy. In Pufendorf's opinion the State is bound to respect such an obligation on the part of a citizen and may only set it aside when the country is in the last extremities and there is a shortage of man-power. The other observation concerns the institution of hostages in international law. The author thinks that the State is authorized to surrender its citizens as hostages to the enemy, and that even their lives may be sacrificed when they cannot be saved without jeopardizing the existence of the State.

The third chapter treats of the punitive power of the State, which includes the power of life and death over the citizen. Pufendorf considers the question how it is possible that individuals, who in the state of nature have no right to punish, can transfer such a right to the sovereign when organizing a State. Pufendorf here takes recourse to analogies, for he was not aware that vengeance, a form of natural law, together with damages, assumes the function of punishment outside the State. The essence of punishment our author sees in retribution whereby a *malum passionis* is inflicted on account of a *malum actionis*. At the same time he requires that such punishment should be of advantage to human society. Here he follows the opinion of Plato, Grotius, and Hobbes. The true purpose of punishment is the prevention of future crime, either by reforming the evil-doer, or preventing him from committing further crime, or discouraging him from such activities, in order that his punishment may restrain others from similar acts. Here we are facing an eclectic theory of punishment which, we may say, contains all the elements of the modern doctrine of legal punishment, with the exception of the most recent doctrine of the so-called criminology that there is no question of right to punishment but only of securing and safeguarding society against anti-social misfits.

This point of view the author admits only with regard to pirates and highway robbers. With such persons, he observes, society lives in a state of war. It is not the question of punishment, but of rendering them innocuous. Everybody has a right to combat them. It is, however, advisable that private persons who, with their ships, wish to engage in a battle against pirates, should obtain from their superiors a written commission to this effect.

With considerable emphasis Pufendorf pronounces against too frequently and too easily granted pardons and amnesties, for they

weaken the respect of the citizen for the penal law. Above all he warns us against granting to the judge in whatsoever form a right to substitute the pardoning power for justice. But where extenuating circumstances are in evidence he considers it a wise policy to leave to the judge a wide discretion as to the measure of punishment. This being the case he takes his stand against the talion, which he declares to be unsuitable as a standard for punishment. Under no circumstances is it permissible, for purposes of retribution, to direct the punishment against any other person than the perpetrator, even though—as Grotius had argued in defence of such a measure—by so doing the mere material aim of inflicting a punishment is attained, as, for example, in the process of the so-called decimation.

In the fourth chapter our author, analysing the power of the sovereign to determine the positions of honour for the citizens of the State, brings together a great many observations on ordinary civic honour and how it may be lost, and likewise on the special honour of privileged classes and its origin, particularly nobility, its historical development and position in European countries, and other matters. Simple human honour, according to Pufendorf, is an accompaniment of the state of nature, while specific honour and nobility are creations of the sovereign power. Comparing the various degrees of honour, he takes up the questions of precedence, which in his century played such an important part in the intercourse of the nations that for that reason the treaty transactions which were to conclude the Thirty Years' War had to be carried out at two different places, Münster and Osnabrück, because only thus could conflicts of precedence be avoided. Pufendorf denies any gradation in the position of dignity of the various rulers of States. Every sovereignty, as a matter of principle, is equal to every other. It makes no difference whether the territory of one ruler is larger or his power greater than that of another, or whether the one be an absolute ruler and the other a monarch limited by the constitution of the country. From such considerations no king is held to yield superiority to another. Similarly no republic is of lesser dignity than another, even if the latter be older or more powerful. The author even denies that the monarchic State ranks above a republic. Neither are the ambassadors of a republic under obligation to defer to the ambassadors of a monarchy. But at conferences with delegates of republics monarchs enjoy precedence because they are the incarnation of sovereignty, while the delegates are only representatives of the sovereign proper. In order to preclude disputes as to precedence at conferences when several persons of equal rank participate, the round table system (*mensae circulares adhibitae congressibus*) may be employed. In permanent associations with regularly recurrent assemblies it is the practice to define precedence according to the sequence of admission to the association. This method is still

in force for the diplomatic corps in a capital. Pufendorf energetically denies the claim of a secular power to precedence before the other nations, on the ground that it was the first nation to embrace Christianity. This order of priority he would permit only in ecclesiastical synods where it was in use in the olden time. It is worthy of note that Pufendorf is not at all an advocate of hereditary nobility. According to him this privilege of nobility is always based anew on the worthy deeds of each individual—*noblesse oblige*.

The fifth chapter treats of the sovereignty of the State in matters of taxation and expropriation, of the right to public property and State domains, as well as of the right to cede the territory of the State or parts of it. As to the latter question, the author denies to the sovereign the right to dispose of his dominion without the consent of the people. If he wants to cede a part of the territory, he needs for this purpose the consent not only of the remainder of the people, but, above all, of that part of the population which would be ceded with the territory. Pufendorf establishes here the basic principles of that procedure in international law which at a later date has been much employed under the name of plebiscite. The sovereign, according to him, also requires the consent of the people for placing any burden on the State or weakening its international rights. This applies, for instance, when he wants to hold the State in fief from a more powerful ruler or desires to release a vassal from vassalage. The same situation obtains when a ruler wishes to surrender a part of his territory to another ruler as security for indebtedness.

With chapter vi begins the part of the treatise that bears exclusively on international law. Here original thought is at the lowest ebb. Pufendorf moves to a great extent in the wake of Grotius, the great master of international law, and accepts the results which the latter had attained in his investigations of this matter. But here also Pufendorf marks his opposition to Hobbes by setting forth his conviction that even in the relationship of the States the natural condition is, as in the case of individuals, that of peace and not of war. Therefore, in order to justify war according to the law of nature, a just cause is required. Of such causes there are three kinds. The first is this: that we are free to defend ourselves and our possessions against the attacks of others; the second is based on the right to obtain by force the settlement of rightful claims which the debtor is not inclined to meet; the third consists in our right to compel the party which has unjustly injured us to pay an indemnification and offer security for the future. But never is the mere fear of future injury sufficient to warrant a preventive war, since only a positive violation of right offers grounds for rushing to arms, and not merely the threatening position which a State holds. Just as with human beings, a State is to be considered as righteous and

peace-loving until the contrary is proved. It is obvious that it is a long way from the doctrines of Grotius to the Briand-Kellogg pact. This pact, even though it concedes the legality of a defensive war, nevertheless leaves no room for a war waged in order to compel the settlement of obligations arising from treaties or delicts. Since there exists no international machinery which substitutes for every individual action against a malicious debtor State compulsory action on the part of the international community of States, and since there is little hope of creating such machinery in the near future, in my opinion Pufendorf's doctrine is still in harmony with the international law of our day. Pufendorf, moreover, teaches that according to natural and international law the State as well as the individual has to exhaust all peaceable means before force may be employed for enforcing just claims.

On the other hand, Pufendorf is aware that the actual waging of a justly undertaken war is not to be judged according to notions of civil law justice. Those engaged in such a war are under no obligation to inflict on the enemy only such disadvantages or wrest from him only such advantages as correspond exactly to the claims causing the war. Measures of war are not in the nature of punishment; they have no punitive aim; they are State acts for self-defence, for the realization of right, and for ensuring safety against future unlawful injury. All means serving these purposes are, to that extent, justified. At this point the author goes beyond Grotius. He recommends, however, that the conqueror show himself humane and generous towards the vanquished. This attitude, he thinks, is dictated by ethical considerations. The measure of retaliation that would be fair in civil relations should not be exceeded further than is necessary.

Of special interest are the views of the author bearing on the case in which a State has undertaken a war, not in its own interest, but for another State. In this case two conditions must be fulfilled in order that the war be just. The State which is being assisted must have a just cause of war against its enemy, and the intervening State must appear authorized to take such action by a special relationship which entitles it to treat the enemy of the assisted State as being also its own enemy. A war of intervention may under certain circumstances be not only permissible but obligatory. A State is not only permitted but in certain circumstances is in duty bound to intervene, as when the defence of protected States is involved. Here, however, Pufendorf admits an exception. Neither the right nor the duty to undertake a war of intervention is in evidence when the protected State has given to its enemy just provocation for war before entering into the relationship of a protectorate. The duty of protection towards the individual citizens of the State comprises also the right to guard their interests when these are violated by another State. For this purpose all means, even warlike

measures, are in order. This duty arises only when such a procedure does not threaten the interests of the majority of the citizens and of the commonwealth.

A duty to undertake a war of intervention may be also based on treaties of alliance. This obligation, however, ceases, according to Pufendorf, if the State which is obligated to render such assistance is not able to render it without jeopardizing the defence of its own people. Therefore, only an inept statesman will rely on an alliance which the other party has no interest in observing. Nor is it a duty to intervene when the ally undertakes an unjust war. Modern treaties of alliance, as a rule, lay down this principle in such a way that the alliance is effective 'only in case of an unprovoked attack by a third party'. Our author is not inclined to recognize a universal right of the States to render armed assistance to a State which is unjustly attacked. As a rule, he thinks, at least a request on the part of the attacked State for military assistance must have been made beforehand. Pufendorf unequivocally condemns the attitude of a State not involved in the war which presumes to act as judge with reference to the controversies of other States. This is opposed to the equality of the States in natural law, and would distract the world with two wars instead of one. Such a procedure is likely to result in the war of all against all, since no State is absolutely free from the guilt of unjust acts.

In the sixth chapter the author discusses also the question: under what circumstances, as an exception, has the individual citizen of the State the right to wage war—a right which in the state of nature is common to all individuals, while in the organized State it belongs exclusively to the supreme power. The chief case in which an exception can occur is when a citizen of one State injures a citizen of another on a territory which belongs to no State. Under these circumstances, according to Pufendorf, the person injured may deal with the violator in accordance with the law of war. Such circumstances obtained from the time of Pufendorf up to the World War on the group of islands called Spitzbergen, where, as the result of lack of authorities with power to punish, whalers, fishers, and hunters used to engage in skirmishes. The powers interested in this group of islands made an attempt to remedy the situation through the Spitzbergen Conference of 1914. Following Grotius, Pufendorf moreover deals with the difference between formal and informal wars, with the characteristics of civil war and insurrection, and with the authority of government officials, under certain circumstances, to undertake warlike activities before these are ordained by the sovereign. Finally, Pufendorf considers the responsibility of a State for the delicts of its citizens. The State's responsibility for such acts with respect to foreign countries Pufendorf admits only in the case in which the State could have prevented the delict, or when

it shields the perpetrator afterwards. (Cf. the dispute between Switzerland and Soviet Russia concerning the assassination of the Russian delegate Vorovsky at Lausanne, and the acquittal of the defendant by the Swiss court.) In conclusion the chapter refers to the law concerning booty and the acquisition of territory by conquest. As Pufendorf's own addition to this subject we must mention the detailed discussion of a special case of international law from Greek history which was arbitrated before the Amphictyonic Council. Alexander the Great, after conquering Thebes, had released the Thessalians, his allies, from a loan they had previously obtained from the Thebans. But the latter, after their State had been reorganized by Cassander, Alexander's successor, nevertheless demanded payment from the Thessalians. Pufendorf discusses in this case the right to booty as it applies to incorporeal things, and sets forth at length the view that the demand of the Thebans was not well founded. Such a right to booty was exercised to the fullest extent during the World War by the belligerents, and was confirmed for the victors in the treaties of peace. Many of these cases later on became the subject of proceedings before mixed courts of arbitration.

The seventh chapter is concerned with agreements made with the enemy, either during war or with reference to war. Here also Pufendorf follows closely the views expounded by Grotius; but from the outset he queries the latter's principle that all such agreements must be observed. He distinguishes between agreements which aim at peace and those which presuppose the continuance of war. The latter class, in his opinion, lacks binding force, since a contract, he argues, requires confidence between the contracting parties, while war has introduced between the enemies an element of force and stratagem. Thus a legal duty to live up to such arrangements is out of the question, and the only important factor to be considered in connexion with these arrangements is that of expediency, since an enemy who has become embittered by the violation of such engagement will be more dangerous than one with whom faith has been kept. Pufendorf doubts, moreover, whether such agreements, the aim of which is to mitigate the severity of the war, are not contrary to the purpose of war. He considers, indeed, that they might tend to prolong war; but notwithstanding this he has to admit that the civilized nations recognize the obligatory force of war treaties in the interest of a chivalrous conduct of war.

The principal instance of such a treaty is that of the armistice. What Pufendorf has to say in this connexion is taken exclusively from the work of Grotius, as is also true concerning his discussion of the other kinds of treaties and of the question to what extent military commanders or individuals may conclude such agreements.

In chapter viii the author proceeds to treaties of peace. He

acknowledges that Grotius has so fully covered this field that there is little left for him to glean. To this phase of the subject, however, belongs the weighty question whether a vanquished nation may contest the treaty of peace on the ground that compulsion has been exercised in connexion with it. Grotius answers this question entirely in the negative as regards formal wars, appealing to the customary law of nations. Pufendorf doubts whether such customary law is valid in relation to a treaty of peace which the victor in an unjust war has imposed on his adversary, unless both parties, without attempting an amicable settlement, have rushed to arms and thus left the final decision of their contest to the fortunes of war.

The ninth chapter enumerates the various kinds of public treaties. They are divided into two main categories: those which simply restate the mutual obligations of the States under natural law, and those which define or supplement such obligations. To the first class belong simple treaties of amity which contain only the promise of the parties not to injure each other. The second category is subdivided into equal and unequal public treaties. Both may have the same objects, i.e. commercial relations, joint conduct of war, the furnishing of auxiliary troops in case of war, &c. If the contracting parties mutually stipulate equal or equivalent performances, for instance, the furnishing of the same contingent of auxiliary troops, or the neutralization of the co-terminous frontier territory, then the public treaty is equal; if the performance varies according to the ability of the partners, so that one party is in an inferior position, then the treaty is unequal. As an example of an unequal treaty the author cites that concluded between Rome and Carthage after the Second Punic War. By this Carthage obligated herself not to wage any war without the assent of Rome. Treaties of this description are not only unequal, but also deprive the party placed at a disadvantage of a portion of its sovereignty, although this is not the case with a mere obligation for war indemnity. From this point of view Pufendorf would consider the treaty status of Germany in the League of Nations not only as unequal but also as one of diminished sovereignty so long as the regulations of the Treaty of Versailles concerning the one-sided neutralization of the Rhine boundary and one-sided disarmament have not been brought into conformity with the principle of equal rights.

Furthermore, the author distinguishes between personal and real treaties. The first mentioned are valid only as regards the person and the duration of life of the sovereign who contracts them; the others are valid as regards the States whose heads these sovereigns are. Treaties between republics invariably belong to the latter category unless a change in the form of the State occurs. Treaties between princes are to be interpreted in one or the other sense according to

their aim and subject-matter. This rule, which had been established by Grotius, Pufendorf supports and supplements with casuistic arguments. Among some special problems of international law regarding State treaties, the author here formulates the question whether treaties of limited duration are to be considered as tacitly prolonged after the lapse of the time specified. He answers in the negative, and denies moreover that actions of the contracting parties in accordance with the treaty after the lapse of time specified may *per se* be construed into a prolongation of the treaty. In point of fact the relationship of amity which is grounded in natural law remains even after the expiration of the positive treaty. In concluding, Pufendorf acquaints the reader with the distinction between the agreements of ambassadors and the public treaties of sovereigns; and incidentally the concept of ratification is discussed.

In the tenth chapter our author tabulates a great many historical examples of various treaties entered into between sovereigns as such, or between sovereigns and their subjects. He discusses the question of the extent to which the rulers thereby obligate themselves and their successors, and especially whether their subjects may base a lawsuit against them on these treaties.

The eleventh chapter treats of the loss of nationality. This does not occur when a ruler dies without leaving an heir to the throne. The result in this case is merely that the relationship of allegiance towards the sovereign disappears; but there is no return to the original freedom of the natural state, as was the accepted doctrine at that time; on the contrary, the citizens remain, during the interregnum, bound by their original compact. Nationality is lost through emigration. It is to be judged from the positive laws of each State whether and to what extent liberty of emigration and immigration exists. Speaking from the standpoint of natural law, Pufendorf is in favour of this liberty. He even argues against the view of Grotius to the effect that mass emigration is not permitted by natural law because it is in opposition to the purpose of the civil community. Pufendorf replies that what is permitted to an individual cannot be forbidden to a group; and since the State has no right to detain an individual against his will, it is of no consequence whether the departure of a greater number will entail a weakening of its force.

On the other hand, no State is free arbitrarily to banish its citizens. A citizen may be deprived of his citizenship and banished from the State against his will only if he is convicted of a crime against the State. Territorial changes, due to warlike conquest or to public treaties of cession, may occasionally result in a forced change of nationality, in order to avoid a threat of war. Lastly, a State is free to surrender one of its citizens to a foreign State for punishment if the citizen has

insulted or injured the foreign State. In this case, if the injured State accepts the person in question, a change of his nationality ensues.

In the twelfth and last chapter, changes in the form of the State and the dissolution of States are discussed. Pufendorf starts with the principle that a change in the form of the State does not terminate the State itself, and consequently its obligations under international law remain unaffected. He denies that a republican government may refuse to honour the treaty obligations which an absolute monarch has entered into for his own interest and not the good of the people, for 'even if the head be sick, it still remains the head' and thus rightly governs the body. Pufendorf would not have countenanced the repudiation by the Soviet régime of the debts of the czarist State.

But we face a change of the State itself when it splits into several States, or combines with another, or is annexed as a province by another State. Pufendorf analyses the consequences of such a change with reference to constitutional and international law, partly in harmony with, and partly in opposition to, the views of Grotius. For the international law of our own day no great profit may be gleaned from these rather academic and philosophical discussions. Here it suffices to point to the doctrine that upon the partition of a State its assets and liabilities must pass in due proportion to the new States, provided no special agreement is entered into concerning this point, as was the case recently in connexion with the division of the Austro-Hungarian monarchy.

Finally, with reference to the complete dissolution of a State, the author deals more with the philosophic than with the international phase of the question. The latter he adapts once more from the work of Grotius. We are surprised to find in the examples which he himself adduces no allusion to the fate of the Jewish people, in whose history the entire dissolution of a State is most impressively given. Pufendorf is content to emphasize the theory that a State by mere territorial change does not suffer extinction as long as it preserves its unity and independence. To support this thesis he could have cited the migrations of the Germanic peoples.

The present summary of Pufendorf's great work is based on the last edition which appeared during the author's life, and which he himself revised and introduced with a special preface. It bears the title: 'Samuelis Pufendorfii de Jure Naturae et Gentium Libri Octo. / Editio nova, auctior multo, et emendatior. / Cum Gratia et Privilegio Sacrae Caesareae Majestatis et Serenissimi Electoris Saxoniae. / Francofurti ad Moenum, Sumptibus Friderici Knochii, Typis Joannis Wustii. / Anno MDCXCIV' (1694). The copy before me is from the Library of the Reichsjustizministerium; it comprises eighteen pre-

liminary pages including the title and preface, and 1,344 pages of text, followed by a table of contents and index covering seventeen pages. It is adorned with a frontispiece which under the portrait of the author bears the distich:

Ista Pufendorfi facies; sed nobile si vis
Ingenium penitus noscere, scripta lege.

The first edition of the work was published, as previously mentioned, in Lund (Londini Scanorum, Sumtibus Adami Junghans, imprimebat Vitus Haberegger) in the year 1672. Copies of this edition are to be found in the libraries of the Reichsgericht, University of Basel, University of Frankfort, University of Heidelberg, University of Jena, University of Lund, Brown University, Columbia University, and the Boston Public Library. Of other editions which were accessible to me or with which I have become acquainted, I enumerate the following:

1. Edition of 1684, enlarged and revised; published at Frankfort (copies in the State Library of Bavaria, the Library of the Reichsgericht, and the libraries of the University of Basel, the University of Lund, and Brown University).

2. Edition of 1688, published at Amsterdam (copies in the libraries of the British Museum, Brown University, Columbia University).

3. Edition of 1692, published at Lund (a copy is in the library of the University of Leipzig).

4. Edition of 1694, published at Frankfort (copies in the libraries of the University of Basel, the University of Rostock, and the Library of Congress).

5. Edition of 1698, published at Amsterdam (copies in the libraries of the Harvard Law School, the U.S. Department of State, and in the Library of Congress).

6. Edition of 1699, published at Frankfort (copies in the State Library, Berlin, and the library of the University of Greifswald).

7. Edition of 1704, published at Amsterdam (copies in the libraries of Brown University, the Harvard Law School, and the University of Michigan Law School).

8. An edition of 1706, with a commentary by Johann Nikolaus Hertz (Hertius) with *Eris Scandica*, published at Frankfort (copies in the libraries of the University of Leipzig, the University of Lund, the Carnegie Endowment, and the Library of Congress).

9. A new edition with commentary by Hertius published at Amsterdam in 1715 (copies in the libraries of the British Museum, the Harvard Law School, and the Library of Congress).

10. Edition of 1716, published at Frankfort (copies in the Library of Congress, and the U.S. State Department Library).

11. Edition of 1744, published at Frankfort and Leipzig: 'cum commentationibus Hertii et Jo. Barbeyraci. Accedit *Eris Scandica* qua adversus Libros de jure naturali et gentium objecta diluuntur. Recensuit et animadversionibus illustravit G. Mascovius.' 2 vols. (Copies in the libraries of the British Museum, University of Cologne, University of Leipzig, University of Michigan Law School, Carnegie Endowment, U.S. Department of State, and in the Library of Congress.)

12. Edition of 1744, published at Lausanne (copy in the library of Brown University).

13. Edition of 1759, 2 vols., published at Frankfort and Leipzig (copies in the libraries of the University of Lund, Brown University, Columbia University, Harvard Law School, University of Michigan Law School, U.S. Department of State, and the Library of Congress).

TRANSLATIONS

French.

1. *Le Droit de la Nature et des Gens de S. Pufendorf* . . . traduit par J. Barbeyrac. Avec des notes du traducteur, etc. Amsterdam, 1706, 2 vols. (Copies in the libraries of the British Museum and the Harvard Law School.)

2. Edition of 1706, published at Frankfort. (Copies in the libraries of Harvard University, Indiana University, and American Antiquarian Library, Worcester, Mass.).

3. Second enlarged edition with an 'Oratio inauguralis' by the translator, Amsterdam, 1712 (copies in the Bavarian State Library and the libraries of the British Museum, University of Heidelberg, University of Leipzig, University of Munich, University of Stuttgart, University of Tübingen, Bowdoin College, Harvard Law School, University of Kansas, New York Public Library, New York Society, and in the Library of Congress).

4. Edition of 1717, published at Frankfort.

5. Edition of 1732 of Barbeyrac, published at Basel (copies in the Library of Congress, and the library of the Carnegie Endowment).

6. Edition of 1734, published at Amsterdam (copies in the libraries of the University of Hamburg, University of Lund, University of Rostock, Harvard Law School, New York Public Library, U.S. Department of State, Carnegie Endowment, and the Library of Congress).

7. Edition of 1740. 3 vols. Published at London (copies in the Library of Congress, the Peabody Institute, and the library of the Carnegie Endowment).

8. Edition of 1740, published at Trevoux (copy in the Harvard Law School Library).

9. Edition of 1750, published at Basel (copies in the libraries of

the British Museum, the Harvard Law School, and the Library of Congress).

10. Edition of 1759, published at Leyden (copies in the libraries of the University of Lund, the John Crerar Library, Chicago, Ill., and the Harvard Law School).

11. Edition of 1771, published at Basel (copies in the libraries of Columbia University, Harvard Law School, and the Boston Public Library).

English.

1. *Of the Law of Nature and Nations*, by S. Pufendorf . . . Translated into English by Basil Kennett and others. . . . The second edition . . . corrected and compared with Mr. Barbeyrac's French translation, with the addition of his notes, etc. Oxford, A. and J. Churchill, 1703. (Copies in the libraries of Amherst College, the Harvard Law School, and the Library of Congress.)

2. Edition of 1710, published at Oxford (copies in the libraries of the British Museum, Columbia University, University of Illinois, and Princeton University).

3. Edition of 1717, published at London (copies in the libraries of Columbia University, Harvard Law School, and the Boston Public Library).

4. Edition of 1729, 'to which is now prefixed Mr. Barbeyrac's Prefatory Discourse, etc. Done into English by Mr. Carew'. Published at London (copies in the libraries of the British Museum, Carnegie Endowment, Columbia University, Harvard Law School, West Point Military Academy, Boston Public Library, and the Library of Congress).

5. Edition of 1749, published at London (copies in the libraries of Harvard Law School, U.S. Department of State, and the Library of Congress).

6. Edition of 1763, published at Oxford (copy in the Library of Congress). Besides these an epitome:

7. Pufendorf's *Law of Nature and Nations*, abridged from the original. . . . The whole compared with the respective last editions of Mr. Barbeyrac's French translations and illustrated with notes, by J. Spavan. 2 vols. London, 1716 (copies in the libraries of the British Museum, Columbia University, Harvard Law School, and the Library of Congress).

Italian.

1. Il diritto della natura e delle genti, ossia sistema generale . . . di Morale, Giurisprudenza, e Politica . . . , rettificato, accresciuto ed illustrato da G. Almici, etc. 4 vols. Venezia, 1757-9 (copies in the Harvard Law School Library and the library of Princeton University).

German.

1. Edition of 1711, published at Frankfort (copies in the State Library of Berlin, the State Library of Bavaria, the State Library of Frankfort, the Provincial Library of Saxony, and the libraries of the University of Breslau, the University of Halle, the University of Marburg, and the University of Münster).

A comparison between the main work and the two other works of Pufendorf already published in this series yields the following results:

The first book of the main work corresponds to Definitions 1, 2, 15, 16, 17, 18, and axiom 1 of the *Elementa*, as well as to chapter i of Book I of *De Officio*; Book II corresponds to Definitions 3, 4, 5, 6, 7, 8, and observations 4 and 5 of the *Elementa*, and to chapters ii, iii, iv, and v of the first Book, as well as to chapter i of the second book of the *De Officio*; Book III corresponds to Definitions 20 and 21 of the *Elementa*, and to chapters v, vi, vii, viii, and ix of the first book of *De Officio*; Book IV corresponds to chapters x, xi, xii, and xiii of Book I of *De Officio*; Book V to Definitions 9 and 10 of the *Elementa*, and to chapters xiv, xv, xvi, and xvii of Book I of *De Officio*; Book VI to chapters ii, iii, and iv of Book II of *De Officio*; Book VII to chapters v–xi of the second book of *De Officio*; Book VIII to Definition 9 of the *Elementa*, and chapters xii–xvii of Book II of *De Officio*. By comparing the chapters of the main treatise with those of the book *De Officio*—and with the help of Professor Schücking's introduction to the tenth number of the Classics, which points out in each instance to what chapter of Hugo Grotius's *De Jure Belli ac Pacis* the chapters of the *De Officio* correspond—the reader may without much trouble ascertain to what extent the individual parts of the system of Pufendorf are congruent with the main work of his great predecessor. I have therefore refrained from further burdening this introduction with a detailed enumeration on this point.

Berlin-Dahlem, March 1933.

WALTER SIMONS.

TRANSLATORS' PREFACE

THE translation of the *De Jure Naturae et Gentium* by Baron Samuel Pufendorf has been made from the one-volume Amsterdam edition of 1688.¹ The translations by Jean Barbeyrac into French (in the edition of Leyden, 1759) and by Basil Kennett into English (London, 1710 and 1717) have been consulted from time to time.

The work presents certain difficulties in style and in format which call for some explanation. Of the former Kennett remarks in his Preface: 'The Commendation of our Author's Judgment hath scarce been more universal, than the Censure of his Composition; which though, by All, acknowledg'd to be expressive, yet to most appears so difficult and discouraging, that they sometimes fancy the Sense to have broken its way through the Phrase, and to have left these Irregularities, as the Token of its Violence.' It has seemed desirable to preserve not only the thought, but, to a certain degree, also the style of Pufendorf, which, for all its intricacies and obscurities, has a certain flavour of the author's personality and age that ought not to be entirely lost, as is frequently the case in the extremely free paraphrases of which Barbeyrac and Kennett generally avail themselves.

As to format, the references which Pufendorf gathered from almost every field of literature, he incorporated into the body of the text. These might have been relegated to notes, as has been done by Barbeyrac and Kennett, but in many cases they form an integral part of the argument, while such a removal would have produced an erroneous impression of the author's style, and at the same time made it much more difficult to refer quickly from the translation to the original.

With but a few necessary exceptions the references to other works have been left in the Latin as Pufendorf gave them. In the *Index of Authors and Works Cited* the Latin abbreviations have been modernized and standardized, and the titles of many of the most familiar works given in English.

In the matter of quotations from other works Pufendorf often took considerable liberties with the text, in omitting words and phrases at will, and sometimes whole sentences, as well as changing the word order. But he was apparently most scrupulous in not modifying the actual views expressed by his authorities. The question arose whether the translators should reproduce Pufendorf's Latin translation of, let us say, Plato's original Greek, or translate the Greek of Plato directly. The latter seemed to be on the whole the proper course to follow, especially with the most famous works, although, of course, no matter

¹ For the privilege of using this edition, as well as that of 1744, edited by Mascovius, for many months continuously, we are deeply indebted to the courtesy of the Columbia Law School Library, and to the Harvard Law Library.

has been introduced which was not in Pufendorf, and all really noteworthy deviations have been recorded. For the more important authors quoted and the longer passages, standard translations have been used and the source acknowledged by giving the initial of the translator in parentheses immediately after the quotation. A list of these translations is given on p. 1369. All of Pufendorf's direct quotations from other authors have been verified, wherever the work in question was accessible, and in case of error the correct reference is given in brackets.

The voluminous and frequently very helpful notes of Barbeyrac on Pufendorf may be found by English readers for the most part in the 1717 edition of the translation of Kennett.

The bold-face figures inserted in the margin of the text indicate the beginnings of pages of the edition of 1688, which has been photographically reproduced.

For generous and valuable aid in preparing the *Appendix, The Text of the Quotations from Greek Authors*, and *The Index of Authors Cited*, we have been indebted to Dr. Katharine S. Tubbs, Miss Mary M. Morrow, Miss Edith C. Jones, and Dr. Marian Harman.

C. H. OLDFATHER,
The University of Nebraska.

W. A. OLDFATHER,
The University of Illinois.

April 30, 1931.

ERRATA

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[*The Title-Page of the Edition of 1688*]

SAMUEL PUFENDORF
ON
THE LAW OF NATURE AND NATIONS
EIGHT BOOKS
LATEST EDITION
Greatly enlarged and corrected



AMSTERDAM
At the House of ANDREAS VAN HOOGENHUYSEN
1688

P R E F A C E

TO THE SECOND EDITION

TO THE GENTLE READER, GREETINGS:

You have here the second edition of our work *On the Law of Nature and Nations*, enlarged by more than one-fourth with the addition here and there of material which served either to round out the study or to throw light on it. It had been my intention also to insert such objections as had been raised by certain men to one passage or another, as well as my replies to them. But my friends opposed this, for the reason that to insert such things as had for the most part been suggested to malevolent minds by stolidity or a passion to calumniate me, would not only break the unity of my work but defile it as well. Such as I have opposed have been treated more as they deserved than as would have accorded with my nature.

There still remain not a few things which could have served to adorn this study, and which might make our work much more comprehensive; but my mind is made up to add to it not another word, lest I be responsible for lovers of these studies going to useless expense in purchasing several volumes of different editions. But if God prolongs my life and permits me in the midst of other occupations to devote occasional hours to this study, I am resolved to add some appendices to certain sections and to elaborate such as still appear to require it. For in addition to the fact that there circulate on every hand false views upon this subject, the refutation of which is in the interest of truth, there remains more than one topic for study, which, when properly set forth, would be suited to add especial lustre to it, and to place its worth and true value in a clear light. Thus every one knows that most of the material in the books of the Roman Law concerns the subject of the Law of Nature and Nations, that is, the law which obligates all men and nations; but there is interspersed with it much that is positive, and of application to the special nature of the Roman state. If these two elements have not been carefully separated, any knowledge of law proceeding therefrom cannot avoid being confused, unstable, and fraught with idle controversies. Therefore, it would, in my judgement, be well worth while to make a concise index to the books of the Roman Law, which would determine what matters therein concern natural law, and what positive law, and whether the bounds are drawn carefully enough between Natural, or universal, Law, and Roman Law properly so called, or that peculiar to the Roman state.

So also for many years I contemplated a Commentary on *Greek Politics*, but up to the present other more necessary undertakings have prevented it. I had planned to present therein the political theories of Greek writers, especially of Plato and Aristotle, which later passed over into Roman authors and also into the schools and writers of our generation, and in which are found not a little that is absurd and erroneous, and some things that are liable to give rise in states to tumults and revolutions. Such a work might very well have been cast in the teeth of those, who, in their defence of the authority of the tottering Aristotle, are said still to enter conspiracies on the order of Catiline's, save that in binding their brothers with the sacred oath they no longer pass around the blood-mixed cup but mugs of beer turbid with dregs. It would also have been a valuable undertaking to inquire whether anything more finished and sublime than our own moral teachings is to be found in the writings of the Stoics, of Seneca, Epic-tetus, and Marcus Antoninus [Aurelius]. And especially, whether at all, and if so, how far, the Christian Moral Theology rises above the common rules of duty as laid down in Natural Law.

Finally, since the acts of supreme sovereigns and of independent states often seem to deviate from the rules of duty which private individuals have to observe in their dealings with one another, it would not be out of place to inquire whether at all, and if so, how far, supreme sovereigns are exempt from the rules of private Law, and how far those acts can be approved, which are commonly said to be done 'for reasons of state',¹ and fall among the French under the phrase *Coups d'État*. If any one undertakes a study of this subject, he will realize the need of no little native wit as well as a knowledge of civil affairs. But whether we will have enough leisure to discuss these subjects, the mist beclouding the future does not allow us to promise. And perhaps there will be found some one with more leisure, who will set forth these matters in a worthy manner and relieve us of that task. Meanwhile, just as my single purpose is to offer some work of use to the public in keeping with my feeble ability, so in all modesty I ask of You, Gentle Reader, your favour against the bitings of ill-will.

Farewell.

TO THE GENTLE READER, THE BEST OF GREETINGS,

IF I had sufficient confidence in my native ability or industry, it would be idle for me to muster reasons why I too have devoted my efforts to the study and adornment of a most noble and useful branch of learning, which, long neglected and practically ignored, has in our

¹ [For *Satus* read *Status*.—Tr.]

day finally begun to lay claim to its own dignity--since to merit the well wishes of mankind is considered by all men a sufficient justification. But since the writers who were the first to shed light upon this subject are accorded such universal fame, it will not be out of the way to set forth the reasons for this undertaking of mine, in order that I may not appear to be repeating what has already been said, or to be striving for an unworthy comparison with the monumental works of men of such outstanding reputation. And first of all, because once, when I was still a young man, I undertook to publish some *Elements*¹ of this branch of learning, not so much out of temerity, or from a lack of respect for this learned generation, as that they who wished me well at that time might have some sort of specimen of what I was capable, from which they could find an occasion for commendation—and most men excused my *Elements* in consideration of the immaturity of my age and effort—it seemed highly fitting that I should by a more mature work publicly apologize, as it were, for the immaturity of the first. This consideration alone gives the open lie to the remarks of a certain scoundrelly sycophant, which he has published abroad against that dissertation in a slanderous work. Although worthy men have before now confuted that calumny of their own accord also in published works, while I for my part never thought it fitting to accord that man the recognition which an answer would have implied.

But there was a further reason which had power to impel me to some undertaking along this line of study: When THE MOST SERENE ELECTOR PALATINE most graciously called me to the chair of this discipline in the University of Heidelberg, and commanded me to be the first to take the title of Professor of this branch of learning (and others have apparently followed his example, in introducing into their Universities a Professorship of the Law of Nature and Nations), it became my first and necessary task to make some contribution to the study of that subject, which had taken its place on the public platform with me as its first exponent. Now the subject was still able to supply matter which called for no less native endowment than industry, and there was not merely left in this field the *σωματοποιεῖν* [organization] of the opinions of each and every learned man: derived, no doubt, from the dictum of Quintilian, *Institutes of Oratory*, Bk. V, chap. x [120]: 'Every kind of argument was made before any instruction was given respecting them; and writers afterwards published the forms of them when they were observed and collected.' Indeed, it has been believed not unjustly that first place has thus far been held by Hugo Grotius, who was apparently the first to call his generation to the consideration of that study, and was also so grounded in it, that in a large part of the field he has left all others nothing

¹ [*Elementa Jurisprudentiæ Universalis* (1660).—Tr.]

further than the task of gleaning after him. But, however much we cherish the fame of that man, so much so that we have been accorded the special designation of his 'Son', it must after all be acknowledged that he has entirely omitted not a few matters, some he has accorded but a passing touch, and introduced some other matters, which prove that after all even he was only a man.

Especially do those cast no slight aspersion upon a most noble work, in whose eyes it often departs from the accepted teachings of the orthodox Church. Now to present some new doctrine in religion has always struck me as a most unhappy undertaking of great intellect, since there is such a mass of other matters in which any man can without risk deceive the most wary.¹ And it is by such methods that the authority of true and useful discoveries is disparaged, and that the sharpest censures are called forth from a host of critics, who were otherwise unworthy even to open their mouths in the presence of such men. Certain learned men have, indeed, essayed to remedy these defects by editing the books of his *De Jure Belli et Pacis* with notes, and one or two of these commentators have rendered a service that is not to be scorned. Yet others have felt that it would be far more useful to lay all that material a second time on the anvil, and to reshape it into a different form.

So also Thomas Hobbes, in his works on the science of civil government, has a great deal that is of the highest value, and no one who understands such matters would deny that he has so thoroughly explored the structure of human and civil society, that few before his time can in this field be compared with him. And even where he goes astray, he still causes a man to think about matters, which, in all probability, would otherwise never have occurred to him. And yet by virtue of the abominable theories, which he has elaborated in the field of religion, and are peculiar to himself, he has turned many against him, and this not without reason; although you may see it happen often enough that he is censured with the greatest scorn by those who have read and understood him the least.

John Selden might possibly have held a position second to none, if he had set himself to apply the law of nature to all mankind with the same ἀκρίβεια [precision] as he did to the traditions of the Hebrews; or if the decisions of a single nation could have been regarded a sufficient proclamation of a law that would obligate all nations.

Moved, therefore, by these considerations I have put my hand to this task, and arranged all this material in that order which appeared to me the most suitable; and I have endeavoured to establish all my contentions with substantial and lucid reasons, in so far as that was

¹ [Literally, 'put out the eyes of crows', a Latin proverb found in Cicero, *For Murena*, xi. 25, and Quintilian, VIII. xx. 23.—Tr.]

possible, and to avoid those errors into which writers of repute before my time had fallen; in all this bearing in mind the words of Quintilian, *Institutes of Oratory*, Bk. XII, chap. xi [27-8], 'If men had been inclined to think that no one could surpass the man who had hitherto been the best, those who are now accounted best would never have distinguished themselves. And although there is no hope of excelling, it is yet a great honour to follow closely behind.' In general, although I have restored in good faith to all from whom I had learned any point touching this subject, what was his own, since 'it is the mark of a generous heart and one that is characterized by frankness and modesty to acknowledge one's indebtedness to other men', but 'of an abject heart and perverted mind to prefer to be caught in the act rather than acknowledge a debt',¹ still, in a subject of this nature where reason reigns by its own right, no man's authority could possibly appear so great in my eyes but that I preferred to embrace that to which the weightier considerations led. And so I have not the slightest fear that offence will be taken by learned men who are still alive, and especially by my fellow countrymen, because of the fact that not infrequently I have gone counter to their views, yet in a modest spirit, and without any intent to belittle them, and never without balancing off reason against reason. Accordingly, that which I have claimed for myself against others, I freely grant others as well against my own views. For I do not acknowledge any association with that type of men who immediately burst out into imprecations and rage, if all their utterances are not revered as though they had been delivered from the oracular tripod, or who do not hesitate to thunder with intolerable arrogance that they acknowledge no errors.

And yet I would not fear to proclaim, now that HIS ROYAL MAJESTY has most graciously judged this work worthy of his approval, that I tremble before the authority of no other censor. And to those who are moved either by an arrogance joined with ignorance, or by a sort of carping *πολυπραγμοσύνη* [meddlesomeness], to criticize such works upon this subject, the best reply would be to repeat the old proverb: Let the cobbler stick to his last. If any others would undertake to criticize, let them know that in dealing with me they must use nothing but reasons. For not even if some of those who have been called to elucidate Holy Writ *have* undertaken to decide some of the questions which properly belong to this field of study, have such questions, for that reason alone, been able to pass into articles of faith; nor ought their final decision to be closed to sane reason; nor is it proper for such men to lay claim to a greater authority in such matters than belongs to those who make a profession of this study. Nor, indeed, need we, in the discussion of this subject, any more flee from or fear

¹ [Pliny, *Natural History*, Pref. xxi and xxiii.—Tr.]

the opprobrium of novelty, provided sound reason grants its favour, than need those, who in our generation have, to their immortal glory, cast light upon medicine, natural science, and mathematics by discoveries of what was unknown before their day. Quintilian, *Institutes of Oratory*, Bk. III, chap. vi [65]: 'Longer perseverance in study would be superfluous, if we were not at liberty to find out something better than what was advanced before.' (W.) *Idem*, Bk. VIII, chap. vi [32]: 'But now, as if everything that was possible in that way had been accomplished, we do not dare to produce a new word, though many that were formed by the ancients are daily falling out of use.' Add Bacon of Verulam, *Cogitata et Visa*, pp. 581-2,¹ and *Novum Organum*, Bk. I, chap. lxxxix, where he gives the reason why 'respecting increases and new fields, as it were, of philosophy, the whole subject is fraught with base suspicions and impotent dislike from the side of religion'.

Although that I have not detracted from the honour due to antiquity is clear from the way in which on every occasion I prefer to cite the ancient authors to witness to my theses. To add to them by calling in a cloud of more recent writers seemed superfluous. The reason why, especially, I have excluded from my work those writers, who, among the followers of the Roman sect, have undertaken to direct to their liking the customs and consciences of men, and whom even Grotius and others² like to call to their side in such great numbers, will be patent, I fancy, to all men of judgement. It is this: Those men as a general thing lay down no fixed foundation or hypothesis for their traditions, but, in addition to what they habitually borrow from the Jurisconsults, just as they are content for the most part to establish idle contentions with equally idle and trivial logic-chopping, and in general hold it a great accomplishment to have adduced whole legions of writers of their sect—to know one of whom is to know them all³—so they all devote futile labour to utter trifles—with the result, however, that there is scarcely any question on which they do not break up into factions. The hidden reason for this condition is that, inasmuch as it is one of the pillars of their sacred Commonwealth for the consciences of men to be directed not by reason but by the authority of priests, these should always have ready at hand a cloud of authorities which is capable of supporting any view whatsoever, according as it is to their interest for any man to be persuaded. And therefore we feel that they deserve very ill of the commonweal, who, in the full brilliance of the solid sciences, still strive to guide the youth to such persistent follies, which are the offspring as well as the mainstay of the kingdom of darkness. Nay, he makes poor use of his time, yokes foxes to the plough

¹ [This reference we have been unable to verify. The same general contention regarding the hostility of superstitious religion towards natural philosophy is formally set forth in *The Advancement of Learning*, V. i.—Tr.]

² [For *alii* read *alii*.—Tr.]

³ [Terence, *Phormio*, 265.—Tr.]

and milks he-goats,¹ who puts himself out to list their views on one side or the other and reconcile them with sound reason.

But I have felt it fitting also to point out that I have made the basis of all natural law the social life of man, because I have found no other principle, which all men could be brought to admit, without violation of their natural condition, and with due respect to whatever belief they might hold on matters of religion. Nor does it appear, that, when such a foundation is laid, the bounds of this study will be made any more narrow than is proper, although this is the burden of the *Introduction* of a certain important work. It is true, there is the saying, 'Natural law is older than society'. Yet, not to mention the fact that it is not inconsistent for an obligation to lie upon a person before the existence of the object towards which it can be exercised, there is the word of God, spoken as soon as the first man was created: 'It is not good for man to be alone.' There are, of course, also duties or 'virtues directed towards God, as well as those of every man towards himself'. But since, in so far as religion touches the study of natural law, it is limited within the sphere of this life, it can upon that score be referred to social life, in so far as this last furnishes the most effective bond for the associations of men. And such things as a man should observe in relation to himself, make him all the better adapted to society.

But the nature of that 'uprightness and innocence of manners which should be observed everywhere and even outside the bounds of society', that is, without consideration of its relation to other men, I have been unable to comprehend. The further statement: 'The formation of society and the application of means to it are left to the choice of nature, and for that reason if the law of nature were only that of society, it would be merely voluntary, arbitrary, and changeable,' is nonsense. For the nature of man has ever been determined by God for social life in general, but it was left to the choice of men to establish and enter particular societies under the guidance of reason, which fact does in no way make the law of nature arbitrary. What, furthermore, is more obvious than this? That the nature of man, in so far as it was made by the Creator a social one, is the norm and foundation of that law which must be followed in any society, whether it be universal or particular. Nor, indeed, do they contribute greater stability or light to this study, who commend that foundation thus: 'The final argument for whatever is naturally just is nature herself, which makes her own law. The guidance of nature must be followed, and we must diligently inquire what that is to which in moral matters she of herself leads, or from which she restrains us. Wherefore natural law must be sought in agreement or disagreement with nature. But, for this purpose, nature must be understood, not as she is at this time, depraved by her corrupt

¹ [Vergil, *Eclogues*, III. 91.—Tr.]

offspring and evil manners, but as she was first created, uncontaminated and uncorrupted.'

Now in addition to the fact that most of these words appear to beg the question and to explain the obscure by the equally obscure, the statement, that the nature of man was first created by God uncontaminated, and was afterwards depraved by man's own sin, is a question of fact, the truth of which can be established only on the authority of Holy Writ. And the result is that so important a foundation is only accepted by those Christians who acknowledge the theory of the origin of sin as held by our churches. Yet since this study concerns not Christians alone but all mankind, surely it would be more appropriate to set up such a principle as no one, provided he be of sound mind, can deny. But on this point let every thinking man decide for himself.

In conclusion, just as I am not without hope that good and wise men will hold this work of mine worthy of their approbation, so I most earnestly pray that, wherever I shall have fallen into error, they may charge that to the imperfection of man's condition; since it would surely be an inhuman and almost insane piece of folly to burn the whole field because of one or two weeds; as Horace [*Art of Poetry*, 351 ff.] says: 'Where a poem has many shining beauties I am not the man to be offended by a few spots which carelessness has let fall on it or human weakness has failed to guard against.' This is not a matter of pride on my part, nor do my white hairs yet bring with them such a degree of obstinacy that I am going to feel that I should blush to have learned or changed aught at the admonition of more learned men. Nay, I shall be ready both to refute without obstinacy, and to be refuted without indignation. How should a sensible man blush to apply to himself the words of Marcus Antoninus [Aurelius], Bk. VI, § xxi? 'If any one can prove and bring home to me that any conception or act of mine is wrong, I will amend it, and be thankful. For I seek the truth, whereby no one was ever harmed. But he is harmed who persists in his own self-deception and ignorance.' Nor would I care to be included in the number of those of whom Aristotle, *Nicomachean Ethics*, Bk. VII, chap. x, says: 'People who are self-opinionated, or ignorant, or boorish, are all obstinate.' (W.) Farewell.

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ON THE LAW OF NATURE AND NATIONS

BY

SAMUEL PUFENDORF

BOOK I

INTRODUCTION TO SUCH LAW

CHAPTER I

ON THE ORIGIN AND VARIETY OF MORAL ENTITIES

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THE task of prime philosophy [metaphysics], if it was to fulfil the calling of its own very nature, was to give the most comprehensive definitions of things and to divide them appropriately into distinct classes, giving in addition the general nature and condition of every kind of thing. Now the classification of natural things seems to have been sufficiently treated by those who have so far undertaken the consideration of that science, but it is perfectly clear that they have not been as much concerned with moral entities as the dignity of these requires. Many, indeed, have not considered them at all; others have but lightly touched upon them, as if they were unimportant or figments of no moment. And yet their nature should by all means be known by man, to whom has been given the power to produce them, and whose life is deeply penetrated by their influence. This consideration impels us to give by way of preface, in so far as shall seem necessary for our undertaking, a discussion of this field of knowledge which has been neglected so far by most writers; so that the definitions of moral things, which we shall give, may not by their obscurity or novelty delay the reader, who has doubtless met but rarely such terms in the common treatises. And if those who have been bred on delicate letters take offence at much of this and frown upon new words unknown to Latium, we ask of them this indulgence, that, as we bear from time to time with them in their excessive niceties regarding their own fancies, so they will pardon us when we pay heed for a few moments more to the exact meaning of things than to the ornaments of speech.

² [For *morles* read *moraies*.—*Tr.*]

For we do not know how such matters can be expressed more conveniently, unless by tedious circumlocutions we are willing to involve them in greater obscurity. Cicero will free us from the charge of novelty, *On Ends*, Bk. III [i]: 'We are forced to give new names to new things. And this is what no one who is even moderately learned will wonder at, when he considers that in every art which is not in common and ordinary use, there is a great variety of new names.' He then adds examples from the liberal and manual arts, and remarks: 'And much more is this course allowable in a philosopher; for philosophy is the art of life, and a man who is discussing that cannot borrow his language from the forum.' (Y.) And Manilius, *Astronomica*, Bk. III [39 ff.]:

I'll leave thy passions and instruct thy mind.
And though some word of foreign stamp appear,
Seem harsh, untuned, uneasy to thy ear;
This is the subject's not the writer's fault;
Some things are stiff and will not yield to thought.
I must be plain. And if our art hath found
Expressions proper, it neglects the sound. (C.)

However, if it so be that a man cannot by any means abide these inelegancies, he may pass them over and move at once to smoother fields.

2. According as all things which this universe embraces consist of their own principles, which the Great and Good Creator has apportioned and assigned to the constitution of their essence, so each several thing is observed to have its own properties, which arise from the disposition and aptitude of its substance, and to exert itself in distinct actions according to the measure of strength imparted it by the Creator. These properties we usually call natural, since by the term 'nature' has generally been designated not merely the entire sum of created things, but also their modes and acts which follow from that innate strength which produces those infinite varieties of motion, whereby, as we observe, all things in this universe are stirred. Now those things which act with no perception at all, or with mere downright perception, or with perception but slightly aided by reflection, are led solely by the instinct of nature, and can in no way temper their actions by any measures that are taken of themselves. But to man there has been given, not merely beauty and adaptability of body, but also the distinctive light of intelligence, by the aid of which he can understand things more accurately, compare them with one another, judge the unknown by the known, and decide how things agree among themselves; so that, as it would seem, not only is he freed from the necessity of confining his actions to any one mode, but he can even exert, suspend, or moderate them. Furthermore, to that same being, man, there has been granted the power to invent or apply certain aids to each faculty, whereby it is

signally assisted and directed in its functioning. It is the task of others to set forth all that in the way of concepts has been discovered to help save the intellect from being confused by the infinite variety of things. It is for us to observe, how, chiefly for the direction of the acts of the will, a specific kind of attribute has been given to things and their natural motions, from which there has arisen a certain propriety in the actions of man, and that outstanding seemliness and order which adorn the life of men. Now these attributes are called Moral Entities, because by them the morals and actions of men are judged and tempered, so that they may attain a character and appearance different from the rude simplicity of dumb animals.

3. We seem able, accordingly, to define moral ideas most conveniently as certain modes [qualities], added to physical things or motions, by intelligent¹ beings, primarily to direct and temper the freedom of the voluntary acts of man, and thereby to secure a certain orderliness and decorum in civilized life. We use the term *modes*, for the term entity seems more fittingly to be divisible into the two great subdivisions of substance and mode, than into those of substance and accident. Furthermore, as mode is distinguished from substance, so moral ideas clearly do not exist of themselves, but have their basis only in substances and in their motions, which they can affect only to a limited extent. Now some modes flow, as it were, from the very nature of the thing itself, while others are superadded by intelligent agency to physical things and modes. For whatever has been endowed with intellect is able, by means of reflection and a comparison of one thing with another, to form concepts, which are suitable to be the guides of a consistent faculty. Moral entities also are of the same kind. You may justly call the Great and Good God their maker, who surely did not will that men should spend their lives like beasts without civilization and moral law, but that their life and actions should be tempered by a fixed mode of conduct, which was impossible without moral entities. Nevertheless, the majority of them have been superadded later at the pleasure of men themselves, according as they felt that the introduction of them would help to develop the life of man and to reduce it to order. And so of these latter the purpose is clear: It is not the perfection of this world of nature, as is the case with physical entities, but it is the perfection in a distinctive way of the life of man, in so far as it was capable of a certain beauty of order above that in the life of beasts, as also the production of a pleasing harmony in a thing so changeable as the human mind.

4. Now as the original way of producing physical entities is creation, so the way in which moral entities are produced can scarcely be better expressed than by the word *imposition*. For they do not arise

¹ [For *intelligentibus* read *intelligētibus*.—Tr.]

out of the intrinsic nature of the physical properties of things, but they are superadded, at the will of intelligent entities, to things already existent and physically complete, and to their natural effects, and, indeed, come into existence only by the determination of their authors. And these authors give them also certain effects, which they can also remove at their own pleasure without any accompanying change in the object to which they had been added. Hence the active force which lies in them does not consist in their ability directly to produce any physical motion or change in any thing, but only in this, that it is made clear to men along what line they should govern their liberty of action, and that in a special way men are made capable of receiving some good or evil and of directing certain actions towards other persons with a particular effect. Also the efficacy of moral entities instituted by God flows from the fact, that, as man's creator, He has the right to set certain limits to the liberty of will which He has deigned to vouchsafe man, and to turn that will, when reluctant,¹ by the threat of some evil to whatever course He wishes. Nay, even men themselves have been able to give a force to their own inventions, by threatening some evil that lay within their power, on him who refused to conform to their dictates.

5. Since, therefore, moral entities have been instituted to bring order into the lives of men, for which purpose it is required that they also, who must live according to their rule, should adopt a set standard in their relations towards one another, in determining their actions, and finally in fixing their attitude towards those things which are used in the lives of men; for this reason they are understood to be inherent primarily in *men*, but also in their actions, and even, to some extent, in things, as they are found in nature, acting either of herself, or with the aid of human industry. But although a division of moral entities might have been made with very good reason according to these three heads, it has seemed more convenient to classify them according to the system of physical entities; and that, partly because philosophers have studied the latter with greater care, and from a comparison with them much light can be thrown on the former, and also because our intellect, immersed as it is in things material, can scarcely comprehend moral entities without the analogy of physical.²

6. Although moral entities do not exist of themselves, and consequently should in general not be classified as substances, but rather as modes, we nevertheless find many of them considered like substances, because other moral things appear to be directly founded in them, in the same way that quantity and qualities inhere in physical substances. Indeed, in the same way that physical substances sub-*pose*, as it were, space, in which they fix the natural existence which they possess, and

¹ [For *reluctantem* read *reluctantem*.—Tr.]

² [For *phisicorum* read *physicorum*.—Tr.]

exercise their physical motions, so persons, especially moral persons, on the same analogy, are held and understood to be in some state, which is, as it were, likewise sub-posed or sub-set for them, so that in it they perform their actions and produce their effects. Hence the nature of a state may not improperly be defined, by virtue of the analogy that it has with space, as a sub-posed moral entity; since space, indeed, does not appear to be a primary entity, but is merely sub-posed, as it were, beneath other things and upholds them in a definite manner. In this way also definite states have been postulated, not for their own sake but only that in them moral persons may be understood to exist. Although a state differs from space in that the latter is a certain kind of immobile substance, both extended from the first and of itself capable of existence even when natural objects are removed; while the former, and indeed other moral things, considered formally and as such, has but the force of mode and attribute, so that when the persons are removed, which are said to be in such a moral state, the state itself can scarcely any longer maintain its own existence.

7. Now space has two aspects: the first, according to which things are said to be *where* or in a place, i.e. here or there; and the second, according to which things are said to be *when*, or in time, i.e. to-day, yesterday, to-morrow. In the same way we note two aspects for a state, the one denoting a moral *where*, and so bearing some analogy with place, and the other having respect to time, in so far as it has a certain moral effect on those who are said to exist in that time. State in its former aspect, analogous to space, can be considered either *indeterminately*, in that it results from moral qualities alone, or *determinately*, in that it involves also the consideration of some moral quantity and a moral comparison. A state¹ of man considered indeterminately is either *natural* or *adventitious*. We call a state of man natural, not because without any imposition it derives from the physical principles of the essence of man, but because it arises from the imposition of the Divine Will, not from the determination of men, and accompanies man from the very² moment of his birth. We are accustomed, moreover, to consider the natural state of man either *absolutely*, or *in relation to other men*. Considered in the former manner, the natural state of man, so long as we can find no more convenient word, we shall designate 'humanity', or that condition in which man is understood to have been constituted when the Creator willed that He should be distinguished above other animate creatures. Cicero, *On Duties*, Bk. I [i.iii]: 'Nature herself has stamped on us a character in excellence greatly surpassing the rest of the animal creation.' From such a state it follows that man should be a creature who recognizes the Author of his being, gives Him due worship, and admires His works; and that there should be expected

¹ [For *Satus* read *Status*.—Tr.]

² [For *ipsa* read *ipsa*.—Tr.]

of man a life utterly different from that of the beasts. To this state the life and condition of animals is opposed.

Now since the very being a man is a state out of which arise certain¹ obligations and certain rights as well, it will not be amiss at this point to consider when that state begins in individual men. And this seems properly to be when any one can really be called a man, despite the fact that those perfections are still wanting which come to a man only in the course of time, when, indeed, he first shows life and sensation as a distinct being, although he has not yet left his mother's womb. But since the fulfilment of obligations requires of a man a knowledge of himself and of that which he is doing, it follows that they do not have any efficacy in action until a man knows how to regulate his actions to some norm, and how to distinguish them one from another. But since rights lay an obligation for action upon others who already have the use of their reason, and hence may be of advantage to those who cannot yet discern what is being done, they are in force from the very beginning of man's existence. Hence, on the ground that the right of not suffering injury at the hands of others is common to all men, if any one while still in the womb receives bodily harm, the injury is done not merely to the parents but also to the embryo as well, and we judge that the same child when grown and become aware of that injury can demand satisfaction in his own right. But if any one should destroy or dissipate what is in the mother's womb before it has taken on a human form, it cannot be said that that mass sustained any injury, although in fact an offence has been done to the law of nature in cutting off a member of society, and an injury done to the state in the loss of a citizen, and to the parents in the loss of anticipated offspring.

Considered *in its relation to other men*, the natural state of man is when men order their lives on nothing but a simple universal kinship resulting from the similarity of their physical nature, before any human act or covenant has arisen which has rendered one man beholden to another. In this sense those who have no common master, who are not subject to another, and who are unknown to each other by way of either benefit or injury, are said to live in a mutual state of nature. And to this may be added a third way of regarding a *natural state*, namely, as one which lacks all the inventions and institutions, discovered by man or divinely revealed to him, that have given him dignity and comfort.

That is an *adventitious* state which comes to men at birth, or some time thereafter, by virtue of some human deed; the divisions of this state will be treated more conveniently in another place.

Here it should be observed in passing, that no one should think²

¹ [For *certe* read *certain*.—Tr.]

² [For *put t* read *putet*.—Tr.]

that a natural state, in the second of the senses given above, never has existed or can exist, because a group of men has never been joined together, free from any adventitious bond, by that simple similarity of physical nature which arises from kinship; since, indeed, Eve was joined to Adam by the conjugal bond, and their descendants have been welded even more closely by a common blood and ancestry and by kinship. But it should be recognized that the bond arising from kinship is gradually weakened among those who are far removed from the common stock, and it is generally considered to have no force beyond the circle of definite terms which men have invented to express degrees of relationship. And although that state did not exist in fact at the birth of the human race, in the course of time it also did emerge, when the memory of a common ancestry had disappeared, or the feeling of relationship arising from it had been lost.

8. Now although every state presupposes in the man who is said to be in that state a certain respect and attitude toward others, since, indeed, every state is accompanied by a right or obligation which cannot be understood without an object for its force; still, some states more expressly denote a relation toward other men than do others, since they signify distinctly the mode in which men mutually transact their business. The most outstanding of these are *peace* and *war*. Libanius, *Progymnasmata* [p. 5, *Chriæ*, i. 6]: 'Two states control all the actions of men, I refer to war and peace.' Now peace is that state in which men dwell together in quiet and without violent injuries, and render their mutual dues, as of obligation and desire. War, however, is the state of men who are naturally inflicting or repelling injuries or are striving to extort by force what is due to them. Peace may be divided into *common peace*, which is maintained towards all men whomsoever, through those duties alone which arise from the law of nature, and *particular peace*, which is based upon formal treaties and definite pledges. This latter again may be *internal*, when it is maintained between members of the same body politic, or *external*, when maintained with people outside our body politic, either ordinary friends or particular friends and allies. There is no such thing as a *common* or universal *war* of all men against one another, for that is a consequence of the state in which beasts are. A *particular war*, which is carried on between distinct groups of men, is either *internal*, that is, civil, or *external*; the former is waged between members of the same body politic, the latter between those who do not belong to the same body politic. When the acts of war are suspended, but the state of war still remains, we call it a truce.

9. Some states can be considered *determinately*, according as they enjoy a greater or less degree of esteem, or as they are accorded much or little honour. For since certain rights or obligations accompany each and every state, that state is generally considered the more out-

standing, the more numerous and the more powerful the rights which it has associated with it; or when its obligations are such that it is expected to perform tasks which call for an unusual ability of courage or intelligence. On the other hand, those which require but rude labour are for the most part considered to have a low standing.

10. The second sort of state, that, namely, which has respect to time considered with a moral effect, is divisible, first, into *juniority* and *seniority*. Each of these may be used with respect to the duration of life, when they are called age, with the stages of infancy, childhood, puberty, youth, manhood, maturity, declining age, senility, and decrepitude; or with respect to some adventitious state, according to the length of time that one has continued in it. Second, into *majority*, when a man is held able, because of his age, to administer his own affairs upon his own responsibility; and into *minority*, when a man has need of a tutor or guardian, because, from weakness of judgement or an inclination toward a wayward life, he is considered unable to manage his own affairs intelligently. Different limits are found to be set for this state among different peoples.

Different from minority is the age capable of guile, for which, likewise, in general no definite limit can be set. Aelian, Bk. V, chap. xvi, relates an interesting way of detecting guile: 'A boy who had picked up a golden plate which had dropped from the crown of Diana, was brought into court. The judges accordingly laid before the boy playthings, knuckle bones, and a golden plate, and when the boy again took the gold, he was punished as being guilty of sacrilege.'¹

11. Before we proceed to other matters, it should be observed that from the paucity of vocabulary we are frequently forced to express² by the same terms both the state itself and the attribute proper to such a state, though they are in fact distinct and are conceived differently. (Seneca, *On Benefits*, Bk. II, chap. xxxiv: 'There is an enormous mass of things without names, which we do not speak of under distinctive names of their own, but by the names of other things transferred to them.' (S.)). So, for instance, liberty is conceived both as a state, with analogy to space, and as a faculty of action, with resemblance to an active quality. So also nobility denotes now a state, and again the attribute of a person, because it is conceived as a passive quality. So also the words truce and peace signify both the state and the means of attaining it.

Also we should not forget, that, just as one person may at the same time be in different states, provided only that obligations accompany- 7
ing those states do not conflict, so the obligations attached to any one state may in their parts be derived from different principles. Hence he who gathers the obligations flowing from any one principle, and

¹ [Summarized.—Tr.]

² [For *apprimere* read *exprimere*.—Tr.]

omits all others, does by no means immediately form a state to which no obligations can or should adhere, save those which he himself remembers. So he who has gathered from the Sacred Scriptures alone the parts of the duty of priests, assuredly cannot deny that those priests are also obligated to perform such duties as are required by the constitutions of individual governments. And so we also who are here treating merely the duties of man, which can be shown to be necessary by the light of reason, do by no means insist that any such state of man, which includes such obligations alone, ever did exist, can exist, or should exist. Although it would be perhaps superfluous to inquire at length whether such a state of man might ever properly have existed. For what some assert has not yet been clearly proven, namely, that 'If man had continued in his state of original holiness, the law of nature which guided him at first, would have continued to do so, except that one or two positive laws might have been added.' For I doubt if it is likely that the human¹ race, even though free from sin, would have remained for all time within the limits of a single garden, subsisting on the fruits furnished by nature, without advancing in civilization through industry and the inventions² of the arts. I cannot as yet understand how they would have compromised their original purity, if, as men multiplied, they had formed certain groups and instituted civil conventions. But it does not seem possible to conceive of such societies without positive laws.

12. Moral entities, regarded on the analogy of substances, are termed moral *persons*. These are either individual men, or men united by a moral bond into one system, considered together with their status, or the function which they perform in common life. Now moral persons are either *simple* or *composite*. Simple persons, on the basis of a difference in their status or functions, are either public or private, as their function is directly for the use of a civil group, or for the advantage of individuals as such. In the usage of Christian peoples public persons are divided into *civil* and *ecclesiastical*. The former are either *principal*, or *inferior*. Some among them rule a commonwealth with supreme authority; some, by virtue of the power given them from the supreme authority, have charge of a certain part of the administration and are properly called magistrates, or aid in the proper administration of the state by their counsels. *Inferior persons* render a less important service to the state and to the magistrates as such. In war the superior and inferior officers correspond to the magistrates, and are in command of the common soldiers, who, in this respect, may be considered public persons, because they are authorized, directly or indirectly, by the highest civil power, to bear arms in behalf of the state.

There is also a special group of political persons who may be called

¹ [For *humannum* read *humanum*.—Tr.]

² [For *in ventas* read *inventas*.—Tr.]

representatives, inasmuch as they represent the person of others. These, having been invested by another with power and authority of action, transact business in his place with the same validity as if it were done by the person himself. Such are legates, vicars, syndics, and others of the sort.

It has, however, recently been observed, that a distinction should be made between ministers who have a *representative character*, such as ambassadors, and ministers of a second degree, such as envoys or residents who do not represent so fully as the former the full authority of those who dispatch them. See the anonymous work *Mémoires touchant les Ambassadeurs*, p. 542.¹ Among private persons, tutors and guardians bear a resemblance to these, in so far as they manage the affairs and business of orphans and minors. On this point Hobbes, *Leviathan*, chap. xvi, is mistaken in holding that in communities a man may frequently represent the person of an inanimate object, which in itself is not a person, such as a church, a hospital, a bridge, &c. For it is not necessary by a fiction of law to assign a personality to any of these things, since it is very much simpler to say that certain states have assigned to particular men the duty to collect the revenues for the preservation of such places, and to prosecute and defend any suits that shall arise on such an account.

The variety of religious persons is easily recognizable by any one according to the religion in which he has been brought up. Any educated man, also, can understand what kinds of persons schools produce.

Among private persons there is a great variety. The main differences arise, first, from their business, their pursuit, or the trade with which they are occupied, and from which they make their living, such being either an occupation worthy of a free man, or one to which some disrepute attaches. Second, from the condition or, as it were, moral state which one occupies in a community, whereby one is a citizen with more or less exclusive rights, another an alien, another a foreigner. Third, from the place in a family, according to which one is the head of a family, and so may represent at once the person of a husband, a father, and a master; another is a wife; another a son; another a servant. These are all members of the ordinary family, with whom, but outside their number, may be included at times a guest. Fourth, from lineage, which gives rise to nobles of different degrees in different communities, and common folk. Fifth, from sex and age; by virtue of the latter, boy, youth, man, and old man; by virtue of the former, male and female. For although variation in sex and age is not due to imposition, still such things involve some moral distinction among men in common life, since different things are recognized as becoming to persons of different sex, and it is proper to treat them differently.

¹ [By Abraham de Wicquefort.—Tr.]

13. A composite moral person is constituted when several individual men so unite that whatever, by reason of that union, they want or do, is considered as one will, one¹ act, and no more. This takes place when several individuals so subordinate their will to the will of one person, or of a council, that they themselves are willing to recognize, and wish others to regard, whatever that one person has decreed or done, concerning matters pertaining to the nature of that body and agreeable to its end, as the will and action of all. It follows, therefore, that although in other cases what several persons want or do is considered the will and desire of as many men as there are physical persons or individuals present, but one will is ascribed to a person, to the composition of which many have united, and the action which proceeds from them as such a body is regarded as one, no matter how many physical individuals have been concerned in it. And so a composite person of such a nature may, and commonly does, obtain some special privileges and rights, which individuals as such in that body cannot claim or secure for themselves.

But here it should be observed, that, just as physical bodies remain the same, although in the course of time, by unobserved forces, through the addition or subtraction from them of minute particles, no small change may be effected in them, in like manner the same person does not cease to exist when there is a succession of individual members, unless at one and the same time such a change takes place as completely to dissolve the nature of that body. But this point will be discussed at greater length elsewhere.

We may divide compound moral persons or societies, like individuals, into *public* and *private*. The former are again either *sacred* or *civil*. Among the sacred we may call some *general*, such as the Catholic Church, and any particular church, whether it be confined within the fixed limits of a commonwealth, or distinguished by public forms of the confession of faith; and some *particular*, such as councils and synods, consistories, presbyteries, &c. A civil society is likewise either *general*, as a state, of which there are many kinds, simple and compound, regular and irregular; or *particular*, as a senate, an equestrian order, a tribe, a parliament, &c. A *military* society is called an army, and is composed of legion, squadron, cohort, company, &c.

Private societies are not merely families, but also, when within states, corporations, such as those of the merchants, the artisans, &c. It has not seemed desirable for us to consider all these species here in any great detail.

14. We shall now make this further observation regarding the nature of simple moral persons, how far, namely, one and the same man can be in different states not mutually antagonistic. So the same man

¹ [For *unamque* read *unaque*.—Tr.]

can at the same time represent several persons, provided the various functions which attend such persons can be simultaneously met by the same person. For although by virtue of physical considerations the same person cannot be both husband and wife, or both son and daughter, or by virtue of moral considerations cannot be at once master and slave, judge and prisoner, litigant and witness, yet nothing prevents the same person from being at one and the same time in his house the head of a family, in parliament a senator, in a court of justice a lawyer, at the king's court a counsellor; in so far, at least, as the various duties concerned do not engage the entire man, but can easily be met at different times. Cicero's remarks, *On Duties*, Bk. I, [xxx], have some bearing upon this point:

We are to observe that nature has, as it were, endowed us with two characters. The first is in common to all mankind, because all of us partake in that excellency of reason, which places us above the brutes. The other character is peculiar to individuals. . . . [xxxii] (To these) is added a third which either accident or occasion imposes on us; and even a fourth, which we accommodate to ourselves by our own judgement and choice. (E.)

And again, *On the Orator*, [II. xxiv]: 'I conceive myself in three characters, my own, that of the adversary, and that of the judge.' (W.) And it was for this consideration that the wiser among the heathen undertook to defend polytheism,¹ which they well knew was contrary to reason; on the ground, namely, that several persons were conceived in the same deity according as he manifests himself in various acts in the world of nature. Seneca, *On Benefits*, Bk. IV, chap. vii: 'God may have as many titles as he has attributes.' (S.*) Maximus of Tyre, *Dissertations*, xxiii [p. 240] [xxxix, Vb]: 'The Gods have but one nature, though many names. Yet we, from the help which they vouchsafe mankind, give them separate names, which are but the index of our ignorance. Different gods go by different names.' Furthermore, it is easily understandable from the nature of imposition, that, when a man assumes, as it were, a new person, there is no physical change in him, no new physical qualities are produced, nor his old ones augmented, but whatever new is thus produced lies entirely within the sphere of things moral. So when one is elected consul he does not become therewith more prudent, nor when he leaves that magistracy less so; although some have observed that the actions of many have borrowed no little dignity from the honour of the office, and that some have not appeared to be the same men when in office that they were as private citizens. This, however, I should reckon among the deceptions of eyesight produced by a display of vanities. In the same way simple folk think that the title of physician adds some efficacy to a prescription. Juvenal, *Satires*, vii [135-7]: 'It is the purple robe that gets the lawyer custom—his violet cloaks that attract clients. It suits their interest to live

¹ [For πολυθέωτα read πολυθεότητα.—Tr.]

with all the bustle and outward show of an income greater than they really have.' (E.)

And yet there are some whose abilities are quickened by the importance of their tasks, but lie dormant at times of leisure. See Cornelius Nepos, *Alcibiades*, chap. i, sections 3-4. One must, indeed, believe that, when God imposes a particular person upon a man, He can and does add qualities that surpass the measure of moral attainments. See *Exodus*, iii, iv; *Deuteronomy*, xxiv. 9; *1 Samuel*, x. 6 and 9; *Matthew*, x. 1, 19, 20. From what has gone before it is, furthermore, patent that the Jews once attributed too great effects to their regeneration, whereby formerly the new person of a Proselyte of Righteousness was imposed upon a Gentile, in holding that none of his former relationships continued, and that he should no longer consider as his relatives, his brother, sister, father, mother, or children begotten in his former condition. See Selden, *De Jure Naturali et Gentium*, Bk. II, chap. iv, where the cause of this error is shown to be the belief that a new soul had been given the proselyte.

15. In conclusion it should be noted that men sometimes create a kind of shadow and imitation of moral persons which represent them in sport. Hence it has come about that the stage has in a very special way claimed for itself the word *persona*. The essence of a feigned person consists in the fact that the dress, gesture, and speech of a different¹ and real person is cleverly represented. Thus the whole procedure bears merely the appearance of mirth, and whatever is said or done by such a person leaves behind it no moral effect, but is valued solely in the light of the cleverness of the impersonation. And for this reason, I may add in passing, I wonder why Peter, Bishop of Alexandria, approved of a baptism given in play by Athanasius when a boy, as Sozomen, *Ecclesiastical History*, Bk. II, chap. xvi, records. Compare also the argument of the Bishop of Minorca upon the intention of the minister in administering the sacrament, in Petrus Suavis, *History of the Council of Trent*, Bk. II, pp. 214-15.

However, the imposition which produces real moral persons is not at all a free thing, but it should presuppose such qualities as are appropriate, so that some real benefit may thereby accrue to mankind; and he who has no respect for this consideration in constituting persons, should be regarded as insulting mankind with his recklessness and folly. So Caligula might have made a worthless and stupid man consul, provided he was a Roman citizen and knew enough to perform at least the routine functions of that office. But to give the consulship to his horse Incitatus,² was sheer madness and silly impudence; and further, to give him the person of a householder, with slaves, a house, and furnishings, so that guests invited in his name might be entertained

¹ [For *alierius* read *alterius*.—Tr.]

² [For *incitato* read *Incitato*.—Tr.]

more sumptuously. See Suetonius, *Caligula*, chap. lv. It was an equal insanity, combined with the grossest impiety, when many ancient peoples placed their kings, the founders of their states, and other illustrious men, after their death, among the number of the gods, and that either because of their merits, or for purposes of flattery. See the oration of Tiberius in Tacitus, *Annals*, Bk. IV [xxxvii, xxxviii]. And any man of sense can readily judge what he ought to think of canonization as practised by the Papists.

16. Now as to things, in so far as they come under the object of law, there seems no occasion to enter them in the list of moral¹ entities; for although men are regarded as different persons because of a different status or function, we regard things in a different way, whether, namely, they are understood to belong to us, or to some one else, or to no one. When, indeed, certain things came under ownership, and the rest were still free from ownership, no new qualities should be understood to have been imposed on such things; but rather, upon the beginning of ownership in things, a certain moral quality arose among men, of which the men were the subjects, and the things only the terms. For just as when at the creation all things were in common, man had the right to apply to his own ends those things which were freely offered for the use of all, so, when ownership had once been established, each man was given the right to dispose of his own property, and among the non-owners there arose the obligation to keep hands off such property. The things themselves, however, obtained therefrom only an extrinsic denomination, inasmuch as they form the object of such a right or obligation. Thus when certain things are called religious and sacred, no moral quality and sanctity inheres in *them*, but an obligation is simply laid upon men to treat them in a certain manner; and when this obligation terminates, such things are supposed to fall back into common use. If, however, any one should contend that certain things as well as persons ought to be considered moral, his words ought so to be explained as to make it clear that morality is being attributed to them not formally but only objectively.

17. So much concerning moral entities conceived upon the analogy of substances. We must now consider those which are formally modes, and are conceived as such. Modes may be divided most conveniently into *modes of affection* and *modes of estimation*. According to the former, persons are understood to be affected in a certain manner, according to the latter, persons and things may be valued. The former fall under the term quality, the latter under the term quantity, such terms being used in their broadest sense. Qualities may, for our present purposes, be divided into *formal* and *operative*. The former are those which do not tend or are not directed towards any act or operation, but only

¹ [For *moralium* read *moralium*.—Tr.]

agree and are joined to the subject as bare forms; hence you may call them also simple attributes. An operative quality is either *primary* or *derived*. According to a primary quality a thing is conceived as suitable or fit for an act, and is either *internal* or *external*, and may also be termed a moral passive¹ quality. A derived quality is that which proceeds from a primary, such as acts.

18. A conspicuous place among moral attributes is occupied by titles, which are designations for the distinctions, made in the civil life of persons, upon the basis of their esteem and status. They are in the main of two kinds. Some, indeed, denote the degree of the esteem of individuals in civil life, or the qualities peculiar to them, but they only connote and hint more or less clearly at the status, according as such and such a title is ordinarily applied to few or many statuses. Such are those honorary titles which are commonly appended to the names of persons of distinction, as 'most serene', 'most eminent', 'most illustrious', &c., the implication of which is greater or less according to the force of the substantives to which they are attached. Other titles directly signify some status or some seat or peculiar place in a status, while they indirectly connote a degree of the esteem which commonly attaches to that status or position. Such are the names of moral persons, at least of those who occupy any post of honour. These are not so important in themselves, inasmuch as they are only ideas representing to one man's mind the status and position of a certain person, as they are when by the imposition of men they signify the rights, power, and function of him to whom they are attributed. So it is not unreasonable that time and again men fight with great ardour over titles, since the denial of the title is understood to be accompanied by the denial to a man of the status, function, power, and rights, which that title customarily expresses or indicates.

Here we must carefully note that the imposition of most titles is not perpetual and uniform, but among different peoples, and even among the same at different times, it shows a wide latitude of variation. So how very simple and modest were the titles of the first class as used among our ancestors! and what was once enough for the first man of the state is now despised by a common clerk. For the increase of titles of this kind does not always argue an increase in dignity, but when the titles wax, while the thing itself remains the same, we must regard² their worth as having diminished.

When, further, some laudatory title is given to a social class, that is because the quality denoted by that title is or should be present in the majority of its members; and so even those who do not possess the quality denoted, frequently come to possess the title. Thus in literary circles some men are called 'most famous' and 'most learned', who are

¹ [For *batibilem* read *passibilem*.—Tr.]

² [For *consendūm* read *consendūm*.—Tr.]

anything but that. So also a lazy nobleman is regularly addressed as 'most active'. Often, also, people in private life, or others, magnify or reduce the titles of others, according as the present condition of their own affairs leads them to flattery or to scorn. And in titles of the latter kind [the designations of status] it very often happens that the title continues, while the position, or the dignity and right, increases or diminishes not a little. Nay, it is even extremely common that in different states the same word is used for varying degrees of honour. Hence it would be highly naïve to rate in the same class all those who anywhere the world over enjoy the same title. It should also be observed that sometimes the mere title is given to a person without the position, or without those functions and emoluments, which generally accompany such a title; to the end merely that by virtue of it he may enjoy external insignia, and occupy a certain position among his fellow citizens. And last, in connexion, chiefly, with the titles of the leading houses of Europe, it happens that the same title sometimes signifies both the line and the possession of the estate mentioned, and sometimes the line but not the possession, with merely the right of succession in the due course of inheritance.

19. Moral operative qualities are either *active* or *passive*. Of the former the most noble species are *power*, *right*, and *obligation*. *Power* is that by which a man is able to do something legally and with a moral effect. This effect is that an obligation is laid upon another to perform some task, or to admit as valid some of his actions, or not to hinder them, or that he shall be able to confer upon another a power of action or possession, which the latter did not formerly possess. For this quality is, indeed, to a very high degree diffusive, as it were, of itself. On the side of its efficacy, power is divided into *perfect* and *imperfect*. The former is that which can be exercised by force against those who unlawfully endeavour to oppose it (force being chiefly exercised inside the boundaries of a state by an action at law; outside the boundaries, by war). In the case of the latter, if any one be prohibited unlawfully from its exercise, he is being treated inhumanely, indeed, and yet he has no right to defend it either by a legal action or by war, unless it so happen that necessity has supplied what it lacks in efficacy.

On the side of its subject, power is divided into *personal* and *communicable*. The former is that which one cannot lawfully transmit to another. But in this there are several differences, for some powers are so intimately connected with a person that the acts belonging to them cannot rightly be exercised at all through the instrumentality of another. Such is the power of a husband over the body of his wife, the exercise of which by another no laws would admit. Such are also the powers the possession of which cannot be transferred by us to another, although the commission of the acts proper to them can be delegated

to others; provided, however, that the acts derive all their authority from him to whom those powers inherently belong. Of this nature is the power of kings who have been constituted as such by the will of the people. For they cannot transfer to any one else the right to rule, and yet they can employ the services of ministers for the exercise of the acts that belong to such a right. Communicable power is such as can properly be transferred from one person to another, whether that be at his own pleasure, or by the authority or consent of a superior.

Finally, with regard to objects, most kinds of power can be classified into four groups. For powers concern either *persons* or *things*, and both these according as they are *one's own* or *another's*. Power over one's own person and actions is called liberty (although the ambiguities under which this word labours will have to be set forth elsewhere). Liberty is not to be understood as a principle distinct from him who enjoys it, or as a right of forcing oneself to an abhorrent task (compare *Digest*, IV. viii. 51; IX. ii. 13), but rather as a man's faculty to dispose of himself and his actions in accordance with his own desires; which faculty of itself involves a negation of any hindrance arising from
13 a superior power. Power over one's own possessions is called *ownership*. Power over the persons of other men is properly *command*; power over another's possessions is *easement*.

20. The word 'right' (*iur*) is highly ambiguous. For in addition to the meanings where it is used for law, and for a body or system of homogeneous laws, as well as for the decision rendered by a judge, it very frequently happens that it is taken as the moral quality by which we legally either command persons, or possess things, or by virtue of which something is owed us. This difference, however, seems to exist between the words power and right, namely, that the former tends more to introduce into things or persons the actual presence of the quality mentioned, and less expressly connotes the mode by which one has secured it. Right, however, directly and clearly indicates that a thing has been lawfully acquired and is lawfully now retained. Because, however, most kinds of power have a distinguishing name, which that quality, whereby something is understood to be owed us, lacks, it is convenient to designate this quality in a special way by the word 'right', although we have not seen fit to avoid the other meanings of this word, because of customary usage.

Now we class right among active qualities, since by virtue of it something can be demanded of another. But it is also placed among *passive moral qualities*, since it enables a man lawfully to receive something. For passive qualities are those by which one can lawfully have, suffer, admit, or receive something. Of these there are three kinds: The first is that whereby we properly receive something, in such a way, however, that we have no power to demand it, nor is there any obliga-

tion on another to render it. Such is the ability to receive a gift that is purely gratuitous. And that such a quality is not an absolute fiction, may be ascertained from the consideration, that, for example, a judge may be forbidden to receive under any consideration a gift from parties to a suit. The second is that whereby we are capacitated to receive something from another, not in such a way that it can be extorted from him against his will, unless a chance necessity requires it, but only in so far as he is obliged by some moral virtue to give it. This is called by Grotius an 'aptitude'. The third is that whereby we are able to force a man, even against his will, to the performance of something, and he himself is fully obligated to such performance by a specific law that prescribes a definite penalty. It should, however, be further observed that many things commonly pass under the head of rights, which, if we cared to speak accurately,¹ are a kind of a complex arising from power and right, used each in its proper sense, and at the same time involve or suppose some obligation, or honour, or something similar. Thus citizenship, or the right of citizenship, embraces the faculty to exercise, to their fullest effects, the acts pertaining to the members of that commonwealth, and the right to enjoy the benefits proper to it, supposing likewise an obligation toward the commonwealth. So, for example, the honours of learned men embrace the power to exercise the specific acts proper to that position, and the right to enjoy the benefits of that calling, to which there is further attached a high degree of esteem.

21. An obligation is that whereby one is required under moral necessity to do, or admit, or suffer something; its divisions will be treated more in detail below. There are also moral 'sensible' qualities which are understood to affect the judgement of men in a particular manner, just as among physical qualities this term is used for those which affect the faculty of sensation; such are honour, disgrace, authority, dignity, fame, obscurity, and the like.

22. A few remarks must also be added now on the topic of the modes of estimation or *moral quantities*. For it is clear that in a society persons and things are rated not only according to the extent of their physical substance, or the intensity of their motion and physical 14 qualities, when they are considered from the point of view of natural principles, but also according to another kind of quantity, which is different from any physical or mathematical quantity. And this quantity arises from the imposition and determination of a rational power. Now moral quantity is found both in things, where it is called *price* (value), in persons, where it is called *esteem*—both of these coming under the idea of value, and in *actions*, for which we lack a distinct term. Each of these will be discussed in its proper place. What we

¹ [For *accura* e read *accurate*.—Tr.]

have said on the variety of moral entities is sufficient for our purposes. The moral quantities of human acts will be discussed below.

23. In conclusion, as moral entities owe their origin to imposition, so from this they obtain their stability, as well as their variations, and when it has ceased to operate, as it were, they simultaneously disappear, just as a shadow disappears the instant a light is extinguished. Moreover, those which are of divine imposition are removed again only at the divine pleasure. Those which have been established by the will of men are abolished again by the same, even though the physical substance of the persons or things remain unchanged. For although it is impossible, from the nature of things, that what has once been done should be made as though it had not been done, as, for example, that he who has once been consul should not have been consul, still we see every day how one ceases to be that which he once was, and how all the moral entities which resided in a person entirely disappear, leaving behind not a single real vestige, as it were. For a moral entity can never attain to the strength of a physical quality. Hence it is folly to believe, that, if any person is imposed upon an individual, by this mere imposition a permanent moral character has been given him. Thus, if a commoner become a noble, he acquires merely new rights, but his substance and physical qualities are changed not one whit. If a noble be expelled from his order, he loses merely his rights; all of his natural endowments remain unimpaired.

CHAPTER II

ON THE CERTAINTY OF THE MORAL SCIENCES

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| <ol style="list-style-type: none">1. Most men deny moral science any demonstrative certainty.2. The nature of a demonstration.3. The principles of demonstrations.4. Demonstration is possible only in that moral science which treats of the goodness and evil of human actions.5. The objection is raised that moral things are uncertain. | <ol style="list-style-type: none">6. Can moral good or evil exist before any imposition?7. Can shame be a proof of this?8. The extent of moral actions on the basis of quality.9. Evaluation of the view of Grotius.10. Latitude is admitted in moral quantities.11. What may be called morally certain? |
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THE majority of scholars have for long firmly held, that moral science lacks that certitude, which is so characteristic of other knowledge, and especially of mathematics, because it has no place for demonstrations, from which alone is derived knowledge that is pure and free from fear of error; and because what is known of it rests on probability alone. This feeling has worked an immense injury to sciences most noble and most necessary to the life of man. For it has caused scholars to investigate but diffidently into that which they believed rested on so slippery a foundation; and those who neglected the moral sciences were supplied with the plausible excuse, that they were founded on no certain demonstrations, and could be treated merely in a rough and ready fashion. This error was to no slight extent fostered by the authority of Aristotle, who in the eyes of most men has attained the very pinnacle of learning, as though the mind of man could proceed no farther. These are his conclusions on moral science, *Nicomachean Ethics*, Bk. I, chap. i: 15

It would be wrong to expect the same degree of accuracy in all reasonings. Things noble and just, which are the subject of investigation in political science, exhibit so great a diversity and uncertainty that they are sometimes thought to have only a conventional, and not a natural, existence. As our subjects, then, and our premisses are of this nature, we must be content to indicate the truth roughly and in outline. For an educated person will expect accuracy in each subject only so far as the nature of the subject allows; he might as well accept probable reasoning from a mathematician as require demonstrative proofs from a rhetorician. (W.)

Now in truth we are not at all moved by the sole authority of this one man, and we shall make a fitting reply to the principal arguments of Aristotle and others, after we have made a few introductory remarks upon the nature of a demonstration.

2. To demonstrate is, therefore, in our opinion, to deduce by a syllogism for things proposed the certain conclusion that must be

unreservedly accepted from particular principles taken as their causes. Now although this is perfectly clear, and can readily be seen every day in the pure practice of mathematical demonstrations, to which no sane man has denied the power of demonstration, still a faulty understanding of one or two words has miserably misled most philosophers hitherto on this point, and caused them most erroneously to exclude demonstrations from many fields of philosophy. Their error came mainly from the fact, that, although the *subject of a demonstration*, as is commonly said, must be necessary, they interpreted this proposition to mean, that, in a demonstrative syllogism, the subject of the conclusion, distinct from the predicate, ought to be a necessarily existent entity. So, for example, in the trite and threadbare instance, 'man is rational and therefore capable of laughter', *man* is the subject of the demonstration, and is of course a necessary being. But as a matter of fact the subject of the demonstration is not some simple term, but an entire proposition, the necessary truth of which is deduced by a syllogism from fixed principles. It is of little consequence here, whether or not the subject of a demonstrable proposition necessarily exists; but it is sufficient, if, when its existence is posited, certain affections are necessarily agreeable to it, and it can be shown by unquestionable principles that they are agreeable to it. Thus it is of little concern to mathematicians whether a triangle be something necessary or contingent, if only they can demonstrate that the sum of its angles equals two right angles. And so the subject of a demonstration is said to be necessary, because of the necessity of the connexion by which the predicate in such a conclusion cleaves to the subject.

- 16 3. The true nature of those propositions that can be used in a demonstration may readily be understood from its end and effect. Science is that which we seek by means of demonstration, that is, a certain and pure knowledge, in every way and at all times constant and free from fear of error. 'We all conceive that that which we know is invariable.' (W.) (Aristotle, *Nicomachean Ethics*, Bk. VI, chap. iii.) It is necessary, therefore, that the propositions be *true* in fact, and not so from mere agreement or hypothesis. For although a long chain of conclusions can be deduced from a certain hypothesis, nevertheless, since they derive from a precarious or partly clouded principle, the streams cannot escape sharing the nature of the fountain. And though two absolutely contrary propositions should be taken, one of which must of necessity be true, of these, nevertheless, only the *τὸ ὅτι* [the fact of the case] could be conclusively proven, for *τὸ διότι* [the reason why it is so] always presupposes as a condition the firmness of the hypothesis upon which it is based.

The propositions of demonstration must also be *axioms*, so that they do not need any further proof, but merit belief upon their own

evidence, or else are reducible finally to some axiomatic truth. But inasmuch as some propositions are closer to first principles and others farther away, it should not be expected that every demonstration can be concluded in a single syllogism; but rather that the arguments from the proposition to be demonstrated must be continued until some first principle is reached. For those who are ever and anon droning their *quicquid* ['everything'], *atqui* ['but'], *ergo* ['wherefore'], are not the only ones who reason correctly, but those who begin with evident principles, and know how to weave a train of necessary conclusions from connected arguments, reason quite as well.

It is also necessary that these propositions be *immediate*, that is, that they flow from one another continuously, without interruption or gap. For a demonstrative argument must be like a chain, the propositions being fastened together like links, so that if one is broken or defective, the whole structure of the argument breaks up.

Finally, propositions must be the *causes of the conclusion*, because they contain the reason why a predicate is a demonstrable proposition necessarily agreeing with the subject. All of the foregoing is explained in complete detail by Erhard Weigel, *Analysis Aristotelica ex Euclide restituta*, whose merits in this field of science have been equalled hitherto by no other man of our country.

4. After these preliminary remarks, we should further observe, that, although it is a common characteristic of all moral sciences that they are under obligation not to remain within the limits of bare theory alone, but to turn their findings to some practical use, still a great difference may be observed between the two principal representatives. One of them concerns the rectitude of human actions in their order according to laws, the other concerns the successful management of one's own actions and those of others, with an eye to the security and welfare primarily of the public. The latter, indeed, properly fall under the head of prudence, as Aristotle, *Nicomachean Ethics*, Bk. VI, chap. v, defines it: 'A true rational and practical state of mind in the field of human good and evil.' (W.) Hence, in the same passage, he designates the duty of a prudent man in the following words: 'It seems to be characteristic of the prudent man to be capable of deliberating well upon what is good or expedient for himself [. . .] as concerns the means of living well.' (W.) And he bases these conclusions of his upon axioms drawn from a keen observation and comparison of the customs of men and the events of human history. Says Fabius in Livy, Bk. XXII, chap.¹ xxxix: 'Nor does the outcome only, that instructor of fools, demonstrate it, but that same reasoning which has continued hitherto, and will continue unchangeable so long as circumstances shall remain the same.' (S.) These axioms, however, do 17

¹ [For v. read c.—Tr.]

not appear to be so firm that infallible demonstrations can be deduced from them; and that is partly because of the remarkable flux and inconstancy which repeatedly manifests itself in the dispositions of mankind, as well as partly because the outcome of affairs is often changed by a slight force, and they fall out quite otherwise than had been anticipated. It happens also that the wit of man often goes astray in the application of those axioms, because of unforeseen events which suddenly upset all calculations, and because divine providence often makes sport of the dispositions of men, however cunningly contrived. Therefore, those who are engaged in the conduct of affairs do not endeavour to draw their plans to the nicety of demonstrations, but when they have used the wisest circumspection and a kind of divination, as it were, they leave the outcome in the hands of fate. See 2 *Samuel*, x. 12. For although what is possible may be known, and several possibilities may be compared, and it can be definitely ascertained not only which of two possibilities is of more and which of less value, granted that they exist, but also what will result from a large number of causes, and what from fewer, now existing, or soon to come into being; and although that which can come about in several different ways is more likely to take place, and consequently the expectation of it is better justified (see Richard Cumberland, *De Legibus Naturae*, chap. iii, sec. 4, n. 4); nevertheless, the mind of man cannot at all times and places grasp and weigh correctly all possibilities, and, because of unforeseen circumstances, many things which seemed more probable, look quite different when we come to the point. And so nearly all men think it sufficient in matters touching the acquisition of prudence to follow the advice of Aristotle, *Nicomachean Ethics*, Bk. VI, chap. xii:

It is right, therefore, to pay no less attention to the undemonstrated assertions and opinions of such persons as are experienced and advanced in years or prudent, than to their demonstrations; for their experienced eye gives them the power of correct¹ vision. (W.)

But let others struggle over this Helen.

Now that knowledge, which considers what is upright and what base in human actions, the principal portion of which we have undertaken to present, rests entirely upon grounds so secure, that from it can be deduced genuine demonstrations which are capable of producing a solid science. So certainly can its conclusions be derived from distinct principles, that no further ground is left for doubt. Seneca, *On Benefits*, Bk. VII, chap. i: 'Whatever things tend to make us better² or happier, nature has rendered either obvious or easily discoverable.' (S.)*

This assertion will be still more clear if we discuss what can be brought forward in opposition. Although Hobbes, *De Homine*, chap. x, is mistaken when he claims that ethics and politics, i.e., the science of

¹ [Reading *ὁρθός* for *τὸς ἀρχαίς*.—Tr.]

² [For *meliores* read *maiores*.—Tr.]

justice and injustice, of right and wrong, can be demonstrated *a priori*, because we ourselves have made the principles, i.e. the causes of justice, namely, laws and pacts, by which distinction is made between justice and equity, and injustice and injury; since before the institution of pacts and laws there was, of course, no justice or injustice, no *public* good or evil among men any more than among beasts. We shall demonstrate the falsity of this position in another place [I. vii. 13; VIII. i. 5], and also how a fallacy underlies the use of the word *public*.

5. Some there are who maintain that things moral are always uncertain and changing, and that no greater certitude can attach to any science than to the objects with which it deals. The reply is, that, although moral entities owe their origin to imposition, and for that reason are not in an absolute sense necessary, yet they have not arisen in such a loose and general manner, that scientific knowledge about them is on that account utterly uncertain. For the very condition of man demanded the institution of most of them, a condition assigned him by the most Good and Great Creator out of His goodness and wisdom; hence such entities can by no means be uncertain and weak. This point will be made more clear below, when we inquire into the origin of natural law. And even if human actions are called moral, 18 chiefly because they are not necessary, but free, still it does not follow, that, when certain principles are posited, such affections as can be unquestionably demonstrated concerning these actions, may not agree with them. For it is clear that the acts which are ordered by the law of nature have an intrinsic force towards a social life, although their real existence depends upon the free will of men. And so long as we deliberate, we are properly called free, while the effects that will follow our actions are properly called, with respect to that liberty, contingent; but when we have determined upon some action, the relation between our acts and all the effects depending thereon, is necessary and quite natural, and therefore capable of demonstration.

Further, it is irrelevant when some deny that any clear judgement can be passed upon human actions, because of the variety of the circumstances, any one of which seems to put a new face on an action, so that legislators can rarely frame a law which admits no exception, and does not necessitate abandoning the letter of the law and having recourse to equity. For there are definite principles according to which it can be shown how much force any circumstance may have in affecting or varying any action. And those same principles constitute the reason why legislators often care very little about excepting from their legislation cases clothed in unusual circumstances, but find a little more security in the use of general terms. Because, indeed, they assume that the judges, whose task it is to examine particular facts with reference to the laws, will understand what circumstance exerted an influence

upon a certain action. The general reason for this is to be found in *Digest*, I. iii. 3-6:

Laws ought to be laid down, as Theophrastus said, in respect of things which happen for the most part, not which happen against reasonable expectation. [...] Rules of law are not founded on possibilities which may chance to come to pass on some one occasion. [...] What occurs once or twice, as Theophrastus says, lawgivers pass by. (M.)

From this, however, it must not be concluded that the judgements of a perpetual law sometimes fail; but only that it is not worth while for legislators to promulgate written laws about cases that rarely happen, since the judges can easily decide them by the principles of natural law. Add Richard Cumberland, *De Legibus Naturæ*, chap. iv, § 4, n. 1.

6. Now in order that this knowledge of natural law with which we are now concerned, and which includes all moral and civil knowledge¹ that is genuine and solid, may meet the full requirements of a science, we feel that we need not declare, with certain writers, that some things are noble or base of themselves without any imposition, and that these form the object of natural and perpetual law, while those, the good repute or baseness of which depends upon the will of a legislator, fall under the head of positive laws. For since good repute, or moral necessity, and turpitude, are affections of human actions arising from their conformity or non-conformity to some norm or law, and law is the bidding of a superior, it does not appear that good repute or turpitude can be conceived to exist before law, and without the imposition of a superior. Selden, *De Jure Naturali et Gentium*, Bk. I, chap. iv: 'The distinction in acts between good and bad, or base and reputable, is produced by law. Thence arises among persons obligation and indebtedness toward the performance of a duty.'

And, indeed, they who set up an eternal rule for the morality of human actions, beyond the imposition of God, seem to me to do nothing other than to join to God some co-eternal extrinsic principle which He Himself had to follow in the assignment of forms of things [at the moment of creation]. All, furthermore, admit that God created all things, man included, of His free will; it must follow, then, that it lay within His own pleasure to assign whatever nature He wished to this
 19 creature whom He was about to create. How, then, can an action of man be accorded any quality, if it takes its rise from an extrinsic and absolute necessity, without the imposition and pleasure of God? On this argument, in very truth, all the movements and actions of man, if every law both divine and human be removed, are indifferent; while some of them are termed naturally reputable or base, because the condition of nature, which the Creator freely bestowed upon man, most rigorously requires either their execution or avoidance; it does not follow, however, that any morality can exist of itself, without any law, in its own motion and

¹ [For *doctrinam* read *doctrinam*.—Tr.]

the application of physical power. Here the following passage from Plato, *Convivium* [p. 180 E], is in point:

Actions vary according to the manner of their performance. Take, for example, that which we are now doing, drinking, singing, and talking; these actions are not in themselves either good or evil, but turn out in this or that way according to the mode of performing them; and when well done they are good, and when wrongly done they are evil. (J.)

This rule he also applies later on to love. Hence every day we see beasts committing without sin deeds the performance of which by man would have involved him in the grossest misconduct; not, indeed, because the physical motions of man and of a beast differ, but because there has been imposed by law on certain actions of man a morality which is wanting in the acts of a beast.

Nor is this true, as some one may rejoin, because there is a natural difference between the actions of man and those of a beast, in that the former has reason, which the latter lacks. For if we consider reason, in so far as it is not imbued with an understanding and sense of law, or a moral norm, it might perhaps be able to permit man the faculty of doing something more expeditiously and adroitly than a beast, and to supply sagacity as an aid to his natural powers. But that reason should be able to discover any morality in the actions of a man without reference to a law, is as impossible as for a man born blind to judge between colours.

Another argument is furnished by J. Adamus Osiander, *Notae ad Grotium*, p. 60:

If there were any such thing as moral good and evil before the existence of law, how could there be any obligation there? since obligation proceeds only from a superior. For moral good and evil involves a relation to a person that performs the act in question; but if there is no obligation resting on that person, neither is there any good or evil.

Here it should be carefully noted that this indifference of physical motion in the actions of men is maintained by us only in respect to morality. For otherwise actions prescribed by the law of nature have, through the determination of the first cause, the native power to produce an effect good and useful to mankind, while actions similarly forbidden produce a contrary effect. But this natural goodness and evil does by no means constitute an action in the field of morals. For there are many things which contribute to the happiness and convenience of man and yet are not morally good, since they are not voluntary actions, nor are they enjoined by any law; while many acts which tend to the welfare of man have the same natural effect among beasts, although among the latter they possess no moral quality. So to refrain from mutual injury, to partake of food and drink in moderation, and to watch over one's offspring, work for the preservation both of men and of beasts; and yet beasts are not on that account said to perform acts which are morally good. Add Richard Cumberland, *De Legibus Naturae*, chap. v, § 9.

So in the last analysis human actions which fall under the direction of the law of nature can be resolved into the natural power that they possess to aid or to injure men, considered either as individuals or in
 20 general. But the reverse, namely, that whatever has natural power to aid or injure any kind of animal is therefore the object of natural law, does not always hold.

Another objection is raised by Aristotle, *Nicomachean Ethics*, Bk. II, chap. vi:

But it is not every action or every emotion that admits of a mean state. There are some whose very name implies wickedness, as e.g. malice, shamelessness, and envy, among emotions, or adultery, theft, and murder, among actions. All these, and others like them, are censured as being intrinsically wicked, not merely the excesses or deficiencies of them. It is never possible to be right in respect of them; they are always sinful. (W.)

But surely we have here a case of *non sequitur*, to wit: there are words for affections or actions, which signify vice of themselves, irrespective of whether they are excessive or moderate; therefore, an affection or action can be base in itself without any reference to law. Nay, these very terms do not signify simple physical motions or acts, but only such as are contrary to laws, and are for that reason complete moral acts. For why should *ἐπιχαίρεκακία* [*Schadenfreude*] and envy be considered evil affections, unless it is that by a law of nature every man should be touched by another's fortune? while this rule is broken when one takes pleasure in the misfortunes of others, and grieves at the sight of their success. Add Stobaeus, *Sermones*, cxi. So what is impudence but a vicious firmness of mind in the face of things at the commission of which the laws bade one to feel shame? For failure to feel shame deserves no reprimand, if the laws do not require it. So adultery is the pollution of another man's wife, whom the laws have assigned to her husband alone. Theft is the taking of the property of another without the permission of its owner, whom the laws recognize as its sole disposer. Murder is the killing of an innocent man, and against the laws. Incest is intercourse with a person whom the laws have not allowed us to touch, and that out of a respect which the law likewise affirms is owed by men to their next of kin. The same conclusion is to be drawn regarding other vices also.

But if, indeed, you remove from all these actions any respect to law, and any element of morality, the mere physical act involves no reason why such actions should still necessarily be held base without consideration to law. For on such a theory it is a matter of complete indifference, whether you have intercourse with a woman who is very closely connected with you by ties of blood, or have intercourse with the same person as does another who has no special right to her; whether you take the life of a member of your own species; whether you take something which another had set aside for his own use, but

which no law had given him the right of removing from the use of others.

The reason why many men cannot understand such an indifference in actions, is because from childhood on we have been imbued with a hatred of such vices; and this hatred, impressed on a mind still simple, appears to have grown to have the strength of a moral judgement, the result being that few have thought of distinguishing between the material and the formal in such actions. Hence it is patent that Grotius, *On the Law of War and Peace*, Bk. I, chap. i, § 10, had not considered this matter thoroughly, when he refers the wickedness of some human actions to the class of things to which the power of God Himself does not extend, because they involve a contradiction. Twice two, indeed, can only be four, because twice two and four are one and the same thing, differing only in name and in the point of view. It is, however, a contradiction for something simultaneously to be and not to be the same thing. But surely such a contradiction does not appear in the case of actions which are opposed to natural law. For the same reason Grotius shortly thereafter undertakes to derive this wickedness from a comparison with *nature when following sound reason*. And yet in 21 the words *sound reason*, as attributed to man, there is involved a reference to the law of society as given to man by the Creator. Again, in § 12, he says that the absolute existence of any natural law is tested by its necessary agreement or non-agreement *with rational and social nature*. And yet man received this social nature not from any immutable necessity, but from the pleasure of God. Therefore, the morality of actions as well, whether they do or do not suit him as a social being, must be derived from the same source. And so morality is fittingly attributed to these actions, not of an absolute necessity, but of a hypothetical necessity, since such a position is posited for man as God freely assigned him above all other creatures.

Nor can any help be found for the defenders of the opposite opinion in the words of Sacred Scripture which are adduced in the foregoing passage. For without doubt from the very beginning God declared to the race of man that He would be a rewarder of the good and an avenger upon the evil (*Hebrews*, xi. 6), and that He would render to each man according to his works (*Romans*, ii. 6). And since His truthfulness does not permit Him to depart from His word, Abraham properly makes his appeal (*Genesis*, xviii. 25). Add *Ezekiel*, xviii. 25; *Romans*, iii. 6. But how can it follow from this that there is any morality in human actions of themselves apart from divine imposition? Just as it has not yet been shown how this conclusion can be drawn from the statement in *Isaiah*, v. 3, that He may justly stop cultivating the vineyard, where He loses His time and His trouble. Finally, in *Micah*, vi. 2, it is asserted that men by their own judgement can

understand that thanks ought to be rendered in return for benefits. But one has no right to conclude from this, that, because men can appreciate benefits rendered them, and should be grateful for the same, such an ability was not given them by any law, but is a necessary thing in itself before the existence of all law. From all this it is evident that the familiar and oft-repeated saying, 'The precepts of the natural law are of eternal verity', should be limited to this extent, that such eternity should not reach beyond the imposition of God, or the origin of the race of man. Although, as a matter of fact, the eternity which is attributed to natural law should be measured and defined in terms of its opposition to positive laws, which are subject to change.

7. It can be maintained, and with some degree of reason among common men, that good and evil repute exist in human actions of themselves, and by their own nature, and not by imposition, because the very blood seems to have a kind of natural sense of base deeds, since it brings blushes to our cheeks, even against our will, as we remember or feel ashamed of them. Nay, they add, it seems to be a contradiction to attribute a physical effect to a moral quality; and so, since a certain movement of the blood, bringing a blush to the cheek, comes as a physical effect from a base action, baseness is to be regarded as an affection or physical and necessary quality of action.

We grant, of course, that the all-wise Creator has planted in the minds of men a sense of shame, to act as a guardian of virtue, and as a bridle for restraining evil. It is also probable that had not God wished mankind to regulate their actions according to law, He would not have implanted in the spirit of man this sense, since only on such grounds does it serve any use. But it is not at all unreasonable that a moral quality, and one, indeed, which owes its origin to imposition, should produce in man, although of course not directly, a physical effect; for the soul, which is most intimately conjoined with the body, can, because of its apprehension and sensitiveness to moral things, give motion to some portion of the body. And it should be carefully noted that shame arises not merely because of some base action, but also from
 22 anything, even though not morally base, which is thought to diminish our reputation. And, indeed, according to Descartes, *Les Passions*, art. 205: 'Shame is a kind of sadness, which is based upon self-love and issues from the thought or fear of disgrace.' Or, according to Aristotle, *Rhetoric*, Bk. II, chap. vi: 'Shame then may be defined as a pain or trouble about those ills [. . .] which seem to lead to ignominy.' (J.) For man is an ambitious animal, and conceited about his own excellence, and he finds the greatest pleasure if he can discover in himself such things as will enable him to distinguish himself above others, and to boast. And when he fears that the estimation of his excellence is going to be lowered in the eyes of others, he experiences the deepest

sadness; a manifestation of which is visible in the special seat of man's pride, when the heart suddenly sends blood to the face. But man wants to have his excellence measured not alone by his avoidance of evil deeds, but also by many other things, in which there is inherent no morality. Hence we see many people blush because of shortness of stature, lameness, baldness, a tumour, a hunched back, or some other bodily deformity, because of some disease, or poverty, poor clothes, at some exhibition of ignorance, to which one can attach no blame, at a harmless mistake, and other things that are not morally base. Add Sira-cides, chap. xlii. 19 ff. And among sins those especially bring a blush, which particularly indicate a weak or abject mind, and which make us an object of disdain, and that not, indeed, in the sight of man in general, but of those whose esteem we especially desire. See Aristotle, *Rhetoric*, Bk. II, chap. vi. But those who have lost all interest in their reputation cease to blush at even the basest deeds. Add Descartes, *Les Passions*, art. 207. But all these facts have absolutely no force in lessening the certainty of moral knowledge, which can still be considered quite firm, even though the morality of men's actions arise entirely from imposition.

8. But what will become of that notorious moral latitude which is opposed to η^1 ἀκρίβεια [the exactness] of mathematics? Does not it also detract somewhat from the certainty of this discipline? That will be perfectly clear, if we shall consider, first, how far we maintain that demonstrations apply here, and then in what things that latitude is to be found. Now demonstrations in moral questions are applied to moral qualities, in so far only as it is agreed that they are clearly, and for certain reasons, suited to such actions and persons; for instance, whether a given action be just or unjust, and whether a given right or obligation lies upon such and such a person considered in general. Things like this, we maintain, can be deduced so clearly from their own peculiar principles and causes, that no man in his senses can cast any doubt upon them. And even if any latitude, or something akin to it, should here be found, it would of itself furnish no obstacle to that certainty. In the goodness or badness of actions, indeed, so far as they denote an agreement or departure from the rule of law, no latitude seems possible, but any digression from the right must at once be considered bad in itself.

Yet in another respect, i.e. as they are concerned with men, a degree of latitude is found (for ordinarily, of course, latitude applies only to quantity). In the first place, because the force which laws have to bind men does not always exist to the same degree, but is more loose in ordering or forbidding certain actions, more strict in others. Hence it follows that one thing is said to be due according to the letter

¹ [For $\eta\eta$ read $\tau\eta$.—Tr.]

of the law, another in equity; that is, according to justice in the strict use of the word, or according to what is fair and right. Justice and equity differ in this respect, that a sterner necessity is laid upon us to do the former, while we are more gently bound to do the latter; yet the latter has a wider scope than the former, for without doubt the
 23 duties of other virtues have a wider range than those of justice. It happens, further, that among men, and in their courts, the law takes a slight account of petty misdeeds. And some things are enjoined in so half-hearted a manner that they may be considered as left to one's sense of shame; and he who does them merits praise, while he who omits them need not fear reproof. Among these Grotius, Bk. I, chap. ii, § 6, seems to include 'concubinage, divorce, and polygamy' before they were forbidden by divine law. 'These things', he says, 'in fact are of such a nature that reason itself declares that it is morally better to abstain from them, but they are not such that wickedness (that is, open fault) would be manifest in them without divine law.' (K.) These matters, however, will be taken up elsewhere. Also the following passage of Aristotle bears on this matter, *Nicomachean Ethics*, Bk. II, chap. ix: 'It is not, however, one who deviates a little from what is right, but one who deviates a great deal, whether on the side of excess or of deficiency, that is censured, for the latter is conspicuous.' (W.*) It often happens, also, that something is unowed and indifferent in itself, and yet its omission or commission may be of the greatest use, either under all circumstances, or only in a special situation. The words of the apostle bear on this point (1 *Corinthians*, vi. 12; vii. 6-9; x. 23); also those of Grotius, *On the Law of War and Peace*, Bk. I, chap. i, § 10: 'Sometimes, also, by misuse of the term, things which reason declares are honourable, or better than their opposites, are said to be according to the law of nature, although not obligatory.' (K.) This enables one to understand whether and to what extent there can be said to be degrees of good. Certainly, if we take the word in its strict meaning, as that which is in accordance with law, it is clear that a thing can no more be better than the good, than it can be 'righter' than the right. Yet one good can be said to be better than another, according to a different degree of necessity inherent in each, whereby one yields to the other under circumstances where both cannot be accomplished at the same time. See *Matthew*, viii. 21-2, where it was recognized as good to bury one's father, but better to follow Christ, and *Acts*, vi. 2, where it was recognized as good to minister to the poor, but better to preach the gospel. This topic will be discussed again in more detail. When, finally, actions lawful in themselves, and indifferent, are measured by their usefulness, one is said to be better than another, to the degree that more benefit accrues from it.

9. On the basis of what has just been said, that passage of Grotius

is to be explained where he discusses causes of doubt in moral actions (Bk. II, chap. xxiii, § 1). Here he says :

Certainty is not to be found in moral questions in the same degree as in mathematical science. This comes from the fact that mathematical science completely separates form from substance, and that the forms themselves are generally such that between two of them there is no intermediate form, just as there is no mean between a straight and a curved line. In moral questions, on the contrary, even trifling circumstances alter the substance, and the forms, which are the subject of inquiry, are wont to have something intermediate, which is of such scope that it approaches now more closely to this, now to that extreme.

Thus it comes about that between what should be done and what it is wrong to do there is a mean, that which is permissible; and this is now closer to the former, now to the latter. Hence there often comes a moment of doubt, just as when day passes into night, or when cold water slowly becomes warm. (K.)

We grant that about other actions, as well as with special relation to the declaration of war, doubt can arise, either because it is not yet entirely clear whether the cause, which would bring on the war, is just or unjust, or because it is not known whether the cause is sufficient to justify war, a thing always open to any turn of fortune that brings such great evils in its train; or because minds still hesitate between the two courses, whether it be good for the state in its present condition to avenge its injuries by war, or better to conceal the affront and defer the satisfaction, lest an inopportune attempt at revenge occasion even greater misfortunes. But that any grounds for doubt come from the uncertainty of moral matters, we emphatically deny. The reason why accurate demonstrations are to be found in mathematics, is not the fact of their abstraction from matter, but something different, which we shall soon discuss. The dictum, 'In morals the least circumstance alters the matter', is ambiguous. For if the meaning is that the least circumstance alters the quality of an action, that is, causes an evil 24 quality to take the place of a good, this does not work towards uncertainty in moral knowledge; for it is also true that a line which varies in the slightest degree from straightness, tends to curvature, but that fact does not produce any uncertainty in geometry. If, however, the saying means that the slightest circumstance increases or lessens the quantity of an action, we answer that this is not always true, at least in a civil court, where the judge often pays no regard to trifles. And even granting this, the fact does not lessen the certainty of moral matters, since even in mathematics the slightest addition or detraction makes a change in the quantity. A lawful [*licitum*] act, which is a medium between what is enjoined and what is forbidden, as we have said, inclines to either part, in the respect that it is sometimes better that it should be done, and sometimes better that it should not be done. But this does not cause any uncertainty, nor does it form an intermediate field, which does not allow one to draw a clear distinction between good and evil. And so the comparisons with 'twilight' and

'lukewarm water' are not justifiable. For these belong to what are usually called media of participation [*media participationis*], as lukewarm water participates in both hot and cold. But what are called media of negation [*media negationis*], such as an indifferent and lawful thing, partake of neither of these extremes, but equally deny them both. For the statements, 'good is not indifferent', and 'evil is not indifferent', are equally true; and it does not appear how such a medium can be a cause of uncertainty.

10. But, as a matter of fact, a certain latitude is found in moral quantities, and principally for that reason mathematical knowledge is generally held to surpass moral in the delicacy of its processes. That is due to the different nature of physical and moral quantity. For physical quantities can be exactly compared with one another, and measured and divided into distinct parts, because they are in a material way objects of our senses. Hence one can determine accurately what relation or proportion they have to one another, especially since with numbers, which we use, all such relations are most exactly set forth. And besides, those quantities are a product of nature, and hence unmoved and eternal. But moral quantities arise from imposition, and the judgement of intelligent and free agents, whose judgement and pleasure is in no way subject to physical measurement; and so the quantity which they conceive and determine by their imposition, cannot be referred to a like measure, but retains the liberty and laxness of its origin. Neither did the end, for which moral quantities were introduced, require such a measure of exactness, and such straining after details, but it was enough for the purpose of man's life that persons, things, and actions be roughly rated and compared. So a latitude is found in the value set upon persons, that is, in the esteem by which we can understand how one person should be preferred to another, but which does not allow us precisely to determine whether his position is two-, three-, or four-fold as good as that of another. A similar latitude is also found in the values of different things, and of actions which form a commodity by which an exact price can be scarcely set on any things other than those which are by their very nature for the use of man; for the rest, they are considered equal, except as the agreement and pleasure of men have determined. In the same way the proportion between many misdemeanours and punishments is set up with a certain degree of latitude. For who can stipulate precisely how many stripes, and how severely administered, shall measure up to the guilt of, say, some particular case of theft? In such a case the estimate of the crime is somewhat lax and careless.

25 Nay, sometimes great latitude is found in many affairs of human life. Civil legislators are not accustomed to cut everything down to the quick. 'The laws', says Cicero, *On Duties*, Bk. III [xvii], 'abolish frauds

one way, philosophers in another; the laws, as far as they can, lay hold of them by the arm; philosophers, as far as they can, check them by reason and wisdom.' (E.) And in rendering a decision it commonly happens that the judge is not over concerned with the slight details. So also in the decisions of worthy men, latitude claims its place as if by its own right. Add also *Digest*, XLVI. iii. 105. Furthermore, in the exercise of vindictive justice, some latitude is allowed not only for clemency, but also for severity. The saying of Tacitus, *Annals*, Bk. XIV, chap. xlv, applies here: 'Every great judicial warning involves somewhat of injustice to individuals, which is compensated by the general benefit.' (O.) And also the remark of Jason of Pherae in Plutarch, *De Sanitate Tuenda* [xxiii, p. 135 F] and *Political Precepts* [xxv, p. 818A]: 'One must do wrong in small matters, in order to do right in large matters.' Nay, the majority of virtues, including justice, allows a sufficiently free liberty and latitude in their exercise, such as mercy, generosity, gratitude, equity, and charity. So also in everyday life, words denoting habits are frequently applied with a certain latitude to men. Thus a man is called just who commits but a few deeds of injustice, even though he commits these deliberately. And so, when in moral matters some quantities are found reduced even to the point of exactitude, as in the prices of certain things, in appointed times, and the like, such a precise determination does not come so much from the things themselves, or from the times, as it does from the imposition and pleasure of men. See Richard Cumberland, *De Legibus Naturae*, chap. viii, § 14. And so we feel that there is a real difference between mathematical and moral demonstrations, because the former are concerned first of all with quantities which can from their nature be exactly determined, while the latter are satisfied merely to point out a certain quality of the subject, leaving the determination of moral quantities to the general pleasure of man's will.

11. But we must take care not to confuse the moral certainty, which we have hitherto been endeavouring to establish, with that which is often applied to questions of fact, when we say, for example, this or that thing, which¹ has been confirmed by trustworthy witnesses, is morally certain. For such a moral certainty is nothing other than a strong presumption, which rests on probable reasons and can very rarely deceive us. This certainty, Ziegler, in his notes on Grotius, Bk. II, chap. xx, § 1, has not quite clearly distinguished from the former, although he allows to the more general precepts of ethics a degree of evidence equal to the propositions of any science properly so called. Yet he says: 'The particular conclusions have much less certainty, and, indeed, are often involved in obscurity, because the things from which they are drawn are in many ways changeable and contingent.' And as

¹ [For *quod* read *quod*.—Tr.]

an example he adds: 'Moral certainty and evidence is the belief that what an upright and respected gentleman has confirmed with an oath, is true. And yet this evidence is not absolutely such, but only conditionally, because it is not entirely impossible for a just and respected man to perjure himself, since he may possibly fall from his virtue.' And yet the certainty by which perjury is known to be evil is very different from that by which it is believed that a good man does not commit perjury, nor is the latter conclusion a proper deduction from the former. In the same way the faith reposed in historians is held morally certain, when they testify about some fact, which is far beyond our own memory, and for which there is no longer possible any actual testimony, as it were, especially if several historians have told the same story; for it is not probable that many would have willingly agreed together to pass on a falsehood to posterity, or would have been able to hope that their lies would not some day be brought to light. Despite
26 this, however, there are examples of popular stories, as it were, which have been propagated through many centuries under the guise of truth.

CHAPTER III

ON THE UNDERSTANDING OF MAN AS IT CONCURS IN MORAL ACTIONS

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| 1. The two faculties of the understanding. | 8. Dubious conscience. |
| 2. What is the property of the representative faculty of the understanding? | 9. Scrupulous conscience. |
| 3. The intellect is by nature right on moral matters. | 10. The nature and forms of ignorance. |
| 4. The nature and forms of conscience. | 11. The forms of error. |
| 5. The right and probable conscience. | 12. Error in lawful actions. |
| 6. The rules of probable conscience. | 13. Speculative error in necessary actions. |
| 7. Rules for the choosing of profitable things. | 14. Speculative error in indifferent actions. |
| | 15. Practical error. |
| | 16. Error in an evil action. |
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SINCE the chief task of this discipline which we have undertaken to present is concerned with the demonstration of the right or the wrong, the good or the evil, the just or the unjust in human actions, all the principles and the affections of these actions will first have to be considered, and then why they are understood to be connected morally by imputation with man. Now the dignity of man far outshines that of beasts by virtue of the fact that he has been endowed with a most exalted soul, which, by its highly developed understanding, can examine into things and judge between them, and, by its remarkable deftness, can embrace or reject them. And for this reason the actions of man are put in a class far above the motions of beasts, which are but a reflex of their senses, without any previous reflection, whatever Charron, *De la Sagesse*, Bk. I, chap. xxxiv, n. 7-8, has maintained to the contrary.

That power, furthermore, which the soul of man carries like a light, goes under the name of understanding, and this is conceived to have two qualities which it exerts in voluntary actions. By the one an object is displayed to the will as if in a mirror, and why it is agreeable or disagreeable, good or ill, is at first glance discernible. By the other the reasons for good or ill, which surround many objects on either hand, are weighed and compared, and a judgement is finally passed as to what should be done, and when and why, while at the same time consideration is taken of the means best suited to the end. In this connexion it should be observed that the initiative for any voluntary action, without exception, proceeds from man's understanding. Hence the well-known saying: 'There is no desire for an unknown object.' Yet this knowledge preceding a voluntary act is not always distinct, since even a confused knowledge is sufficient to make the will bestir

itself. For this reason there often arises a desire to try out something unknown.

2. It should further be observed, regarding the former faculty of the understanding, that it belongs to those which are usually called natural, as opposed to free, so that it is not within the power of man to apprehend things in any other way than as their forms present themselves to his understanding, and the will cannot prevent the understanding from assenting to a proposition which seems to it clear and manifest. But it is, nevertheless, within man's power to give his undivided
 27 attention to the object considered, and by careful thought to balance well the reasons for good and ill, not, indeed, stopping with a mere superficial examination, but penetrating into the very innermost being of a matter. And by such means he can obtain an accurate judgement on the subject. In the same way it makes a great deal of difference, in looking at things with the eye, whether you give a thing but a fleeting glance, or contemplate it with a steady gaze. Add Richard Cumberland, *De Legibus Naturae*, chap. ii, § 9.

From what has been said it is easily understood how large a place this feature of the soul allows for education and laws. The power of man, indeed, cannot enable the understanding to conceive things under any other form than that in which they appear to it. And since agreement or belief cannot but assent to the appearance as apprehended by the mind, a man can only reach a judgement on a matter, as he himself has seemed to have perceived it; and by no law can one justly demand that he do otherwise. Just as also no one can be made wise by a bare and simple command. Yet because many things, which are most self-evident to those who explore them with attention, are not to escape the careless inquirer, and the will can divert the mind from the examination of some truth by thrusting before it other objects, a diligent contemplation of things contributes greatly to confirming a judgement of the understanding, and consequently those who have the oversight of others should take care that a proper opportunity is afforded for its use. And they may also sanction with punishments the demand that one make careful use of those means by which the obscurity of things can be dispelled, and their real nature represented.

3. Now since the understanding carries, as it were, a torch before our actions, and when that gives an uncertain light we cannot fail to wander from our course, we must insist upon the truth of the principle, that, in the faculty of apprehension and in the judgement there is inherent a natural rectitude, which does not allow us to be misled in moral questions, if proper attention be paid to them, and which does not suffer those faculties to become so corrupted that we cannot but be misled. An ill-shaped mirror, indeed, presents distorted images,

and a coating of bile on the tongue prevents any proper judgement of tastes; and of course a mistake could not be ascribed to us as a fault, if we have not the ability clearly to distinguish between right and wrong, while it would be the greatest injustice to charge us with an error which we could in no way avoid. Hence, if we do not wish to destroy all morality in actions, we must at any hazard maintain that the understanding of man is by nature sound, and that upon sufficient inquiry it apprehends clearly, and as they actually are, the matters which present themselves to it. And further, that the practical judgement, at least as concerns the general precepts of natural law, cannot be so corrupted that it may not be held responsible for any evil actions that come from it, on the ground that they proceeded from an insuperable error or ignorance. Compare Richard Cumberland, *De Legibus Naturae*, chap. ii, § 10.

Now at this point we give notice that we are not here discussing what power the understanding may have, without¹ the special assistance of divine grace, in² matters depending upon a particular revelation of God; for such an inquiry belongs to another discipline. Nor are we concerned whether in speculative truths, which require for their investigation the most subtle resources of the mind, a man may not, by being misinformed, embrace a false opinion so heartily that he can by no possible means free³ himself from it. But we are discussing the powers of the understanding, as they are needed to adapt our actions to the law of nature. And here we hold, that no man of mature years, and possessed of reason, is too dull to comprehend at least the general precepts of natural law, especially those which are most commonly kept by society,⁴ and observe to what extent they accord⁵ with the rational and social nature of man. And however much a man may have failed, through indolence, to meditate on one or another precept, or through haste and boldness have reached false decisions of action, or, due to false information, or else a mind corrupted by evil habits and a vicious²¹ life, have brought doubt upon their truth and necessity, or have fashioned for his own use rules of action contrary to natural law, still we do not acknowledge such ignorance or error to be so insuperable that actions based upon it cannot be imputed to the doer of the same. For these general precepts have been so fully set forth, and so interwoven with nature, that man can never descend so nearly to the level of brute beasts as to be incapable of understanding and judging between them. Why, no outstanding mental ability is required for this or any special intellectual acumen, but the ordinary light of one's native wit is sufficient, provided the mind be not affected by some disorder. This is illustrated by the statement of Cicero, *Tusculan*

¹ [For *circa* read *citra*.—Tr.] ² [For *citra* read *circa*.—Tr.] ³ [For *exsolvere* read *exsolvere*.—Tr.]

⁴ [For *invita* read *in vita*.—Tr.]

⁵ [For *convenientiam* read *convenientiam*.—Tr.]

Disputations, Bk. III [v], when he says that 'folly', that is, 'an unsettled humour, that proceeds from not being of sound mind, can perform the ordinary duties, and discharge the usual and customary requirements of life, but raving is a total blindness of the mind.' (Y.)

4. The judgement passed on moral actions by the understanding, in so far as it can take cognizance of laws, and so is responsible to the lawgiver for their execution and observance, is given the special name of *conscience*. As the actions of men either precede or follow it, we get a distinction that enables us to speak of *antecedent conscience* and *consequent conscience*. The latter is a judgement or reflection of the understanding, approving what has been rightly omitted or done, and condemning the opposite; it is attended by peace of mind or agitation, according as it gives us its witness and makes us expect either the blessing or the wrath of the lawgiver, as well as the goodwill or anger of other men. Pliny, *Panegyric* [lxiv. 3]: 'One man may possibly deceive another, but no one has ever deceived himself. Merely let him look into his own life and ask himself what he deserves.' The other variety of conscience precedes acts, telling us what is good and what evil, and what, therefore, must be done or avoided. But here it should be observed, that a place is allowed the conscience in directing the actions of man, only in the respect that it can take cognizance of laws; for the direction of human actions is their special prerogative. Hence, if one wishes to ascribe to the practical judgement or conscience some particular power to direct actions, which does not emanate or arise from law, he ascribes the power of laws to any fantastic idea of men, and introduces the utmost confusion into human affairs. And it must be confessed that such a use of the word conscience, so far as I have been able to find out, is not to be found either in the Scriptures or among the ancient Latin authors, but it was first introduced by the Schoolmen, while in recent times what are called 'cases of conscience' have been invented by crafty priests to enable them thus to bend the minds of men to their own caprice. Nay, if we maintain the proper meaning of the word, to do something contrary to the conscience is nothing other than for you to do something consciously and willingly which you knew was wrong, and its opposite is to do something through error or ignorance. However, we have decided to withdraw the word from such a misuse and to employ it in its proper sense.

5. A correctly informed conscience is of two kinds: either it clearly knows that the conclusion, at which it has arrived, to do or to avoid something, rests on sure and unquestionable principles, that is, it agrees with the laws which form the rule for actions, and agree with the conscience; or else it holds its conclusion true and sure, and can see no reasons that might throw doubt upon it, but it does not know how to reduce the conclusion to the form of a demonstration, and so

falls back on commonplace arguments. The former is called *right* conscience, the latter *probable* conscience. Regarding a right conscience, this is the rule that has been given: Every voluntary action which is opposed to it, and every avoidance of an action which it declares to be necessary, is sin; and a sin all the more heinous the more clearly a man knew his duty, the non-performance of which argues a greater depravity of mind. See *Luke*, xii. 47-8. 29

A probable conscience, we feel, differs from a right one, not because it does not recognize the truth of its conclusion, but because it does not know how it can, by its own power, reduce this conclusion to the form of a demonstration, and so it does not have so clear and fixed a recognition of its correctness. For, as others say, nothing is probable in itself, but only in respect to our intellect. Now most men govern their actions by this rule, since, forsooth, to few only has it been given to examine how the duties of life flow from their first sources. Most men feel so secure in their common tenor of life, in the authority of teachers regarded as being above the suspicion of fraud, in custom, and in the obvious decency or convenience of acts, that they feel it is idle to inquire with some care into the reasons for such things; just as most workers are satisfied to perform their tasks with certain convenient tools and to leave to mathematicians the demonstration of their working. And this holds all the more true for propositions which are some distance removed from their first principles, and which require, therefore, a longer operation in deduction, a full understanding of which is practically beyond the reach of those whose minds have not been disciplined in the different sciences. However, this fact gives no support to that pernicious doctrine of probability, devised mostly by more recent Casuists and Jesuits, which falls back upon the authority of a single Doctor, and he a man devoid of reason, with whom all others disagree. That by this principle every moral doctrine is subverted, and that the consciences of men are thereby dependent upon the caprice of priests, to use to their own ends, has been proved by Ludovicus Montaltius [Pascal], *Lettres Provinciales* [Letter V]; compare also the notes on the same by Wendrock [Nicole] and Samuel Rachel.

Here we make the further observation, that probability of fact, and probability of statement, or law, are improperly confused by them. In questions of fact, indeed, the authority of one estimable man can form a probable presumption and a half-established proof. But, in defining matters of the law, it would be clearly absurd and rash to place so much value on the remark, not based on reasons, of one man, with whom others of no less authority disagree, that it could safely be admitted to be a rule for action.

6. Some rules are commonly laid down for the direction of a probable conscience, concerning which our opinion is that they have

a place, when strict law and equity seem to clash, or when both sides of a question lie outside the scope of laws, and yet one seems to approach more nearly than the other to what is reputable, or else one is regarded as more likely to produce some advantage or disadvantage. For in matters which are specifically enjoined or forbidden by a law, there is no such opportunity for choice that one may be rejected and another taken (since, of course, laws will not be satisfied if their explicit prohibitions or commands are met by several different equivalents); but choice is restricted to the things that are permissible, and these lie outside the province of law. Now the chief rules are as follows:

1. In a probable conscience, when two opinions are advanced, neither of which is opposed to a law, and one rests on more substantial considerations, while the other is safer, either may be taken.

2. When two opinions are advanced, one of which rests on weaker considerations, while the other is safer, the safer is properly preferred.

3. In a probable conscience, a well-informed man can follow the opinion that seems most probable to him, although it may not seem so to others, unless he fears that some inconvenience may arise from the fact that he is departing from the common view.

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4. An ignorant man is safest in following the authority of the more prudent.

5. A person under the authority of another may properly, at the command of his superiors, do something, if he is not¹ certain that it is unlawful, even though it does not seem to him probable that it should be done.

6. In matters of little importance, if there are probable arguments on each side, either may be chosen.

7. In matters of great importance, if probable arguments are to be found on both sides, the safer side is to be preferred, or the side from which, even if one should fail by a wide margin to achieve his purpose, less harm can come than from following the opposite course.

7. To proceed, even though we have set ourselves, first and foremost, the task of discussing the good and evil, the just and unjust, leaving any treatment of the useful and useless to another branch of learning, still it might not lie outside the bounds of our subject, to outline at this time what rules the understanding should follow in its deliberations upon a useful judgement. This is especially true, since the conclusions drawn above depend very much on these, and in directing our actions much regard must be taken of utility, according

¹ [For *non non* read *non*.—Tr.]

to the statement of the Apostle, *1 Corinthians*, vi. 12: 'All things are lawful for me', that is, what he has just been discussing, 'but not all things are expedient.' And in business positions some affairs are entirely committed to an individual's prudence and care, and he is held to have managed badly, if, either through shortsightedness or inadvertence, he has undertaken something that offered less advantage. So in the deliberations which naturally arise regarding such matters, in the performance of which we are not bound by necessity or determinate obligation (for necessity precludes deliberation, and determinate obligation leaves to the agent only the execution), it is laid down as fundamental, that nothing should be undertaken, from which in moral estimation (that is, so far as the eye of man can judge between uncertain consequences, and penetrate the obscurity of the future), it seems likely that as much evil as good, or even more evil than good, may arise. The reason for this is clear. For the more an object loses in goodness, the more it gains in evil, and it loses all claims to goodness, if it have an equal amount of evil. A farm is considered worthless, if its income does not surpass its outgo. Cato, *On Farming*, Bk. I [i]: 'With a farm [. . .] however productive it may be, if it has the spending habit, not much will be left over.' (H.) For undertakings of the nature that we are discussing are made with the sole purpose of getting for ourselves some return. Xenophon, *Greek History*, Bk.¹ VI [iii. 6]:

For my part, I can neither commend those persons, who, having become competitors in public games, and having gained reputation by several victories, are so fond of contention, that they will not cease from it until they are beaten and forced to relinquish their profession; nor can I praise those gamesters, who, if they are lucky in one trial, play for double stakes; for I see that the greater part of such adventurers sink into utter destitution. Contemplating these examples, it is incumbent on us never to reduce ourselves to such a struggle, that we must either gain all or lose all. (W.)

Lucan, Bk. I [282]: 'Equal labours and anxieties are being sought for a greater reward.' (R.) The saying of Isocrates, *Archidamus* [37], also applies here: 'Now, when two good things are set before us, the one evident, the other unknown, you would behave ridiculously, if you were to reject the acknowledged good, and decide to choose that which is the subject of doubt.' (F.)

From such statements Grotius, Bk. II, chap. xxiv, § 5, deduces the following corollaries: 1. 'If the matter under discussion seems, in moral estimation, to have an equal efficacy for good and for evil,' that is, if as much loss as profit will come from it, 'it should be chosen only if the good has somewhat more possibility of good than the evil has of evil'; that is, if the profit will be far greater in case the undertaking turns out well, than the loss, if fortune decrees otherwise. Thus it would not be rash to hazard ten if you stand to gain, by the favour

¹ [For 1. read L.—Tr.]

of fortune, a hundred. Compare Epictetus, *Enchiridion*, chap. xxxv-xxxvi. 2. 'If the good and evil which may result from some matter in debate seem equal, that thing only should be chosen which is more likely to lead to good than to evil'; that is, if it is easier for profit rather than loss to come from it. This is borne out by Arnobius, Bk. II [iv]:

Since, then, the nature of the future is such that it cannot be grasped and comprehended by an anticipation, is it not more rational, of two things uncertain and hanging in doubtful suspense, rather to believe that which carries with it some hopes, than that which brings none at all? For in the one case there is no danger, if that which is said to be at hand should prove vain and groundless; in the other there is the greatest loss [even the loss of salvation] if, when the time has come, it be shown that there was nothing false in what was declared. (B. and C.)

Add M. Pascal, *Pensées*, chap. vii. 3. 'If the good and evil seem to be unequal, and the efficacy of the same no less unequal, the matter under consideration is to be chosen only if its efficacy for good, as compared with that for evil, is greater than the evil itself compared with the good'; that is, if the evil produced is less than its ability to produce good; 'or if the good is greater in comparison with the evil, than is the efficacy for evil compared with that for good'; that is, if the efficacy by which evil can result instead of good, is less than the surplus of good over evil. 4. When, however, there is as much good as evil in a thing, and its ability to produce each is uncertain, a cautious man will abstain from the thing, if no necessity urges him on.¹

8. When the judgement of the understanding is perplexed, and cannot decide whether something is good or evil, and so ought to be done or avoided, it is called *doubtful conscience*. For this the following rule is given: So long as no urge, that is born of reasons, inclines the judgement of the understanding to either side of a question, action should be held in abeyance; and he who undertakes something while his conscience is, so to speak, in equilibrium, is guilty of sin. For such a person has, so much as in him lies, violated a law. For it is as if he had said to himself: 'I am, it is true, uncertain whether this action is against the law, but I will undertake it, whether it is or not. Cicero, *On Duties*, Bk. I [ix]: 'Those, therefore, are wise monitors who teach us to do nothing of which we are doubtful whether it is honest or unjust; for whatever is honest manifests itself by its own luster, but doubt implies the entertainment of injustice.' (E.)

Grotius, Bk. II, chap. xxiii, § 2, remarks on this passage: 'This rule', that is, of abstaining from an action, 'does not apply when a person needs must do one of two things and there is a question whether either is right; for then it will be permissible to choose the one which seems less harmful. For when a choice cannot be avoided, the lesser evil assumes the character of good.' (K.) This maxim, we feel,

¹ [This last corollary is not quoted from Grotius.—Tr.]

properly applies to evils of damage and not to moral evils, where, indeed, it amounts to some profit to be able to avoid a greater damage by accepting a lesser. But when it is applied to moral evils it requires a careful interpretation. Properly speaking, therefore, neither of two moral evils should be chosen. Yet it frequently happens that two affirmative laws, or one affirmative and another negative, seem to clash in such a way that at a given time a man cannot satisfy both. In such cases simple persons, indeed, believe that there is a comparison between two evils or sins of omission, and the one should be chosen which seems to avoid the greater sin. But, as a matter of fact, in such cases it is not true that the lesser of two *sins* is chosen, but that which, except for such a conflict, *was* a sin, ceases to be a sin, once the necessity becomes incumbent of fulfilling the stronger law. So, for instance, when there is a conflict between the affirmative precept, 'Give alms', and the negative, 'Thou shalt not steal', one certainly must not steal so as to have means for alms; according to the words of the Apostle: 'Evil is not to be done that good may come of it.'¹ However, in this case the failure to give alms is not properly a sin, since affirmative commands have no power to obligate one, when the means to fulfil such commands are lacking. In the same way, when a conflict arises between two affirmative precepts, as, for example, 'Obey God', and 'Obey the magistrate', one should without doubt obey God rather than men (this rule Socrates, in Plato's *Apology* [p. 29 D], also laid down: 'Men of Athens, I honour and love you; but I shall obey God rather than you.' (J.)); not because the lesser of two *evils* should be chosen, but because ³² disobedience to a magistrate is not an evil, when it cannot be avoided without a violation of the obedience due to God. For a weaker obligation yields to a stronger, when both cannot be met at the same time.

9. To a doubtful conscience is related a *scrupulous* conscience, as it is called, when a judgement of the understanding is accompanied by anxious fear that possibly what one decided was good, may turn out to be evil, and *vice versa*. When a scruple of this kind rests upon probable grounds, action should be suspended until it may be removed by reason or the authority of wise advisers, but when it arises from unmanly superstition, it should be disregarded and banished from the mind. Add Descartes, *Les Passions*, arts. 170, 177, where for 'fluctuation of the mind' and 'remorse of conscience', which precede an action, he quite properly prescribes this 'remedy', namely, 'to accustom oneself to forming sure and fixed judgements on all matters which one meets.' But it should be added that such judgements are to be formed on a pure and firm moral science or system of natural law, as well as on the Christian religion purged of all the vain additions of men. For although

¹ [*Romans*, iii. 8, inexactly.—*Tr.*]

without this the mind can perhaps be so confirmed, that it will not experience remorse and fluctuations of the conscience, still such a firmness does not avail for long, and does not free one from the imputation of sin. Hence the words which follow the above quotation cannot be approved: 'And a man should feel that he has always done his duty when he does what he judges to be better, even though that judgement be the worst possible.' And yet this does not mean that one is curing an ill, but that he is merely drugging the mind by an unsuitable opiate.

10. When there is no intellectual understanding as to whether some action should be undertaken or avoided, it is called *ignorance*. So far as this concerns our discussion, it is divided with respect to its *influence on action*, or with respect to its *origin*. In the former respect it is twofold: Either it is the cause of something which takes place unbeknown to it, or else it is not. The former may be *efficacious*, the latter *concomitant*. The former denies to the understanding that knowledge, which, if present, would have prevented the action. Such was the ignorance of Abimelech, *Genesis*, xx. 4, 5, who would never have conceived the idea of taking Sarah for his wife, had he known she was the wife of Abraham. The latter denies to the understanding that knowledge which would not have prevented the deed; so that a man would have done something just the same, even if he had known what he did not. So a man may in ignorance kill his enemy, whom he would have killed none the less, had he known he was in the place into which he throws his weapon quite casually, and without intending to injure any one. This is illustrated by the remark of the man who threw a stone at a dog, but by a bad aim hit and killed his mother-in-law: 'Fortune plans better than we.' Some wish to distinguish these two forms of ignorance thus: That which proceeds from the former kind may be said to be done simply *through ignorance*, that from the latter kind, *by a man who is ignorant*. And yet, even in the latter case, only an accidental homicide has been committed. For that ill-feeling was, to be sure, tainted with evil, but nevertheless it did not contribute to the murder.

With respect to its origin, ignorance is divided into *voluntary* and *involuntary*. By some the former is also called consequent and vincible; the latter antecedent and invincible. The former (whether it be directly affected or caused by inattention and laziness) is when a man does not know what he could and should have known. The latter is when a man does not know about a matter which he was neither able nor expected to know. Now invincible ignorance is either such *in itself but not in its cause*, or *both in itself and also in its cause*. It is the former when one cannot get rid of, and dispel in an action the ignorance out
33 of which that action arises, and yet one is at fault for falling into such ignorance. So a man who sins because of drunkenness, often does not know what he is doing, but yet he is at fault, *because* he does not know

it. It is the latter, when a man not only does not know what he was unable to know before an action, but he was also not at fault for remaining in such ignorance, or for falling into it. The remarks of Aristotle, *Nicomachean Ethics*, Bk. II, chap. i, as well as the notes of Eustratius on the passage, apply at this point, where he distinguishes between what is done by one who is ignorant, and what is done through ignorance. As an example of the former is given the act of a drunken man, or of a man in anger. For although such men often do not know what they are doing, still the cause of the action is not ignorance, but drunkenness, or anger, of which the man could have avoided the former, and restrained the latter. And he then adds, that they cannot be said to do wrong involuntarily, who do not know what should be done and what avoided, but he calls this ignorance in election, or ignorance of universals; for every man was expected to know such things. But ignorance which is concerned with particulars, makes an action involuntary, such ignorance regarding the questions as 'who, what, about what, and in what, by what means, [for what cause],¹ and in what way? No sane man can be ignorant of all these together, for certainly he will know that he himself is acting, thus answering the particular 'who?' But regarding the others there is a possibility of ignorance. Those will admit that they have erred in 'what?', who have told what they did not intend to. Another illustration is when one wished merely to show his friend a catapult, but let it go off and wounded him. An illustration of ignorance 'about what' and 'in what' (which are the same thing), is when one mistakes his son for an enemy and kills him. Ignorance in regard to the instrument is when a man would throw at somebody a pointed spear, which he thinks has no point, and so unintentionally kills him. 'For what cause?' is when we apply a medicine to another for his recovery, and do not know that it is poisonous. 'In what way?' is when a man, wishing to give a light blow for the sake of instructing another, inflicts a serious wound.

The Roman Jurisconsults treat under a special head ignorance of law and ignorance of fact. Yet they do not consider ignorance so much for the effect it has on moral actions, as for its influence on the retention, acquisition, or loss of some right or legal action. But what they have to say on both of these points can be reduced to this position, namely, that ignorance of law is for the most part connected with a degree of culpable negligence, but ignorance of fact is not; hence equity directs that the former should be prejudicial to a man, but the latter not.

II. When not only is there no knowledge of the true state of affairs, but also in its place a false belief has so filled the mind that it is held to be true, the mind of man is said to be in *error*. This error is

¹ [Accidentally omitted here; see a few lines further on.—Tr.]

either superable or insuperable. The former is that which a man should and could have overcome, by using the diligence which is morally possible, or allowed by the common condition of human affairs. The latter is that which a man could not overcome by the use of all diligence morally possible. Here it should be observed that, even allowing the sentiment of Marcus Antoninus [Aurelius], Bk. IX, chap. xlii (add Arrian, *Epictetus*, Bk. I, chap. xxviii): 'For every one that doth amiss misses his true mark and hath gone astray' (H.), still, since that error was not invincible, the evil deeds consequent upon it cannot be removed from the class of sins, nor can a general pardon be granted them.

12. But it should be carefully observed that error has different effects; touching actions which a man is entirely free to undertake and to neglect, or the exercise of which has been left to his judgement; and touching actions which are commanded or forbidden him by law, or
 34 by the order of a superior. In actions of the former kind, error is understood to interfere with consent, so that they are not followed by those effects, which are otherwise likely to flow from an action to which you have consented, especially when the error did not befall you as the result of supine and excessive carelessness. And so in contracts, an error about a thing or some quality of it, in view of which a man was induced to enter the agreement, renders the agreement void. For it is supposed that the man consented not absolutely but because of the supposition of the presence of that thing or quality, on which as a condition he based his consent; and when the thing or quality is not to be found, the agreement also is understood to be void. This point will be discussed more fully below in its proper place.

13. But the case appears to be different, when it concerns necessary actions, or such as are commanded or prohibited by a superior. Here the distinction must be made as to whether the error concerns theory or practice; that is, whether one entertains a false opinion about the necessity of actions, and thinks that what really ought to be performed should be neglected, and *vice versa*; or whether an error occurs in the very exercise of an action, which gives the action an entirely different application from what was expected. We feel that errors of the former kind do not prevent the imputation of an action to the agent, according as it shall appear to agree or disagree with the rule prescribed, since they are regarded as being in every way superable. For he who wishes to lay down a rule for the actions of another, should make his will so clear that it can be easily understood by the one whom he has undertaken to bind. For it is most unjust to demand obedience to an *unknown law*, or to one whose inner meaning is beyond the capacity of the minds of those for whom it has been enacted. Therefore, if any one errs in theory, that is, if he has persuaded himself that something has been enjoined upon him, which has actually been forbidden, and *vice versa*,

it is felt that he has not shown proper diligence, and so he cannot avoid the imputation to himself of what was done through his error.

This principle is expressed by others in the following form: If the conscience entertains a superable error about an evil thing, the man sins, whether he acts according to it or contrary to it; that is, if a man has persuaded himself that an action has been enjoined, which was to have been avoided, or that an action should be avoided, which had been enjoined, he sins in performing the former and in avoiding the latter; for such a performance, or such an avoidance, is a real departure from the law, and the agent was able, and under obligation, to understand the full sense of the law. And yet the same man would have sinned no less if he had avoided an action which was in fact forbidden, but which he thought was enjoined; and had he performed an action which was indeed enjoined, but which he thought was forbidden. For although there is here no overt act which is contrary to law, nevertheless, because he thinks that his conscience is following the law, that false moral choice, at least, which is at variance with the law, will be imputed to him as sin. For the evil intention of the agent makes the action appear evil, at least as concerns the agent. Thus it appears that actions which can be imputed to the agent as good cannot proceed from an erroneous judgement of the understanding, and that when a man has been falsely persuaded that a thing is unjust, it is for him illegal, so long as he has not seen the error of his belief. Add *Digest*, XLVII. xlvi. 8.

14. However, if a speculative error concerns a matter in itself indifferent, that is, if a man be persuaded that something, which is in fact indifferent, should be done or avoided, he will be guilty of sin, only if he has acted from a wicked moral purpose, contrary to what his false apprehension suggested, but not if he has acted in accordance with this error. For things indifferent are beyond the scope of the law, which is, therefore, not violated either by their commission or omission. And an error which affords no occasion to sin, seems harmless. But it is clear that actions originating in such an error cannot have effects like those which otherwise follow actions commanded by laws. Thus, if a legislator had offered a reward to those who obey his laws, certainly¹ that man could not claim it for himself, if by error he had observed indifferent 35 things, on the supposition that they had been fully covered in the laws.

15. But it is more common that an error appears in the exercise of actions enjoined by laws; for instance, if the true object of an action has been withdrawn, and another substituted in its place. So also, if a mistake has been made about the time and place to execute some command. Although such actions are not attended by the effect which actions properly directed to their end produce, they still avoid the effect appropriate to bad actions, since the error was not contracted

¹ [For *sane* read *sane*.—Tr.]

from any culpable negligence. Others state this principle as follows: An intervening error prevents the action from being imputed to one in either way, either as good or as evil. Seneca, *Hercules Raging*, [1237]: 'Who ever called an act of madness crime?' (M.) Thus, although you would otherwise be free from the obligation, if you pay a man whom you owe, should you have paid him by error, you have not committed a sin, but the former obligation has not been removed. Again, if any one in good faith, but with ill-considered generosity, has conferred some kindness on a wicked person, who proceeds to use it for evil ends, he will certainly be unable to pride himself on a good deed, but he will be cleared of any connexion with the evil deed, nor will he be held to have contributed anything towards its commission. But when a man has been commanded to examine carefully the object, place, or time of an action, he will have difficulty in escaping the imputation of the effects of the applied action, unless he can prove that his error was morally invincible. Thus, if you command your servant to awaken you at a certain hour of the night, he will not be listened to if he should say that he made a mistake in counting the strokes of the bell; but he will be free from blame, if for some reason the clock was wrong.

16. But it also happens frequently that an error occurs in the execution of an evil action, in that a man misses the object which he had intended. In such a case the malice of the agent will remain the same, but the gravity or unimportance of the act will vary directly with the importance of the object upon which it happened to fall. Thus, if a man who had intended to strike an enemy with a missile, should by chance strike some one else, he will be none the less guilty of homicide. See *Digest*, XLVII. x. 18, § 3; *Digest*, XLVIII. viii. 14; Grotius, *Florum Sparsio* on this passage. But the crime itself will be considered more or less grave, according to the worth or meanness of the man who is dead of a wound intended for another. Here belongs the case of a man unintentionally killing some one else, when he wished merely to wound him or to inflict a minor injury upon him, for in such a case judgement is rendered on the basis of the fact itself. But when an action, although going wrong, happens to light upon a lawful object, there will be no further evil than that which emanates from the evil intention of the agent, so that such an error will prevent the act from coming under the name of the crime which¹ a man intended to commit. And so the saying of Seneca, *On the Steadfastness of the Wise Man*, chap. vii, will not hold good, at least in a civil court: 'If a man lies with his wife as if she were a stranger, he will commit adultery, but his wife will not.' Add Seneca, *On Benefits*, Bk. II, chap. xix; Bk. V, chap. xiii, towards the end. But compare Libanius, *Declamations*, xxxv (p. 780 B, C, D, ed. Morellius).

¹ [For *quod quis* read *quod quis*.—Tr.]

CHAPTER IV

ON THE WILL OF MAN AS IT CONCURS IN MORAL ACTIONS

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| <ol style="list-style-type: none">1. Acts of the will.2. Freedom of the will.3. The indifference of the will must necessarily be asserted.4. How the will is inclined to good.5. Certain dispositions of the body incite the will. | <ol style="list-style-type: none">6. Likewise habits.7. And passions.8. Also intemperance.9. Mixed actions.10. The involuntary. |
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SINCE the most wise Creator wished to make man an animal to be governed by laws, He implanted in his soul a will, as an internal director of his actions, so that after objects were proposed and understood, he might be able to move himself to them by an intrinsic principle apart from any physical necessity, and be able to choose what seemed to him the most fitting; as well as turn from those which did not seem agreeable to him. Now the will is conceived as working in human actions through two faculties, through one of which it is understood to act *spontaneously*, through the other *freely*. To spontaneity, so to speak, men attribute certain acts or motions, of which some are internal, usually called 'elicit' [*elicit*], others external, usually called 'enjoined' [*imperati*]. The former are those which are produced immediately by the will and are received back by the same. Some of these are concerned with the end, such as volition, intention, fruition; others with the means, as consent, choice, and use. Volition is that act of the will by which it is merely carried to the end, without any consideration whether it be present or absent; that is, an act by which the end is only approved. Others call this the will of simple approbation, whereby something is apprehended as being agreeable with the nature and inclination of some person, although he has not yet started actually and effectively to produce or to attain it. Intention or choice is a desire capable of securing an end; that is, it is an act of the will, whereby it effectively moves toward an absent end, and strives by action to produce or attain it. Since this act is joined with attempt and hope of attaining that end, it is easy to gather what are the things with which it is concerned. They are, as Aristotle, *Nicomachean Ethics*, Bk. III, chap. iv, observes: 'It seems to be a general law that our moral purpose is confined to such things as lie within our power. A man embraces what he thinks is within his own power.' Therefore 'moral purpose is not concerned with what is beyond our power'.¹ (W.) *Ibid.*, Bk. VI, chap. ii:

¹ [In the text of Aristotle these words occur a little before the preceding ones.—*Tr.*]

Nothing that is past can be an object of the moral purpose. For we deliberate not upon what is past but upon what is future or contingent; but the past cannot be undone. Thus Agathon says rightly enough:

God himself lacks this power alone
To make what has been done undone. (W.)

Now although there are many degrees of intention, according to its variation in strength, yet for the purpose of civil life it is usually divided into plenary and semi-plenary. The former term is used when the will, after sufficiently examining a thing, and without having been swept away by the violence of its passions, directs itself towards something; a semi-plenary will is when sufficient deliberation has not been taken, or the reason was carried away by a swirl of passions. Fruition is the peace or delight of the will in an end now obtained and present. The opposite of this is repentance, which is usually joined with shame and grief, and is an aversion to something which we before intended or accomplished. Consent is a simple approbation of means, in so far as they are judged useful to some end; these means, when once in our possession, are selected by choice to secure some end, and applied to use. Acts are termed 'enjoined' [*imperati*] which are turned over for
37 execution by other human faculties, as these are moved by the will.

2. Freedom, men call a faculty of the will, whereby, given all things requisite for acting, it is able, from among many objects before it, to choose one, or some, and to reject the rest; or, if but one object be presented, it may admit or not admit it, do or not do it. Requisites for acting are sometimes summed up under the single word 'occasion', from which requisites the final determination of the agent is considered to be a separate thing; and when determination is added to the other requisites, action at once follows. Now the requisites connected with liberty are distinguished from that aid to actions which is furnished by the man himself. But more particularly the faculty of choosing, from among many objects, one or several, is called liberty of specification or contrariety; the faculty which is concerned with the choice or rejection of but one object, is called liberty of contradiction or of exercise.

Now liberty is supposed to add to spontaneity, firstly, an indifference as to the exercise of its acts, so that the will is under no necessity to exert one of its acts, that is, to will or to refuse, but, touching a particular object before it (for in general it cannot help but turn to that which is good as such, or renounce evil as such), it may choose whatever action it please, although chance may incline it more to one than to another. Liberty also adds a free determination, so that the will¹ by an internal impulse may choose here and now either of its acts, that is, to will or to refuse.

It should, however, be added, that, even though it may seem to

¹ [For *voluntas* read *volutas*.—Tr.]

a man that something should be desired or avoided, this is not dependent on the will but on the state of the object, according as it presents an appearance of good or evil; although that desire or aversion, which thus follows the appearance of the object, is not so strong but that there still remains to the will the liberty to shape itself to some outward action upon the object; especially since the appearance of an evil thing can seem desirable only so long as another evil is at its side. Hence, in order to refute the idea of Hobbes, *De Homine*, chap. xi, § 2, that appetite and aversion necessarily follow our preconception of some pleasure or trouble, which will arise from those objects, and that, therefore, no place is left for free will, we must carefully distinguish a volition of simple approbation, from an effective volition or previous choice, the latter of which does not necessarily depend upon particular objects. He employs in the following words an idle subtlety when he says: 'When we say that a man has a free will to do this or that, it must always be understood with this further condition: if he pleases; for to say that any one has a free will to do this or that, whether he pleases or not, is absurd.' Surely no one is so stupid as not to recognize that this implies a contradiction. Besides, it is folly to wish to add to the proposition, as a condition, the very thing which it asserts. That a man is able to desire to do a thing, if he so desires, is as if I should say, 'Peter runs, if he runs.' Who would call this added clause a condition? From what has been said, it is also clear what one should think of the remarks of Antoine Le Grand, *Institutio Philosophiae*, Pt. vii, art. 5; as if a man could not desire what he clearly and distinctly perceives to be good, and *vice versa*; and that a man sins only because he does not clearly and distinctly perceive the good.

3. But the chief affection of the will, which seems to rise immediately from its very nature, is that it is not restrained intrinsically to a definite, fixed, and invariable mode of acting, which affection we shall denominate indifference, and that this intrinsic indifference cannot be entirely destroyed by an extraneous means. And this must be maintained all the more firmly because upon its removal the morality of human actions is at once entirely destroyed. Arrian, *Epictetus*, Bk. I, chap. xvii:

What, I say, can overcome impulse but another impulse; and what can overcome the will 38 to get or the will to avoid except another will to get or to avoid? 'If he threatened me with death', one says, 'he compels me.' No, it is not what he threatens you with which compels you, but your own decision that it is better to do what you are bidden than to die. Once more, then, it is your own judgement which compels you—that is, will puts pressure on will. (M.)

Idem, Bk. I, chap. xxix: 'The will may conquer itself, but nothing else can conquer it.' (M.) Add Simplicius,¹ *On Epictetus*, chap. i, p. 22.

¹ [For *Simplicius* read *Simplicius*.—Tr.]

And yet it must be held that they are doing this very thing, who imagine some sort of physical determination in human actions, according to which even the very movement in itself, considered as a physical entity, is so determined by the first cause that it cannot take place in any other manner than as it has been determined, and its morality arises afterward from a second cause. The same thing is done by those who wish to lay human actions under an absolute necessity due to divine foreknowledge. Granted that this foreknowledge cannot be deceived, still, that it does not at once destroy the indifference of the will, can be easily understood, if we either clear the word foreknowledge from the imperfection which it seems to imply, in common with other words which are drawn from human affairs, and applied to God (since with God there is no succession of time); or, if we say that the divine concurrence accompanies secondary causes in such a way as to leave to them the ability to act in the way assigned them by God, and yet without lowering them, as concerns moral actions, from the class of principal causes to that of mere instrumental causes. Add Lucian, *Minos* [*Dialogues of the Dead*, xxx]; *Jupiter confutatus*; Antoine Le Grand, *Institutio Philosophiae*, Pt. VIII, chap. xvii-xviii. Grotius, *Opuscula de Dogmatis Reipublicae Noxiis*, gives good warning how dangerous such ideas are to the state. "Those who completely take away free will can scarcely escape making God the author of all crimes; a thing which Plato said should by no means be allowed in a state (*Republic*, Bk. II [p. 379]: "The causes for evil should be sought anywhere but in God.") Suetonius, *Tiberius*, chap. lxix, quite properly says that Tiberius despised all religions because he believed that everything took place by fate; and Proclus, *On Timaeus*, agrees with this, since he says that those whom he calls atheists fall into three groups: the first comprises those who deny that God takes any interest in the universe and in the acts of men; [. . .] the third comprises those who ascribe to God so great an interest that man is under necessity to do whatever is done, and no liberty is left to him. The philosopher Sallust, *De Diis et Mundo*, chap. ix: "To ascribe to Fate injustice and wantonness is to make out ourselves good and the gods evil." Also in Plautus, *The Pot of Gold* [743 f.], when one person says: 'I think it must have been fated; otherwise it wouldn't have happened, I'm sure of that'; the other [Euclio] neatly¹ retorts: 'Yes, and I think it must have been fated that I'm to shackle you at my house and murder you.' (N.)

4. But some preliminary remarks should be made concerning the nature of good, so that the indifference of the will may be correctly apprehended. Now good is considered in an absolute way by some philosophers, so that every entity, actually existing, may be considered good; but we pay no attention to such a meaning, and consider a thing

¹ [For *lepede* read *lepide*.—Tr.]

as good only in so far as it has a respect to others, and it is understood to be good for some person, or on his behalf. Taken in this sense the nature of good seems to consist in an aptitude whereby one thing is fitted to help, preserve, or complete another. And since this aptitude depends on the very nature of things, whether this nature be native or adapted by some contrivance, that good which we can call natural, is firm and uniform, and in no way dependent on the erroneous or changeable opinions of men. But since good does not arouse a voluntary appetite on the part of man, unless it be perceived, at least in a general way; and since true sense or perception gives only a rough 39 idea of the real being of things and what may come from it; since also errors often deceive the very mind itself, and impede the force of senses and passions, it results that certain persons incorrectly assign an idea of good to some thing, and so a good arises which is called *imaginary*. Moreover, individual men seek and love a certain thing according as they think it has something for their advantage, and will aid in their preservation and improvement; while the opposite things they regard as evil and avoid. But just as it is not required of a thing to be good and to have some power to attract the desire, that it be held a good only for him alone who seeks it, and to the degree that it is taken away from the advantage to another, especially since the social ties and intercourse of other men can give advantage to us, as well as to themselves; so among all men there is so wholehearted an agreement on the general nature of good, and of its main divisions and kinds, that there would appear to be no compelling reason why the general, and therefore unbroken and uniform, idea of good should be denied, because of a difference on some particulars, or why it should depend solely in a state of liberty on the opinion of one man, in a commonwealth on that of the highest in authority, and be weighed by that opinion alone. Add Richard Cumberland, *De Legibus Naturae*, chap. iii, where he refutes certain errors of Hobbes on the nature of good, and chap. i, § 20. *Moral* good, which is found in the actions of men, is treated below in its proper place.

From what has been said it is clear that it belongs to the nature of the will always to seek what is inherently good, and to avoid what is inherently evil. For it implies a clear contradiction that you should not incline to what you see is agreeable to you, and should incline to what you feel is not agreeable. And so this general inclination of the will can admit no indifference, as though the will might seek good and evil by an appetite of simple approbation. But the will of individuals exerts the force of its indifference on particular goods and evils, as men incline to different things at particular times. And this is so because scarcely any things good or evil appear to a man uncontaminated and distinct, but intermixed, evil with good and good with evil. This is

accompanied by the personal inclination of individuals towards special things, nor is it given to all men to distinguish the substantial and enduring from the simulated and transitory; hence comes the almost infinite variety in the wishes and desires of men, all seeking their own advantage, indeed, but each by a different road.

Furthermore, many men do not know what things are good for them and so do not desire them; many because of outward signs of evil do not measure the advantage attached, and so reject what should have been desired, while they desire what should have been shunned. This point is made by Aristotle, *Nicomachean Ethics*, Bk. III, chap. vi:

It will perhaps be best to say that in an absolute or true sense it is the good which is the object of wish, but that in reference to the individual it is that which appears to be good. (W.)

You may apply here the words of Gunther, *Ligurinus*,¹ Bk. III [289 ff.]:

If one speaks false alone he can deceive no man;
Untruth creeps in through imaged truth, deceives the ear
By stealth, and dominates the mind.

Hence, in almost any thing or action, aspects of good and evil, both real and apparent, present themselves and draw the mind this way and that way until finally the will by some intrinsic power determines on one side or the other. An action undertaken in this way is called spontaneous, according to Aristotle, *Nicomachean Ethics*, Bk. III, chap. xiii [III. iii]: 'An action would appear to be voluntary, if the agent originates it with a knowledge of the particular circumstances.'

40 (W.*) On this passage Eustratius observes:

Both the following factors are necessary for a spontaneous decision, namely, that the principle be in the agent, and that the agent know the particulars; for he who acts from ignorance has the principle, and he who knows the particulars can be led to action by compulsion.

5. But it does not always happen that the mind, from a state of equilibrium, as it were, brings itself to some action or non-action without the influence of any external force. Oftentimes, rather, from different causes it is violently led to one path, sometimes an external compulsion falling upon it with such force that it can no longer be considered master of its own strength. In the same way the mariner does not always speed with a favouring wind, but is sometimes buffeted by gales and can scarcely hold the steering gear, or again is hurled from the helm to yield his vessel to the will of the winds.

Therefore, among the things which make the will of man incline to different ends, are to be classed the individual qualities of mind by which some become strongly inclined to a particular course of action, qualities to be found as much in whole nations as in individuals. To

¹ [For *Ligmino* read *Ligurino*.—Tr.]

their production, it seems, the heaven above us contributes not a little, as well as the character of the soil, as Lucan, Bk. VIII [365], says:

The mildness of the climate makes the nations effeminate.

Herodotus, Bk. IX [cxxii]:

Nature has so ruled that soft countries give birth to soft men, nor is there any region which produces very delightful fruits, and at the same time men of a warlike spirit. (R.)

Add Charron, *De la Sagesse*, Bk. I, chap. xlii. Their production is also affected by the temperature of the humours of the body, arising from the race to which a man belongs, his age, food, health, manner of life, and other causes, by the form of the organs which the mind uses in performing its functions, and similar considerations. Add Hobbes, *De Homine*, chap. xiii, and Bacon of Verulam, *The Advancement of Learning*, Bk. IV, chap. i. Regarding all these factors it should be maintained that no one of them, in so far as they influence the production of any moral act, has enough power in any way to turn the will from its course. Horace, *Satires*, Bk. II, sat. viii [*Epistles*, I. i. 39-40]: 'No one is so uncouth that he cannot grow refined if he but lend a willing ear to culture.' Socrates in Xenophon, *Memorabilia*, Bk. I [ii. 23]: 'Now I believe that everything fair and noble can be attained by study and effort.' And although it does not seem possible at times for the will to prevent some impulses, based on the very constitution of the body, from making themselves felt, and even breaking forth into action, still it can at least prevent their breaking into sin. Thus, if one be so strongly moved by the desire of love that he cannot restrain them, it is still within his power to satisfy them without sin. See I *Corinthians*, vii. 2. And Plato, *On Laws*, Bk. VIII, rightly claims that unnatural vice can be suppressed in a Greek state, although among that people and at that time it had a strong hold on public morals. The same conclusion must be drawn about much that is said concerning the morals of the age, in the *Art of Poetry* of Horace, and by other authors in general. So, granted that old men are inclined to avarice, it will still be within their power to gain wealth without injury to others, and without depriving them unjustly of their property. Add Huartes, *Scrutinium Ingeniorum*, chap. v.

6. Another thing which also strongly inclines the will to certain acts is the repetition of the same acts, and the consequent familiarity with them, which causes an action to be undertaken easily and gladly, and the mind to seem, as it were, drawn to an object before it. And inclinations of such sort, when joined with desire and adroitness in action, commonly go under the name of *habits*, which are called virtues and vices, in so far as they are concerned with good and bad moral acts. There is no need to weary ourselves in enumerating these, since most of those who have thus far announced their intention to discuss moral philosophy believed that they have expounded the greater part of

41 their science when they have explained the names of the eleven virtues. Let it suffice to remark in general, that those dispositions of men's minds are virtues which move men to actions that conserve themselves and society; and those are vices which make men inclined to do what tends to destroy themselves and society. In this connexion Hobbes, *De Homine*, chap. xiii, § 9, is deserving of criticism, when he says that 'only in civil life can there be a common measure for virtues and vices'; and therefore, 'there is no such a measure, in a state of nature, by which virtue or vice can be weighed and defined'. For surely the definition just proposed by us can apply also in a state of nature. And whatever things are commanded as virtues in states, should be demanded on the measure of this definition. And if in a state anything¹ be enjoined, with which that definition does not square, such an injunction should be considered absurd. The variation to be seen in the laws of different states does not make impossible the existence of a common and uniform definition of virtues. For this diversity is either concerned with those things which lie outside moral laws; or it arises from the fact that sometimes the force of civil law is added to some precept of natural law, and sometimes not; or, finally, it is an indication that some legislators were not befriended by a sane reason. This topic will be treated more fully below.

Now vices and evil manners, developed by long habit, seem to become so engrained in a man's nature, that they can be resisted only with great difficulty. Calpurnius Flaccus, *Declamations*, ii: 'When once shame has vanished, no disgrace is unlovely to minds bent upon vice.' Lucian, *Adversus Indoctum* [xxv]: 'For when a dog has once learned to gnaw leather,² he cannot stop.' Add Bacon, *Essays*, chap. xxxvii. And yet actions proceeding from such a nature do not cease to be considered spontaneous. Nay, even if those actions, by which a habit is formed, and which precede it, are undertaken with a stronger previous choice, and with a stronger effort, than those that follow the acquisition of a habit, when as it were of their own accord, and without the command of the will, the rest of the faculties rush to an object, still this fact should not detract from their quality of good or evil. For surely it would not be fitting, that an action be accounted less good, because it has been often undertaken by the same person; or that he should be held to have sinned less, who has sinned often; especially since such a person himself would be largely responsible for his acting so easily and readily. On this point Aristotle, *Nicomachean Ethics*, Bk. III, chap. viii, [vii] observes:

But actions and moral states are not voluntary in the same sense. For while we are masters of our actions from beginning to end, inasmuch as we know the particulars, we are masters

¹ [For *aliquid* read *aliquid*.—*Tr.*]

² [So modern editions. Pufendorf's text ran, 'eat leather.'—*Tr.*]

only of the beginnings of our moral states; we do not perceive the particular steps by which they advance, as we do not perceive the particular steps in diseases. But as it was in our power to act in one way or another, our moral states are voluntary. (W.)

On this passage Eustratius remarks:

We have a control only over the beginning of habits, not over their increase and end. For their additions and increase are not known and not perceived, since, indeed, they grow gradually and unobserved, and so some now and then go to greater lengths in depravity and vice than they could have desired. This can be seen in the case of drunkenness and debauchery, in which men advance a bit freely and carelessly, as if the contraction of a habit were in our power, and acquire a habit by continued acts before they realize it. Nor is it merely in the case of vices that additions and increments are not noticed, but in virtues also the advance is made without our realizing it, so that no one can recognize his own progress until he has made it.

7. The will is also in no slight degree impelled to certain actions, 42 by those motions of the mind, which are chiefly stirred by the appearance of good or evil in some object, and are called passions; while in addition they greatly becloud the judgement of the mind. Pindar, *Olympian Odes*, vii [30-1]: 'Tumult of mind hath ere now caused even the wise man to go astray.' (S.) Their number, how they are aroused and calmed, and their use have been ably discussed first of all by Descartes, *Les Passions*, and Antoine Le Grand, *Institutio Philosophiae*, Pt. VII, chap. xix. With these may be compared Hobbes, *Leviathan*, chap. vi; *De Homine*, chap. xii. For our purpose it is enough to add that the passions, however violent they be, do not entirely extinguish the power of the will, but even those who have rather weak spirits can acquire an absolute control over all their passions provided they devote sufficient industry to their formation and control, as is shown by Descartes, *Ibid.*, art. 50. Cicero, *Tusculan Disputations*, Bk. I, chap. iii [IV. xiv. 31]: 'All the disorders and perturbations of the mind proceed from a neglect of reason.' (Y.) And Medea is wrong when she says in Ovid, *Metamorphoses*, Bk. VII [19]: 'But some strange power holds me down¹ against my will'; especially since she herself recognizes that the dictate of her reason is struggling with her passion: 'Desire persuades one way, reason another. I see the better and approve it, but I follow the worse.' Not irrelevant also are the remarks of Grotius, *On Matthew*, v. 22, namely, that τὸ πάθος, ἡ ὁρμή, and ἡ συγκατάθεσις, are different. Πάθος itself, or the faculty by which we can be angered, τὸ θυμοειδές, planted in us by nature, cannot be plucked out of our being, and is one of those intermediate qualities whose use may be either good or bad. But because that part of the mind, in which τὰ πάθη [the passions] are seated, is in itself ἄλογος [incapable of reason], it happens, that, without expecting any judgement of the reason, ὁρμαί [impulses] exert their force; and unless these are carefully held in check, there follows a συγκατάθεσις [consent], when, in other words, that part of the mind,

¹ [For *trahit* read, with the accepted text, *gravat*.—Tr.]

which was bestowed upon man so as to restrain his passions, lets go the reins and allows itself to be drawn along. And this *συγκατάθεσις* [consent] is voluntary, and is given at the will of man. But by diligent attention and exercise, and above all by the aid of the Holy Spirit, even these first motions, which philosophers compare to the twinklings of the eyes, can be restrained both from lasting too long and becoming too strong. Seneca, *On Anger*, Bk. II, chap. iv.

Richard Cumberland, *De Legibus Naturae*, chap. ii, §§ 26-7, shows how man has been endowed by nature with special powers to curb the passions, and how at the same time his life and strength are more seriously threatened, than are those of other animals, from violent and ill-controlled passions, and how, therefore, he is under greater necessity to restrain them. And so, since some passions are aroused by an appearance of good, and others by an appearance of evil, and they urge one on to acquire some good or avoid some evil, the difference is observed between them, that the former allow little or no excuse, if anything was done on their impulse, other than that which was proper, while the latter allow more indulgence, according as the evil which excited them threatens a greater disaster for man's nature. For it is much easier to go without a good which is not necessary for nature's preservation, than it is to admit an evil that tends to its destruction, as Aristotle, *Nicomachean Ethics*, Bk. II, chap. ii, says: 'It is more difficult to contend against pleasure than against anger.' (W.) And if any one has done evil in acceding to the continued call of vice, it is understood that he has exposed himself to the fortune of some future evil for a pleasure at hand, and when he has enjoyed the fruit of some thing, which, in his judgement, was worth whatever evil might come of it, he can under no pretext demand that the evil be reduced. But the man who has done wrong, in fear of some impending evil, is strongly defended by the weakness of human nature, because he wished to get off with the lightest evil he thought possible. This point will have to be discussed at greater length in another connexion.

8. Finally, the will is powerfully enticed to some kind of action by
 43 drunkenness, caused usually from a drink, or fumes of different kinds, or also by opium, which is most eagerly sought after throughout a large part of the Orient, and which sets the spirit and blood into a most violent disturbance, excites them, and renders men liable first of all to lust (Propertius, Bk. IV [viii. 32]:

When the wine is in her, one lover will be all too few. (B.)

anger, and rashness; and Lycurgus calls wine 'an evil medicine because it turns men's minds'. (Hyginus, *Fables*, 132.) Isocrates, *To Demonicus*, [32]: 'For when the mind is destroyed by wine, it is like chariots which have lost their drivers; for as they rush on without control for the

loss of men to guide them, so the soul often stumbles when the intelligence is destroyed.' (F.) For this reason the law of Minos¹ among the Cretans was 'not to drink with others unto drunkenness' (Plato, *Minos* [320 A]). Add Pliny, *Natural History*, Bk. XIV, chap. xxii. Aristophanes, *The Wasps* [1253 ff.]:

Drinking ain't good: I know what comes of drinking,
Breaking of doors, assault, and battery,
And then, a headache and a fine to pay. (R.)

Among the Hindus drunkenness is so condemned as to be reckoned one of the five most heinous sins, which are: Intercourse with one's mother, the term including mother-in-law and wife of one's teacher; murder of a Brahmin; theft of gold; drunkenness; and contact with those who do the above. Manilius, *Astronomica*, Bk. V [226]:

Besides, excess in wine inflames their fire,
And Bacchus makes their fury blaze the higher. (C.)

Mahomet made use of religion to withdraw nations highly addicted to wine from its use.

Whoever voluntarily contracts this habit, since he knew, or was able to presume, its effects, has no more right to demand that injuries committed through it should not be imputed to him, than has one who has himself in a rage torn the roof from his house, to complain at the rain pouring into it. Plautus, *The Pot of Gold* [750 f.]: 'Drink is altogether too cheap, if the drunkard can do what he likes and not suffer for it.' (N.*). Yet in indifferent actions, and those which one may undertake or avoid at his own pleasure, a drunkenness which has completely dulled the mind has this force, namely, that the effect which would have followed, had it been undertaken deliberately, does not follow the act.

Now these are the causes which give to the will a physical bias, as it were. But in a moral way an obligation inclines it most, or ought to incline it, which, however, no matter how great it be, does not remove the intrinsic liberty of the will, nor make an action² involuntary, however strongly base desires may perhaps pull in the opposite direction. To this you may apply the words of Aristotle, *Nicomachean Ethics*, Bk. III, chap. iii: 'But it would seem irrational to assert that such things as ought to be the objects of desire are desired involuntarily.' (W.) We say, however, that obligation *ought to incline* the will, for such is the baseness of the minds of men that often the mere forbidding of a thing excites the lust to sin. Ovid, *Amores*, Bk. III, el. iv [9 ff.]:

We ever strive for what is forbid, and ever covet what is denied. Whatever is guarded we desire the more, and care itself invites the thief. 'Tis forbidden joys delight. She to whom erring is free, errs less;³ very power makes less quick the seeds of sin. (S.)

¹ [For *Minoris* read *Minois*.—Tr.]

³ [For *minus* read *minus*.—Tr.]

² [For *actionum* read *actionem*.—Tr.]

This sin you may more exactly credit in part to the base curiosity of men, to whom everything unknown appears wonderful¹—a conclusion amply confirmed by the harshness of the interdict of it, and by the trouble involved in obeying it; in part, to hatred and disrespect for the person who has issued the interdict, whereby we disdain to have our liberty limited by one towards whom we feel so ill, while on the contrary it is a characteristic of love, when a man gladly accedes to the will of the person whom he loves.²

9. It should be observed, further, that sometimes in the face of most grave ills, and such as are held to exceed the ordinary strength of man's mind, the will is under so strong a compulsion that it agrees to undertake something from which it would shrink in perfect horror were it not under such necessity. Such actions, being partly voluntary and
44 partly involuntary, are called mixed. For they are voluntary, in so far as their principle is in the agent, who knows everything that is involved in the action, and in so far as the will, for the present moment, and from necessity, turns toward such actions as the lesser evil, or but a part of an evil, since any other course would plunge it into an entire or greater evil. And this in the present situation imitates the nature of good, since it is impossible for both the lesser and the greater evil to be avoided at the same time. Aristotle, *Nicomachean Ethics*, Bk. V, chap. vii: 'The lesser evil in comparison with the greater counts as a good.' (W.) Quintilian, *Institutes of Oratory*, Bk. VII, chap. iv [12]: 'In a comparison of evils the less is to be regarded as a good.' (W.) The following passage of Aristotle, *Nicomachean Ethics*, Bk. III, chap. i, applies here:

No one throws anything overboard willingly in the abstract, yet every sensible person will do it for his own safety and the safety of his fellow passengers. Actions like this, although they are of a mixed character, are more like voluntary than involuntary actions. (W.)

But actions of this nature have an involuntary character because the will is forced to them, contrary to its own inclination, since it would never undertake them, if it could escape the greater evil in any other way. For this reason they have this in common with involuntary actions, that the moral effects which follow other purely voluntary actions are in these entirely, or at least largely, lacking. For although, once in a while, so strong an obligation is laid upon one that it ought not to be refused, even at the threat of death, regarded as the most terrifying of natural evils; yet when such an obligation is not expressly evident, it is by no means easily presumed, as being too hard for man's condition; and when it is not actually present, it would be folly for one not to wish to come off with the least possible evil. Hence some things, which would have merited reproof, if done without such a

¹ [Tacitus, *Agricola*, xxx.—Tr.]

² [For *amari* read *amati*.—Tr.]

cause, are praised by fair-minded men, if they are undertaken under the pressure of such a necessity; some are held to be more deserving of pity than indignation, others are entirely or partially excused, and the odium and guilt of the action rest in the last analysis on another, while the man who executed the deed is adjudged innocent. This principle is illustrated by the words of Aristotle, *Nicomachean Ethics*, Bk. III, chap. i:

Such actions are at times subjects of praise, when people submit to something that is shameful (that is, unbecoming) or painful for the sake of gaining what is great and noble. There are also some actions which are pardonable, although not laudable, as when a person is induced to do what is wrong by such causes as are too strong for human nature, and do not admit of resistance. Yet it is probable that there are some actions where compulsion is an impossibility: a person would rather suffer the most dreadful form of death than do them. (W.)

Add Eustratius, *ad loc.* But I doubt whether it were worthy, especially on the part of a Christian Bishop, in this connexion, to give the following example of a mixed action: 'Intercourse with another man's wife, though wrong, becomes no longer wrong when it is the means of assassinating a tyrant.'

10. Lastly, since the requirements for a voluntary action are: (1) that the principle of the motion be in the agent, or that the agent move to the deed by the impulse of his own will, and (2) that he know what would be the outcome; it is clear, that, in the absence of either or both of these factors, the action is made involuntary. Aristotle, *Nicomachean Ethics*, Bk. III, chap. i: 'It is generally admitted that acts done under compulsion, or from ignorance, are involuntary.' Touching the latter he very properly adds, *Ibid.*, Bk. III, chap. ii: 'If an action is to be called involuntary because of such ignorance,¹ it is necessary that it should be painful to the agent, and should excite in him a feeling of regret.' (W.) An action is properly called compulsory, when a man is compelled by an extrinsic stronger principle to apply his body to it, and this in such a way that he shows his aversion and dissent by patent signs, and especially by a bodily reluctance or opposition. 45 Aristotle, *Nicomachean Ethics*, Bk. III, chap. i, gives an example: 'If the wind, or people who have us in their power, were to carry us in a certain direction.' (W.) In this class falls the example of the warship driven by the force of a tempest into the harbour of the Rhodians, which the state treasurer wished, according to their law, to confiscate, in Cicero, *On Invention*, Bk. II. So the friends of Lucretia 'comfort her distressed mind, by transferring the guilt from the ravished one to the author of the crime, saying that the mind, and not the body, sins, and that if there was no intent, there was no guilt', as the story is given in Livy, Bk. I, chap. lviii.

¹ [For δὲ read κατὰ.—Tr.]

This reluctance is assumed, in a court of law, to be present in such actions or experiences which, in the general opinion, were not undergone voluntarily, and in the absence of all signs of actual consent; and this is called by some interpretative reluctance. Now the Hebrew law held that a virgin had suffered violence, when a man had lain with her in the fields and no witnesses were present. But Philo Judaeus, *On Special Laws* [p. 608], denies that the law protects a maiden who has in solitude willingly given herself to a ravisher. Neither can the same law work to the hurt of a maiden, who, in a city, was unable to cry out, or cried in vain. A compulsory thing is such in itself, but not in its cause, when a person is for the present in such a state that he cannot repel an attempted violence; but he was at fault for getting into such a state. To this class you may refer the violation of Dinah, as told in *Genesis* xxxiv, for the maiden should not have wandered among strangers. It is compulsory in itself, and in its cause as well, when some one was not at fault for getting into such a state, whereby he could be forced into something. We say, 'If he was not at fault,' that is, if he undertook nothing but according to the laws of duty and prudence. For if a man performs a task assigned him, or uses his native right in some other way, and yet is not acting rashly, nor without forethought, he cannot be held responsible for anything that he is forced to do under these conditions.

CHAPTER V

ON MORAL ACTIONS IN GENERAL AND THEIR APPLICATION TO THE AGENT, OR THAT WHICH ALLOWS THEM TO BE IMPUTED

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| <ol style="list-style-type: none"> 1. The nature of a moral action. 2. Its matter. 3. Its form; also a moral cause. 4. A moral action considered formally is always a positive entity. 5. The cause or ground why something can be imputed to a man, or not. 6. Necessary things cannot be imputed to a man. 7. The effects of our vegetative faculties. 8. Things impossible. | <ol style="list-style-type: none"> 9. Things compulsory; and simple execution. 10. Things done through ignorance. 11. Things seen in a dream. 12. Future evils. 13. But evil actions, even when proceeding from habit, are under all circumstances to be imputed. 14. How the actions of another may be imputed to us. |
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Now that we have in accordance with our undertaking explained the understanding and will, as the principles from which the actions of men draw the right to be placed in a class distinct from the actions of beasts, it is our next task to examine moral actions in general, since this study of ours is chiefly concerned with the investigation of their¹ rectitude or depravity. Moral actions are, therefore, the voluntary actions of a man considered with the imputation of their effects in common life. We call those actions voluntary which so depend upon a man's will as a free cause, that without its determination, proceeding from its acts as they are drawn from a previous cognition of the understanding, they would not take place; and the performance or non-performance of which rests within the power of man. These are here considered, not in so far as they are movements produced by some power through the nature of things, but in so far as they proceed from a decision of the will, which has the power² to turn to either one of two contradictory courses. For a voluntary act contains two things: The first is material, which is the motion of a power existing by its nature, or its exercise considered in itself; the second is formal, which is the dependence of that motion or exercise on the decision of the will, according to which dependence the action is regarded as decided by a cause that is free and self-determining. The exercise itself, considered apart and in itself, is, for purposes of distinction, called an act of the will, or an act arising from the power in man of willing, rather than a voluntary act. Furthermore, we may consider a voluntary act either in itself and absolutely, according as some physical motion is undertaken by a previous decision of the will, or reflexively, regarding the degree to which its effects can be imputed to a man. Voluntary actions which have this reflexive

¹ [For *gaurum* read *quarum*.—Tr.]

² [For *potentiae* read *potentiae*.—Tr.]

feature are by a special usage of the word called 'human'. And from the fact that a man is said to be of good or bad morals, according as he performs those actions well or ill, or according as they do or do not agree with some law as their norm, as also the fact that the inclinations of men's minds, resulting from repeated actions, are called morals, it has come about that human actions themselves are designated by the term moral actions.

2. The essence of moral actions, considered in the way just mentioned, includes two elements, the one material, the other formal. The material element is any physical motion of some physical force, whether it be of the locomotive faculty, of the sensitive appetite, of external and internal senses, or of the understanding, so far as concerns the exercise of apprehension. For a judgement is so dependent upon the apparent quality of an object, that in regard to it there is no place for direction by the will, although in forming that judgement there are some opportunities for our own choice and activity. Indeed, an act of the will, considered in its own natural being, or viewed in a narrow sense as an effect, is a product of a power implanted in it as such by nature, as may also be the restraint of some physical motion which a man could exercise either in itself or in its cause. For a man may be liable for punishment by an act of avoidance, as well as by one of commission. Moral actions include also the inclinations of natural powers toward certain objects, inclinations prepared by previous moral actions, at least so far as they furnish spurs for action. And not alone can my motions or habits, or the privation of either, be the material of my moral actions, but also all these as they proceed directly from others, provided that they can and should be governed by my will. Thus at Sparta the lover settled for the shortcomings of the object of his affections (Aelian, *Varia Historia*, Bk. III, chap. x).

Nay, my moral actions can even be furnished material by the actions or operations of animals, vegetables, and inanimate things, if they are capable of a direction that comes from my will. So, in the very law of God, the damage inflicted by a goring ox is charged to the owner, provided he knew beforehand of the tendency of the animal. Add *Digest*, I. i, at end; *Digest*, IX. 1, 2 and 3; *Digest*, IX. ii. 11, 5; *Law of the Visigoths*, Bk. VIII, tit. iv, chap. xvi. Thus a vine-dresser is responsible, if it be due to his negligence that the vine has wasted all its power of bearing by putting out shoots. So also the destruction caused by a fire is laid to him who started it, and damages by the sea or a river to those who broke the dikes, or failed to keep them in repair. Quintilian, *Institutes of Oratory*, Bk. I, chap. x [33], has given an orator's example of this:

A flute-player, who had played a Phrygian tune to a priest while he was sacrificing, is accused, after the priest has been driven to madness, and has thrown himself over a

precipice, of having been the cause of his death. (*Ibid.*, Bk. VII, chap. iii [31]): Some youths, 47 who were in the habit of associating together, agreed to dine on the sea-shore. One of them being absent from the dinner, the others erected a sort of tomb to him, and inscribed his name upon it. His father, returning from a voyage across the sea, landed at that part of the coast, and, on reading his son's name, hanged himself. These youths are said to be the cause of the father's death. (W.)

Finally, admissions or receptions of the acts of another, can be the material of my moral acts, in so far as it was my fault that they took place. Thus the woman is held partly accountable in rape if she rashly went to places where she could have foreseen that she might suffer violence.

3. The formality of a moral action consists of its 'imputativity', so to speak, whereby the effect of a voluntary action can be imputed to an agent, or can be considered as belonging to him in a special way, whether the agent himself produced the physical effect also, or caused its production by others. And, from this formality of the action, the agent also shares in the denomination of morality, and is called a *moral cause*. Hence it is clear that the real basis [*ratio formalis*] of a moral cause, strictly speaking, lies in its imputation, as imputation, however, concerns its purpose, and so it is nothing other than the voluntary agent to whom the effect is or should be imputed, because he is its author in whole or in part; and therefore, whatever its acceptance carried of good or evil, must be referred to him, and he must be held responsible for both. Thus one man is the moral cause for an injury to another, whether he has raised a bump on his head with his own hands, or broken it with a club, or turned dogs loose upon him, or sent murderers after him. Thus Anah is the moral cause of mules (*Genesis*, xxxvi, 24),¹ and Jacob of the different colours in the sheep of Laban (*Genesis*, xxx, 37). Thus Lysias, in his speech *Against Agoratus* [xiii. 87], who as an informer had caused the death of many citizens, says: 'Is not he who was responsible for their death a red-handed murderer?' Ovid, *Heroides*, ep. ii [147-8]:

Demophoon 'twas sent Phyllis to her doom;
Her guest was he, she loved him well.
He was the cause that brought her death to pass;
Her own the hand by which she fell. (S.)

Yet he who has furnished only the occasion for another to do something, cannot always be considered the moral cause of the deed. Hence it was not merely a stupid sentence but a cruel one as well, when Cn. Piso, as reported by Seneca, *On Anger*, Bk. I, chap. xvi, gave the following reason for sentencing a soldier to death, for whose fancied death another had been condemned: 'You I order to be executed, because you have been the cause of your comrade's condemnation.' (S.)

¹ This interpretation of the passage is very doubtful.—Tr.]

Nor does there seem to be any reason for our joining with the author [Velthuysen] of the *Dissertatio de Principiis Justitiae et Decori*, p. 161, in distinguishing between a moral cause *in itself*, and a moral cause *by accident*. For the expression *cause by accident* is obscure, and likely to lead to idle controversies; while if no effect of an action can be properly imputed to a man, we may by no means call him a moral cause, however greatly he contributed to the material element of the action. It is, however, clear that it makes a great deal of difference regarding the seriousness of imputation, to learn how far a person was the principal of an action; as well as to ascertain whether a person really intended a certain effect, or whether it was attained through his ignorance, or through some other accompanying factor. For in the case last mentioned, the act would be imputed to one, because it was against the laws of prudence or foresight, not against those of justice; and so one is judged to have acted imprudently perhaps or hastily, but not maliciously.

However, it would not be beside the point to consider a little more fully what is set forth in the passage referred to above. Our author [Velthuysen] first of all lays down the following rule:

Whatever is evil by its own nature and can under no circumstances become good, may by accident follow upon the use or defence of my right, without my thereby incurring the guilt of sin, and I am not for this reason obliged to abstain from the use of my right.

Grotius, Book III, chap. i, § 4, also lays down a similar law, but wisely amends it both there and in Bk. III, chap. ii, § 9. Our author
48 continues: 'A sin is said to follow by accident upon another free act, when there follows upon the use of a thing for which I have a right, some effect which I have no right to produce except by such a use of the thing.' There might be given, as an example of this maxim, that which is commonly called by theologians an 'accepted offence', regarding which they say that a person should not omit an honest, pious, and due act, no matter how much offence some base fellow may take from it; and they prove this by the example of our Saviour. Because of His example, surely, no use should be made of the phrase 'cause by accident', for even with this saving clause added, it is blasphemy to call the fount of all good a cause of evil. It should rather be said that he who has committed a good and necessary act, at which another has taken offence, can in no way be considered the cause of the sin which the other consequently commits. This is practically what is meant when we say: 'He who uses his own right does an injury to no man.'

He adds further: 'Since everyone has the right to preserve his health, the use of a drug is proper to recover one's health, although such use may be followed by insanity (for a short time), or drunkenness, or (voluntary) masturbation, or abortion' (when, of course, otherwise both

the mother and unborn child would have to die), and so the person who uses such a medicine is only a cause by accident of such effects. It would have been simpler to have said, that the effects in such cases cannot be reckoned as sins. But, aside from that, not all the examples, with which he wishes to illustrate *a moral cause in itself*, or that which is truly one, are quite proper. For he says: 'Should a criminal who is to be executed walk to the place of execution and ascend the ladder', he cannot for this reason be called a moral cause of his own death; for the officers lead him, if willing, and drag him, if unwilling. But I do not see why a person who drinks to excess, or weakens his vitality by honourable necessary toil, should not be called the moral cause of his untimely death, although the former sins, while the latter does not, and neither can, properly speaking, be called a murderer. But you may properly call that man the moral cause of his death, who is condemned because he refused to offer the evidence by which his innocence could have been established.

4. It should also be observed that the formal part of a moral action,¹ that is, its power to be imputed [*imputativitas*], has the nature of a positive form, from which, like shoots from a root, are derived its affections, properties, and consequences, and for this reason a moral action can be called a positive entity (at least in the order of morals, if not always in that of natural things), whether its matter be a physical motion, or an absence of physical motion. For it is enough to classify something in the order of morals as a positive entity, if we understand there to be in it that from which true affections of that order arise; for as there are no affections in a non-entity, that which has definite and positive affections can by no means be termed a mere non-entity.

5. Now the reason why a moral action may belong and be imputed to some one (in whom we have said a real basis [*ratio formalis*] for it consists), is none other than because it lay within his power and ability to cause such an action to take place or not, to be undertaken or avoided. This is so clear that even the most ignorant of men, when charged with some deed accomplished or neglected, think they can offer no better excuse than to say that they could not help it, whether the thing was done or not. Hence it is to be considered a primary axiom in morals, that a man can be asked for a reckoning for those things, the doing or not doing of which lay within his power; or, what amounts to the same thing: Any² action controllable according to a moral law, the accomplishment or avoidance of which is within the power of a man, may be imputed to him. And the contrary: That which neither in itself, nor in its cause, was within the power of any man, cannot justly be imputed to him. And it is no exception to this rule, when one is sometimes expected to do some chance thing that is not in our power,

¹ [For *actiones* read *actionis*.—Tr.]

² [For *quelibet* read *quaelibet*.—Tr.]

for that case never arises unless a man voluntarily takes upon himself such an obligation. However, it is within a man's power to pledge himself to repair some damage, which has resulted from a cause over which we had no control.

Now for an action or deed to be imputed it must be voluntary, as we have said in the preceding chapter, § 10, and subject to the direction of our will. But for an omission to be imputed to a man, it is requisite that the faculty and the opportunity for the deed have been present. The opportunity [*occasio*] embraces four factors: That the object of the action be at hand; that there be a convenient place where we cannot be hindered by others, or run the risk of some injury after the action; that there be a convenient time in which more pressing business does not have to be transacted, and which will likewise suit others who join in the action; and, finally, that one have the natural powers for the action. When any one of these factors is absent, through no fault of the man, it is absurd and unjust to impute to him the blame for the action not taking place. Cicero, *On Invention*, Bk. I [xxvii]: 'The occasion is that portion of time which affords opportunity of doing or not doing something.' Add Descartes, *Les Passions*, arts. 144-6.

6. After these general considerations, it will be worth while for us to consider more clearly the precise actions which can and cannot be imputed to a man. Such things, then, as arise from a physical necessity or from any causes beyond the direction of men, cannot be imputed to any one. So it is a foolish thing told of the kings of Mexico, namely, that on ascending the throne they promised their subjects to see to it that the sun would rise and set at the proper time, the rain fall when it was needed, and the earth bring forth its fruits. Nor can it be imputed to a man that natural causes produce one and not another effect, in one and not another way; for instance, that the fire gives forth heat and not cold. And yet the effects of natural causes give good ground for imputation, in so far as their active power was elicited or strengthened by man, through the application of active principles to passive, or through the awakening of hidden forces by suitable means. On this principle a heavy yield is credited to the farmer, according as his diligent cultivation increased the fertility of the field; the damage from a blaze to him who set it afire; the varied colour of lambs to the cunning¹ of the shepherd Jacob (*Genesis*, xxx. 37). Such a natural effect can even be attributed to a man, because he moved the Supreme Cause, who directs all things, to determine or not to determine upon that particular effect. On this basis the three-year drought can be attributed to Elijah (1 *Kings*, xviii. 1; *James*, v. 17). Similarly it is related that a long continued drought in Greece was brought to an end at the prayers of Aeacus. Apollodorus, Bk. III [ii. 6]. So also the death of those whom the

¹ For *salertiae* read *solertiae*.—Tr.]

pestilence destroyed, may in a measure be imputed to David, although not to the extent of making it murder (2 Sam. xxiv. 13, 17).

7. Furthermore, one cannot impute to a man the actions and effects of the vegetative faculties which are found in his body, as they are due to his birth, or to causes for which he is not responsible. Although it is within his power to lay before those faculties an object suited or not suited to them, which may nourish, weaken, or destroy their power, as well as to pervert or injure the organs through which they function. Thus a man can deserve no merit for having received from nature an active, strong, and well-developed body. But to overcome a natural weakness by attention to it, and to increase one's native strength, deserve praise; while to destroy one's strength by laziness or wilfulness, is regarded as a disgrace. So no one can be criticized for a feeble, sensitive, and weak body, for distorted or maimed limbs, or for 50 want of strength, since, indeed, such weaknesses were contracted through no fault of his. As Aristotle, *Nicomachean Ethics*, Bk. III, chap. vii, says: Not only are the vices of the soul voluntary, the vices of the body are also voluntary in some cases, and in these cases we are wont to pass censure. For while nobody censures people who are born ugly, we do censure people whose ugliness come from negligence and want of exercise. It is the same with bodily infirmities and defects; nobody would find fault with a person who is born blind or whose blindness is the result of illness or of a blow; he would rather be an object of pity; but if his blindness were the result of intemperance, or licentiousness of any kind, he would be universally censured. (W.)

A similar sentiment is in Plutarch, *How to Study Poetry* [xiii, p. 35c]:

When Ulysses reproacheth Thersites, he objecteth not to him his lameness nor his baldness nor his hunched back, but the vicious quality of indiscreet babbling. [. . .] In this instance, Homer derides those who are ashamed of their lameness or blindness, as not thinking anything a disgrace that is not in itself disgraceful, nor any person liable to a reproach for that which is not imputable to himself but to Fortune. (And a little farther on) [p. 35 r]: For as they who scourge a man's garments do not touch the body, so those that turn other men's evil fortunes or mean births to matters of reproach, do not only with vanity and folly enough lash their external circumstances, but touch not their internal part, the soul, nor those things which truly need correction and reproof. (G.) (Add Plutarch, *Symposiacs*, Bk. II, qu. i, p. 633, A-C.)

Yet it was not without reason that among the ancient Gauls, as Strabo, Bk. IV [iv.], relates: 'A youth who exceeded the measure of his girdle was punished,' since they judged that a large stomach on a youth came from gluttony and laziness. Nicolaus of Damascus, *De Moribus Gentium* [fig. 105 Jakoby]: 'The Iberians have a belt of a certain fixed length, and if any man's stomach is too large to fit that, it is regarded as a great disgrace.'

Under this head come also other faculties, which are in our bodies by the gift of nature without any contribution on our part, when, for example, one is endowed with a quick or a sluggish mind, keen or dull senses, a good or a weak memory; provided such a natural faculty has not been strengthened or weakened by a man. Here applies the passage

in Aristotle, *Nicomachean Ethics*, Bk. V, chap. x: 'There are many things in the course of nature which we both do and suffer with full knowledge, but which are not either voluntary or involuntary, as e.g. growing old or dying.' (W.) These are not the kind of thing that can be imputed. You may also include under this head the fact that parents cannot be held accountable for bringing into the world wicked children, provided they did not contribute to their wickedness by the way in which they brought them up. Hence the statement of Vindex cannot be approved, who said that Nero was justified in killing his mother, 'because she brought into the world such a monster.' Philostratus, *Life of Apollonius of Tyana*, Bk. V [x].

8. It is clear, also, that such things as exceed our strength, and cannot be prevented or accomplished by it, cannot be imputed, provided that the weakness in question was not contracted by our own fault. On this principle rest the well-known maxims: Impossibilities are incapable of obligation; No one is to be understood as having enjoined impossibilities in his own law; and, consequently, If any impossibility is found in a law, as well as in an agreement or will, it is to be treated as not binding, or else as warranting a more suitable interpretation. Ovid, *From the Pontus*, Bk. I, el. viii [I. vii. 37-8]: 'No power has strength to guarantee that a friend will do no wrong.' (W.) Quintilian, *Institutes of Oratory*, Bk. VI, chap. iii [28]: 'To insult another's misfortune is thought inhuman, either because the insulted party may be free from blame, or because similar misfortune may fall on him who offers the insult.' (W.) Here applies also the story which Herodotus, Bk. VIII [iii] tells¹ of how, when Themistocles demanded money of the inhabitants of Andros, with the support of the two most powerful goddesses, 'Persuasion and Necessity,' they opposed to him two even stronger, 'Poverty and Helplessness.'

But it should be observed that it is one thing for a matter to be called *physically impossible*, and another for it to be called *morally impossible*. The former impossibility offers an obstacle, which so hampers the will that it cannot free itself for action, or wastes all its efforts in the attempt. But a moral impossibility affords no obstacle superior to the power of action inherent in the will, since it arises entirely from the will itself. On the latter basis, therefore, we say it is impossible that all men should be willing to agree to hand down *gratis* a lie to posterity; or, further, that any man should order his life so circumspectly and piously that he offers no offence in the most trifling thing, at least in the precipitancy of his passions. From such matters the author of *De Principiis Justi et Decori* [Velthuysen], p. 174, concludes:

A legislator cannot command what is physically impossible, but he can command obedience in things which include a moral impossibility, because he commands nothing contrary to

¹ [For *memerat* read *memorat*.—Tr.]

the liberty of the will, since the entire difficulty in obedience lies in the will itself. Thus it is not impossible for a single individual to frame a lie *gratis*, and if so, it is not impossible for a whole group; yet it is certain that all mankind will not do so. By the same argument every man is free to speak the truth, and therefore so is the whole body politic; but it is absolutely certain that no state will be so happy as to have all its members refrain from falsehood; and yet such an impossibility does not take away the liberty of the individuals, nor does it free them from sinning. So also we say that a perfect obedience to the law is impossible, and yet such an impossibility will not diminish the freedom of the will, because it is as impossible for one man to obey the will of God in all things, as it is for all mankind to be free from the guilt of lying; and yet one can guard himself from single acts of sin, just as individual citizens can keep themselves unspotted from sin, although this will never happen.

In so far as these matters pertain to theological dogmas we leave them for consideration in their proper place. But if we confine our discussion to the bounds of a court of law, there seems to be no reason why these questions should not be admitted rather than those raised by Grotius, Bk. II, chap. xx, § 19, where he speaks about sins which some call 'sins of daily occurrence': 'It can indeed be questioned whether such as these can rightly and properly be called sins, since the liberty, which they seem to have in specific cases, they do not have when considered in the aggregate.' How, indeed, can such slips taken together avoid the character of sin, when as single cases they are sins? And yet, in a court of law, such slips are generally regarded as not subject to punishment.

9. Those things also cannot be imputed, which one suffers or does under compulsion, for such things are understood to belong in a moral sense to the man who exerted compulsion, while he who experienced or executed them is properly treated merely as the object or physical instrument. Dionysius of Halicarnassus, Bk. I [lviii]: 'Everything that is involuntary deserves forgiveness.' Cicero, *On Invention*, Bk. I [xxx]: 'If it is suitable to forgive those who have unintentionally hurt us, then we ought not to feel grateful toward those who have unavoidably helped us.' One is considered to have suffered compulsion, not only when the principle of motion is in another person, who forces a man, despite his resistance and objection, to lend his body to do or suffer something, but quite as much, when, upon the threat of some peril to his life,¹ or of some other grave evil, a man is forced by another to undertake the execution of a deed to which he himself is otherwise strongly averse; yet this in such a way that not the victim of compulsion, but the other, wishes to be regarded as the author of the deed. An example of the former kind is when a stronger man has violently shoved one person against another, or when he has seized the person's hand and struck another with it; or when one has offered violence to a woman who did not, through any fault of hers, incite his passion. Her body, indeed, suffers disgrace in this way, but the taint does not touch her

¹ [For *vires* read *vitas*.—Tr.]

soul. 'My body only was violated, my heart is pure,' says Lucretia in Livy, Bk. I, chap. lviii. This story is admirably treated by Henri Estienne (Stephanus), *Apology for Herodotus*, chap. xv. But you cannot excuse those women who allow a ring to be stripped from a weakly resisting finger.¹

It is an instance of the latter kind of compulsion, when, for 52 example, a soldier is ordered, upon pain of death, to execute a man whom he knows to be innocent. Nothing can be imputed to him on this count, since he is assigned the mere execution, which is agreeable with his position as a soldier, and which there is no reason to refuse at the risk of his life, since he could by no means save the innocent man by his own death. But it must be agreed that the execution of some acts is so momentous or disgraceful that it is considered noble to prefer death rather than to lend one's assistance to such deeds, even though the guilt therefrom will attach to another. This is shown in the passage of Aristotle, *Nicomachean Ethics*, Bk. III, chap. i, given above. It would be an example of this, if one should be commanded to defile his own mother. When that was done by Oedipus, even through insuperable ignorance, he was so troubled that with his own hands he tore out his eyes. Hence Aristotle in the passage mentioned above, *Nicomachean Ethics*, Bk. III, chap. i, gives as an example: 'If a tyrant, who had our parents and children in his power, were to order us to do some shameful act, on condition that, if we did it, their lives should be spared, and, if not, they should be put to death.' (W.) The word 'shameful' must be accepted with reservations, and not extended to include such things as the example we have just given.

10. Ignorance also prevents imputation, in so far as it makes an action involuntary. Xenophon, *Training of Cyrus*, Bk. III [i. 38]: 'When men do wrong from ignorance, I believe they do it quite against their will.' (M.). Euripides, *Hippolytus* [1334-5]:

But thy transgression, first,
Thine ignorance from utter sin redeems. (W.)

Certain passages from Aristotle furnish excellent illustrations of this; as *Magna Moralia*, Bk. I, chap. xxxiv [I. xxxiii]:

When the ignorance is the cause of his doing something, he does not do this voluntarily, so that he does not commit injustice; but when he is himself the cause of his ignorance, and does something in accordance with the ignorance of which he himself is the cause, then he is guilty of injustice and such a person will justly be called unjust. Take for instance people who are drunk. Those who are drunk and have done something bad commit injustice. For² they are themselves the causes of their ignorance. For they need not have drunk so much as not to know that they were beating their father. Similarly with the other sorts of ignorance which are due to men themselves, the people who commit injustice from them are unjust. But where they are not themselves the causes, but their ignorance is the cause of their doing what they do, they are not unjust. This sort of ignorance is that which comes

¹ [Horace, *Odes*, I. ix. 24.—Tr.]

² [For *quandoquidem* read *quandoquidem*.—Tr.]

from nature; for instance, children strike their parents in ignorance, but the ignorance which is in them being due to nature does not make the children to be called unjust owing to this conduct. For it is ignorance which is the cause of their behaving thus, and they are not themselves to blame for their ignorance, for which reason they are not called unjust either. (S.)

Seneca, *Phoenician Maidens* [249 ff.]:

Some are o'ertaken by untimely fate

While still within the womb, yet without sin. (M.)

But I should not be inclined to extend this last consideration beyond the human courts of law.

Although it should be observed, in the case of children, that they are sometimes reprov'd or chastened for such things, not because they could be considered in a court of law as sins, in the proper sense of the word, but as a means only of correction, to keep the children from annoying others by so acting, or, on arriving at maturity, from finding pleasure in a habit which they had formed in their tender years. The same position is to be maintained regarding the insane and delirious, who have come by such an affliction through no fault of theirs; for any blows given such persons have no more the nature of a punishment for a fault, than have the blows that are given a kicking horse to break him of his habit. Add Antonius Matthaeus, *De Criminibus Prolegomena*, chap. ii, §§ 5-8.

But if a man is the cause of his own ignorance, and knowingly and willingly has become responsible for not knowing what he could and should have known, he is held to have acted knowingly and with deliberate intent. Aristotle, *Magna Moralia*, Bk. I, chap. ix. 'For we blame the ill and the ugly when we think that they themselves are the 53 causes of their being ill or of their having their body in a bad state, on the assumption that there is a voluntary action even there.' (S.*) And more fully, *Nicomachean Ethics*, Bk. III, chap. vii [V. vii]:

Legislators punish and chastise evildoers, unless the evil be done under compulsion or from ignorance for which its authors are not responsible. But they punish a person for mere ignorance, if it seems that he is responsible for it. Thus the punishments inflicted on drunken people who commit a crime are double, as the origin of the crime lies in the person himself, for it was in his power not to get drunk, and the drunkenness was the cause of his ignorance.

(Plautus, *Truculentus*, Act IV, sc. iii [831 f.]: 'It's not wine that's in the habit of ruling men, but men wine; those, indeed, who are virtuous men.' (R.))

Again men punish people who are ignorant on any legal point, if they ought to know it, and could easily know it. Similarly in other cases we punish people, whenever it seems that their ignorance was due to carelessness; for they had it in their power not to be ignorant, as they might have taken the trouble to inform themselves. (W.)

Ignorance of universals and of what every one was expected to know, does not prevent imputation, but only ignorance of particular cases,

and of what is concerned with a fact. Aristotle, *Nicomachean Ethics*, Bk. III, chap. ii:

An action is not involuntary if a person is ignorant of his true interest. The ignorance which is the cause of involuntary action, as distinguished from that which is the cause of vice, is not such ignorance as affects the moral purpose, nor is it ignorance of the universal; for this is censurable. It is rather ignorance of particulars, i.e. ignorance of the particular circumstances and occasion of the action. Where this ignorance exists, there is room for pity and forgiveness, as one who is ignorant of any such particular is an involuntary agent. (W.)

An example of this ignorance is given by Cicero, *On Invention*, Bk. II [xxx]. There was a law somewhere,

That no one was to sacrifice an ox to Diana. Sailors, tossed by a violent storm upon the deep, vowed that, if they reached the harbour which they saw, they would sacrifice an ox to the god of the place. It so happened that in that port there was a temple of that Diana to whom it was unlawful to sacrifice an ox. Being ignorant of the law they sacrificed an ox after landing, and in consequence were brought to court.

If, in a person's deed, there be no malice of forethought, or ignorance voluntarily contracted, but only such as crept in through a kind of inadvertence (what Aristotle properly calls an *ἀμαρτημα* [mistake]), imputation is not, indeed, entirely suspended, but it is partly diminished, and to this extent the saying of Quintilian, *Institutes of Oratory*, Bk. I, chap. vi [2], may be allowed: 'They commit no fault who follow great authorities.' (W.) This point is covered in that remarkable passage of Aristotle, *Nicomachean Ethics*, Bk. V, chap. x, which is referred to and illustrated by Grotius, Bk. III, chap. ii, § 4. And here I would introduce the example from Aristotle, *Magna Moralia*, Bk. I, chap. xvii, of the woman who gave her lover a philtre, from which he died. The court of the Areopagus declared her innocent, when indicted, because she did it without forethought and purpose,¹ for she gave it out of her love and with no intent of murdering the man, although she failed to achieve her intention. However, such a decision must, of course, presuppose that it never occurred to the woman that the drink could in any way be harmful. Otherwise the Roman law is superior, *Digest*, XLVIII. xix. 38. 5. Add Antonius Matthaeus, *De Criminibus* V. v. 6, on *Digest* XLVIII.

Furthermore, since the images which fancy forms in sleep are not within our power, what one seems to do in his dreams cannot be imputed to him, except in so far as our dwelling with pleasure on such things during the day has impressed their images deeply upon our mind. Nonnus, *Dionysiaca*, Bk. XLII [325 f.]: 'For what a man does in the daytime, the image of that he beholds at night.' Hence no crime can attach to him who, according to Tacitus, *Annals*, Bk. XI [iv], saw in a dream Claudius crowned with a wreath of wheat. Add Ammianus Marcellinus, Bk. XV, chap. ii. So also the fisherman in Theocritus,

¹ [For *cogitatio* read *cogitato*.—Tr.]

Idylls, xxii, was not a little perturbed because he thought that he had sworn in a dream never again to set forth to sea. (Add, however, the oath made in a dream by Evagrius in Sozomen, *Ecclesiastical History*, Bk. VI, chap. xxx.) Nor was Caesar guilty of incest from his dream as told in Suetonius, *Julius Caesar*, chap. vii. Although Byblis was not 54 entirely innocent, in Ovid, *Metamorphoses*, Bk. IX [468 f.]: 'When she is relaxed in peaceful slumber, she often has visions of her love: she sees herself clasped in her brother's arms and blushes, though she lies sunk in sleep.' (M.) And the argument which Plutarch, *Quomodo Quis Suos in Virtute Sentiat Profectus* [pp. 82 F, 83], offers is not altogether groundless, namely, that a fairly clear conclusion can be drawn from a man's dreams as to how his mind is shaped. Epicurus, in Diogenes Laertius, Bk. X [120], says that the wise man 'will be the same man asleep and awake.' (Y.) Some apply to this purpose *Psalm* xvii. 3. Add Claudian, in the preface to *De Raptu Proserpinae*.¹ Theocritus, *Idylls*, xxii [xxi. 44-5]: 'For in his sleep every dog surmises food.'² (E.*)

12. Finally, it is unreasonable that the imputation of some future evil should be dragged, as it were, backwards to deeds already done, unless that future misdeed hangs upon some present or past act of ours, like a necessary effect upon its cause. For an effect is very commonly attributed to the man with whom the cause was connected. In fact, it is not at all strange that by imputation through favour some future deed may work an effect on the doer himself, or some one else, before it is done, for just as one can do a man a favour gratis, so one who knows the future will be able to do some favour upon certain conditions. But since evil actions can only be imputed as they are deserved, it would be absurd to impute them backwards to those who have no knowledge of the future, no obligation or ability to prevent their taking place, and, finally, no communication of action with him who was going to do it. Cicero, *On Invention*, Bk. I³ [xliv]:

That is remote, when one goes too far back; for example: If Publius Scipio had never given his daughter Cornelia in marriage to Tiberius Gracchus, and thereby caused the birth of the two Gracchi, there would never have been such serious revolutions; therefore, it appears that Scipio is responsible for this misfortune.

13. With the above exceptions, no action should be thought involuntary and incapable of imputation, no matter how irrational its undertaking be, or how strongly one be led to it by some disease of the mind. Indeed Plato, *Laws*, Bk. V [p. 731 c], says:

As to the actions of those who do evil, but an evil which is curable, in the first place, let us remember that the unjust man is not unjust of his own free-will. For no man of his own free-will would choose to possess the greatest of evils, and least of all in the most honorable part of himself. (J.)

¹ [Probably *In vi. consulatum Honorii* is intended.—Tr.]

² [Later texts read 'surmises a bear'.—Tr.]

[Forl. read l. I.—Tr.]

Add *Timaeus*, 1085 A [p. 86 E]; Marsilio Ficino, *On Plato's Laws*, Bk. IX, Preface; Apuleius, *De Philosophia* [II. ii]. Aristippus used to say, in Diogenes Laertius, Bk. II [95]: 'Errors ought to meet with pardon; for that a man did not err intentionally, but because he was influenced by some external circumstance.' (Y.) The same thought is expressed in M. Antoninus [Aurelius], Bk. IV, § 3; Bk. VII, §§ 22, 63; Bk. VIII, § 14; Bk. XI, § 18. But Aristotle refutes this idea in several places, as in the *Magna Moralia*, Bk. I, chap. ix:

As Socrates said, to be virtuous or vicious does not rest with us to come about. For if, he says, one were to ask any one whatever whether he would choose to be just or unjust, no one would choose injustice. [. . .] And it is evident that any who are vicious will not be vicious voluntarily; so that it is evident that neither will they be involuntarily virtuous. (S.)

Aristotle rejects this by arguing that otherwise it would be absurd for a legislator to command good actions, and to forbid or punish evil ones, unless both were ἐφ' ἡμῖν, in our power; and that otherwise it would be absurd for praise to be accorded virtue, and blame to follow upon vice. Also at greater length in *Nicomachean Ethics*, Bk. III, chap. vii: 'All men aspire after what appears to be good, only they are not masters of the appearance. But what the end looks like to each man depends upon his character.' (W.) For it is within our power, and not so very difficult, to understand properly whether a thing is just or
55 not. Add Eustratius on the passage. Along the same line, and in the same chapter, Aristotle shows clearly that ignorance, contracted by one's own fault, does not make one's action involuntary, nor, also, do base habits and a mind corrupted by frequent sins. 'If', he says, 'a man without ignorance does things whereby he is made unjust, he is such of his own volition; but he will not, by the mere wishing, cease to be unjust and become just.' (W.) (This last statement, however, must be taken either in a composite sense, or on the grounds that the mere will may not by a single effort remove a once established disease of the mind, although it can be cured by long continued effort.)

No more is one who is sick made well [by wishing]. It may happen that he is voluntarily ill through living an incontinent life, and disobeying his doctors. If so, it was once in his power not to be ill; but, as he has thrown the opportunity away, it is no longer in his power. Similarly, when a man has thrown a stone, it is no longer possible for him to recall it; still, for all that, it was in his power to throw or fling it, as the original act was in his power. So too the unjust and licentious person had it in his power in the first instance not to become such, and therefore he is voluntarily unjust or licentious; but when he has become such, it is no longer in his power not to be unjust or licentious (W.)

before, of course, they have reformed themselves.

In this connexion what the author [Velthuysen] of *De Principiis Justitiae et Decori*, pp. 165 ff., says should be considered:

Moral habits, which we commonly call evil, are not in fact sins, and are not deserving of punishment, if considered in themselves. For they do not touch an effect by any moral

causality, so long as they remain habits and do not manifest themselves in acts. Whatever obstacle they furnish to virtue they effect through an act, which a man calls forth by his will, this becoming thereby a cause of moral taint. But to wish to create some other moral cause superior to the will, is to destroy the very nature of the will, and to make its elicited act an enjoined one, and to attribute to a habit a real power of operating without any actual operation. For operation is only through the will, and prior to an elicited action of the will no moral operation can take place, since the morality of an act proceeds from the will. Nay, prior to an action of the will, a habit is only a physical thing, or a physical affection of the soul. But when the soul operates for evil through the will, because of this act the habit ceases. The power by which evil habits dispose the mind to evil action, is different from that by which, for example, lascivious conversation arouses licentiousness in the minds of its auditors, since the operation of the speech is previous to that of the will of the auditor, although the effect does not always follow.

This can be made clearer by the following example. A twist to the foot is in itself, and so long as the foot is quiet, not a violation of the rules of dancing. But when the crooked footed makes some wrong steps, the moral cause is not the twist to the foot, but the will of him who moved the foot. Our author continues: 'The reason why we detest evil habits, is partly because the man contracted them by evil deeds, and partly because men who have them are usually inclined to evil acts. And although they are diseases of the mind, they do not deserve punishment of themselves but because they were voluntarily contracted.' Thus, if we beat a boy because he put his ankle out of joint in a wanton and reckless jump, the cause for the blows is not the putting his ankle out of joint, but the reckless jump.

14. Furthermore, not only his own actions, but also those of others, are commonly imputed to a man, but for this to be possible he must in some way have had some real part in the actions. Since otherwise there is no reason for the effects of a moral action passing from one person to another, unless the other has participated in it by doing or omitting something. Arrian, *Epictetus*, Bk. I, chap. xxviii [23]: 'No one comes to his fall because of another's deed.' Marcus Antoninus [Aurelius], Bk. VIII, § 56:

To my power of choice the power of choice of my neighbour is as much a matter of indifference as is his vital breath and his flesh. For however much we may have been made for one another, yet our ruling Reason is in each case master in its own house. Else might my neighbour's wickedness become my bane; and this was not God's will, that another might not have my unhappiness in his keeping. (H.)

So when some sound comes to our ears which we are unwilling to hear, it is not an offence to have heard it,¹ provided nothing else was done. Lucian, *De Imaginibus* [xxviii]: 'Unless you think that there are mistakes made also in hearing.' Yet a guilty hearing may sometimes be considered a sign of assent. So in Tacitus, *Annals*, Bk. I [xxxv], when some revolting soldiers offered Germanicus the throne, 'he leapt down

¹ [For *aliquid* read *aliquid*.—Tr.]

headlong from the tribunal, as though himself infected with their crime.' (R.) Themistius, *Orations*, v [xix, p. 230 B]:

Formerly, in crimes of this kind, no line was drawn between guilt and accident; and it was regarded as equally wicked for a man to engage in some unholy machinations, and to hear about the same quite unintentionally. This, however, was a charge brought against nature rather than against man, because nature had given him wide-open ears, which he cannot close and open at will, as he can his eyes and his mouth. And yet hearing is practically the only sense which eludes our control, and whatever pours in thereby, as into a house wide open and without any doors, must be received. But you made a complete separation between hearing and guilt.

It sometimes happens, accordingly, that an action is not imputed to its immediate performer, but to another who commanded it, I mean when a man charges the mere execution of some deed upon a subject of his under threat of the most terrible punishment which he is able to inflict. An example from Procopius, *History of the Gothic Wars*, Bk. I [vii. 19]:

As for the proposals which the ambassador has received from the lips of him who has sent him and then delivers, he himself cannot reasonably incur the blame which arises from them, in case they be not good, but he who has given the command would justly bear this charge, while the sole responsibility of the ambassador is to have discharged his mission. (D.*)

So when the Roman Senate had decreed that the consul should be delivered over to the Samnites, it was a foolish proposal of some one, that the man who held the swine while the treaty was being made, should also be handed over; Cicero, *On Invention*, Bk. II [xxx]. Mamertinus, *Panegyricus Maximiano Augusto dictus*, I [xi. 5]: 'From the Emperor proceeds even that which is administered by others.'

Seneca, *Trojan Women* [870-1]:

If aught of sin there be,
'Tis his who doth command the deed. (M.)

When Mithridates killed Attilius and others who had conspired against him, he dismissed the freedmen of Attilius unhurt, 'since they had merely served their master,' Appian of Alexandria, *Mithridatic Wars* [xc].

But an action is more commonly imputed quite as well to him who performed it, and this mainly in three ways: (1) the master is considered the principal cause of the action, and the doer a minor cause; (2) both of them are equally guilty; (3) the master is the minor cause, and the doer the principal¹ cause. In every case, however, a man joins another's action either positively or negatively, that is, by commission or omission.

Now a man is considered the principal cause of an action, which is actually carried out by another, when he commands one who is his subject to do it; or when by some authority of his, that cannot easily be resisted, he moves one to do something which could not be enjoined by

* [For *principales* read *principalis*.—Tr.]

his orders in the strict sense of the word. This is illustrated in Tacitus, *Annals*, Bk. III [xvii], by the action of Tiberius in the case of Marcus Piso, whom he cleared of the charge of rebellion; "the father", he said, "had given the order, and the son could only obey." Add *Digest*, IX. ii. 37 beginning; XLVII. x. 11. 3; Ant. Matthaëus, *De Criminibus Prolegomena*, chap. i, § 13. Now it was the authority and not any power of a father that could bind him to commit that offence.

He is also the principal cause who gives the consent which is necessary before one can do something. Cf. Valerius Maximus, Bk. II, chap. viii, § 2; Libanius, *Progymnasmata* [p. 12 D, *Chriae*, ii. 14]: 'He was of the opinion that the man who owed the penalty for what had been done, was the one without whose consent it never would have been done in the first place. [. . .] Those whose hands have actually committed the crimes are not to be considered more guilty than those who made the same possible.'

Again, he is a principal cause who ought to have prohibited something, and yet does not, assuming that he is under a perfect obligation 57 to do so, and one has the right to expect from him such a prohibition. See *Digest*, IX. ii. 45; IX. iv. 2; XLVII. vi. 1. 2. Seneca, *Trojan Women* [291]:

He who sin
Forbids not when he can, commits the sin. (M.)

Sophocles, *Philoctetes* [387-8]:

And all the lawless doings in the world
Spring from ill teaching. (S.)

For this reason, also, Diogenes cuffed the teacher of a gluttonous boy: 'Very properly regarding the one who failed to teach, rather than the one who failed to learn, as being at fault.' Plutarch, *An Virtus Doceri Possit* [ii, p. 439 D]. See also Aelian [*Varia Historia*,] III. x. Juvenal, *Satires*, xiv [233-4]: 'No one holds it enough to sin just as much as you allow him, but men grant themselves a more enlarged indulgence.' (E.) Add *Digest*, I. xvi. 4. 2. In Tacitus, *Annals*, Bk. IV [xx. 5], Messalinus moved:

To provide by a decree of the senate, 'that the magistrates of the several provinces, however innocent themselves, and even unacquainted with the mismanagement of others, should be punished for the crimes of their wives committed in the provinces, equally as for their own.' (O.)

So also in the English laws, a husband is held responsible and must give satisfaction for the offences of his wife towards others, whether of word or deed, on the ground that he did not use the power which was his to correct her shortcomings. Nay, even if a man and his wife unite in committing a felony, according to the laws of England the wife is not considered a principal in the crime, nor even an accessory, because the

obedience she owes her husband put her under constraint. Edward Chamberlaine, *The Present State of England*, Pt. I, chap. xvi.

He is a principal cause who commands or hires others to commit some crime. See Antonius Matthaeus, *De Criminibus Prolegomena*, chap. xiii; and V. iii. 16 on *Digest* XLVIII.

Such, also, is the man who gives his assistance to another; as one who places a ladder to a window, so that a thief may enter a house; who knocks the money out of a man's purse, so that a thief may snatch it up; who scattered a herd of cattle, so that another may steal them. Cf. *Digest*, XLVII. ii. 54. 4; XLVII. ii. 66. 2.

Or the man that conceals stolen goods, as in the line of Phocylides, [136]: 'Both are thieves, the one who stole and the one who hid.' Plato, *Laws*, Bk. XII [p. 955 B]: 'If any one knowingly receives anything which has been stolen, he shall undergo the same punishment as the thief.' (J.) *Digest*, XI. iv. 1. Add *Digest*, XLVII. xvi; *Edict of Theodoric*, chap. cxvi. On the abettors of adultery cf. *Digest*, XLVIII. v. 8 and 9. Periander, the tyrant of Corinth, 'drowned all women panderers,' Heraclides, *De Politis* [Aristotle, *Fragments*, XXI. xx]. Add Ant. Matthaeus, *De Criminibus Prolegomena*, chap. i, § 11, and his remarks in X. i. 1-2 on *Digest* XLVII.

He is also a principal cause who should have given help to an injured party and did not. Cicero, *On Duties*, Bk. I [vii]: 'The man who does not repel or withstand an injury, if he can, is as much to blame as if he deserted the cause of his parents, his friends, or his country.' (E.) Add Ant. Matthaeus, *Prolegomena*, chap. i, § 15. So if soldiers who were hired to protect travellers should refuse to drive off the attacks of robbers, for whom they are a match, they will be held as guilty as the robbers. A watchman will likewise be held responsible for a fire which he could have quenched at its start and did not. Add *Ezekiel*, xxxiii. 6. Thus, among the Egyptians, according to Diodorus, Bk. I, chap. lxxvii, a man who saw another being murdered on the road, or suffering some violence, and, when he could have aided him, did not, was liable to capital punishment. Even if he was too feeble to give any help he was still expected to point out the criminals and bring their crime into court; should he fail to do this, he was given a certain number of stripes and starved for three days. Add *Digest*, IV. ix. 7; XLVIII. ix. 2. 6; XLVIII. ix. 7; XLVIII. x. 9. 1; XLIX. xvi. 6. 8. So also Abbas, a Persian king, when he was stamping out the robbers, according to Pietro della Valle, *Viaggi*, Pt. II, ep. 1, published a decree, that, if any traveller was killed or robbed, the inhabitants of the nearest town had to give satisfaction for the deed. And among the Spartans, 'He who did not reprove a fault that was committed in his presence was adjudged equally culpable with the guilty.' (G.*) Plutarch, *Instituta Laconica* [p. 237 c, viii]. Cato, also, in urging the magistrates to punish offenders, used to say: 'That

they that did not prevent crimes when they might, encouraged them.' (G.) [Plutarch, *Apophthegms*, *Cato*]. See *Digest*, IX. iv. 2; XL. viii. 7; XXVII. viii. Plato, *Laws*, Bk. IX [856 B], has admirably treated the silence and dissimulation of magistrates: 'But he who takes no part in such proceedings' (that is, revolutions), 'and yet being the chief magistrate of the state, knowing of them or not knowing of them, by reason of cowardice does not interfere on behalf of his country, such a one we must consider nearly as bad.' (J.) Add the story of the daughters of Scedasius in Plutarch, *Amatoriae Narrationes* [iii], and Grotius on *Proverbs*, xxix. 24: 'He is on the same plane as a thief, who, when adjured by the magistrate, does not give the name of the thief who is known to him.' See also *Leviticus*, v. 1.

In the same way, if a madman, entrusted to the care of a person, has been guarded rather carelessly¹ and so done injury to some one, the guardian will be held responsible for the deed, even though no responsibility can be imputed to the madman himself. See *Digest*, I. xviii. 14.

But those who give advice, and praise, and assent, to a contemplated deed, are considered minor causes of another's deed, provided that their advice, praise, and assent, were factors in the undertaking of the deed. For otherwise the man whose praise was not a factor in some evil deed, cannot atone for the deed itself, but only for his depraved will. Ovid, *Tristia*, Bk. V [xiv. 45-6]: 'He who reminds thee to do what thou art already doing, by so reminding praises thy acts and by his very exhortation approves them.' (W.)

So a law of the Lombards, Bk. I, tit. ix, § 25, holds a man, who stands by and urges on a scoundrel, to be a participant in the crime. Add *Romans*, i. 32. Quintilian, *Declamations*, cclv: 'To commit a crime and to approve it are in nature much the same.' Ant. Matthaeus, *De Criminibus Prolegomena*, chap. i, §§ 9, 10 and 14. You may also put under this head men upon whose recommendation some business is entrusted to a person; the mistakes of such a man quite properly cause his sponsors also to blush. See the words of Socrates in Xenophon, *Memorabilia*, Bk. II [vi. 36 ff.].

But the question of the guilt of advice, as defined in *Institutes*, IV. i. 11, deserves some special notice. About this passage there has been much dispute among writers on the law, whether, namely, the words 'by help and counsel' [*ope et consilio*] should be taken conjunctively or disjunctively. For if the word counsel means 'with intent or purpose', then only the man who aided a thief by his evil advice, and not by some thoughtless word or deed, is guilty of theft. Cf. *Digest*, XLVII. ii. 52. 13. However, if any one has merely given advice and not help, we must decide whether such counsel was general or special. An example of the former is, when a man advises a person, who is com-

¹ [For *negligentibus* read *negligentius*.—Tr.]

plaining of his poverty, to get something by stealing it. The man who gives such advice cannot be regarded as a thief, at least in a court of law. But if a man gives special advice, as, for example, he should show in what way, and at what time, a house was to be entered, where the valuables are located, or how one could best hide himself, such a person will have all the earmarks of a thief. See Ant. Matthaeus, *De Criminibus Prolegomena*, chap. i, § 7. And it should be further observed, regarding counsel and any similar participation in another's act, that by it the guilt is, indeed, communicated, but not entirely transferred from the agent to the counsellor, unless the former was under a special obligation to carry the advice into effect. There is, therefore, some reason to the complaint of Diodotus in Thucydides, Bk. III [xliii], that the orators should be held responsible for their advice,¹ and not the people for listening to them. He adds:

Indeed, if not only those who gave advice but also those who followed it had to suffer alike, you would show greater prudence in your decisions; but as it is, whenever you meet with a reverse you give way to your first impulse and punish your adviser for his single error of judgement instead of yourselves, the multitude who shared in the error. (S.)

So Hobbes, *Leviathan*, chap. xxv, lays down the general rule:

The man who asks for counsel can rightfully neither punish nor accuse the one who gives it. Because when he asks for it he has permitted the adviser to give whatever counsel he pleases. Hence one who gives counsel at the request of his king or of an assembly, whether it pleases them or not, cannot be punished, since it was given upon request.

- 59 (I should add, however, the proviso, that the counsellor give his advice in good faith, and that he have some knowledge of the matter he is advising upon. For it is surely improper to be willing to deliver an opinion on matters about which one is ignorant.)

But if a man advises his fellow-citizens to do something forbidden by law, he can be punished by the state, no matter whether such advice be given with malice or forethought or only in ignorance; because ignorance of the law does not excuse him who should have known the law.

Hence the maxim of the English, the justice of which George Bates, *Elenchus Motuum Nuperorum in Anglia*, Pt. I, commends, cannot be accepted without some reservation:

The king can never err or do wrong to any man; since all the fault and blame properly belongs to his ministers and counsellors, whose duty it is to advise their prince, to refuse their assistance should he be bent on some wrong, or to resign their positions rather than obey him when he orders something contrary to the laws.

Add the incident in Gellius, Bk. I, chap. iii, about Chilon, who felt pangs of conscience because he himself had privately condemned a friend as clearly guilty of a crime, but had persuaded others, who were his judges, to let him² go free. That is also an interesting story of the same author, Bk. II, chap. xviii, to the effect that a person was convicted

¹ [For *concilii* read *consilii*.—Tr.]

² [For *cum* read *eum*.—Tr.]

as a kidnapper, because he held out his mantle, as if he were covering himself, and prevented an escaped slave from being seen by his master who was passing by.

In this, or in the former class, belong those men who lead others by their example to a sin which otherwise they would not have committed. *Matthew*, xviii. 6. Juvenal, *Satires*, II [79 f.]: 'A whole flock perishes in the fields from the scab of one sheep, or pigs from mange, and the grape contracts the taint from the grape it comes in contact with.' (E.) Add Grotius, Bk. II, chap. xvii, § 6 ff. and chap. xxi, § 1 ff.; Antonius Matthæus, *De Criminibus Prolegomena*, chap. i, § 6 ff.

From what has been said, one can judge of the reason and limitation of the common maxims: A man is held the author of what he does through another; *Digest*, II. x. i. 1; we make those things ours to which we give our consent; whatever has been done by another at our command, in things pertaining to us, obligates us ourselves; an action is ours, the execution of which we have laid upon another; and the like. As for that communication of actions which arises from uniting into one moral body, it will be discussed in another place.

Finally, if one may be said to share in another's action, because of his permission, or because he did not prevent the occurrence of such an action, it is necessary not merely that he should have been able of his own natural strength to prevent that action, but that he should also have been obligated to prevent it. When either of these conditions is lacking, nothing can be imputed to a man who allowed another to act at his own pleasure. Hence nothing can be imputed to God on the ground that He is said to permit sins. For he is not constrained to prohibit them in the sense that they cannot possibly be committed, that is, by denying or reducing our natural strength, or destroying the liberty of the will. For without these no moral action could be performed by man. Lucian, *De Mercede Conductis* [xlii], well covers the case: 'God is not responsible, but the responsibility rests with the chooser.'¹ So it is merely a jest when we say, for instance, that we will let it rain. And there is, therefore, no moral effect in our permitting another to perform some action, which we were not enjoined to prevent, or which is beyond our power to prevent, provided such a weakness was not incurred by our own fault; or when it was done without our knowledge, unless this ignorance arose through sheer negligence, and did not surpass the diligence we were expected to show.

And finally, I cannot be imputed with the permission of a good action, which I might, indeed, have prevented, but should not have. And so he can impute nothing to me who has allowed me to avail myself of my own right, or who has not hindered me from doing so, that is, who has done me no wrong.

¹ [Lucian himself is here quoting Plato, *Republic*, x. 617 E.—Tr.]

ON THE RULE OF MORAL ACTIONS, OR ON LAW IN GENERAL

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| <ol style="list-style-type: none"> 1. A law differs from counsel; 2. And from an agreement; 3. And from right. 4. The nature of law. 5. The nature of an obligation. 6. The origin of an obligation. 7. No man is under obligation to himself. 8. A man to be under obligation must have a superior. 9. How a man may lay an obligation upon another. | <ol style="list-style-type: none"> 10. It is not possible to do so by mere force; 11. Nor from any natural superiority alone. 12. What force adds to an obligation. 13. The lawgiver and the law ought to be known. 14. The essential parts of a law. 15. The permission of a law. 16. The material of laws. 17. Who is obligated by a law? 18. The divisions of a law. |
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WE must now discuss that moral rule¹ or law in accordance with which moral actions should be required, and by their agreement² or disagreement with which they are allotted their distinct qualities. First of all, a law should be distinguished from other things which appear to have some relation to it, and are therefore confused by some persons with it; such are *counsel*, *agreement*, and *right*. Now a law differs from counsel, in that by virtue of the latter, a man tries, with the help of reasons drawn from the matter in hand, to induce a person to undertake or to avoid something, but he has no power over him, at least in the present case, to put him under a direct obligation, the person being entirely free to follow his advice or not. Yet counsel may furnish an opportunity for an obligation, in so far as it gives one the knowledge which causes or increases an obligation. Thus a doctor cannot by any authority prescribe to a patient what he must take or avoid, but since he shows him what is wholesome and what unwholesome for him, the patient is expected to lay hold of the one and avoid the other, not from any right which the doctor has over him, but from the law of nature, which charges every man with the proper care of his own life and health. Although a law itself should not lack sound reasons for its promulgation, still these do not constitute the real ground for obedience to it, but it is rather the power of the enactor, who, on publishing a decision of his will,³ lays an obligation upon his subject to carry out the very letter of his command, even though it may happen that the reasons for such a requirement be not entirely clear. The words of Hobbes, *Dé Cive*, chap. xiv, § 1, apply in general here: 'Counsel is a precept in which the reason for obedience is drawn from

¹ [For *denorma* read *de norma*.—Tr.]

² [For *congruunt* read *congruent*.—Tr.]

³ [For *voluntates* read *voluntatis*.—Tr.]

the thing prescribed.' But a law or 'a mandate is a precept in which the reason for obedience is drawn from the will of the person prescribing it. For no one can properly say, "so I will, so I command," unless his will is equivalent to a reason.'¹ And so laws are obeyed, not primarily because of their subject-matter, but because of the will of their enactor. Hence, also, 'Law is the direction of one who has power over those whom he directs; counsel is the direction of one who has no such power. To do what law directs is a man's duty, to do what counsel directs is a matter of one's own pleasure. Counsel is directed to the end of him who is directed,' and this end he himself can weigh and approve. But although law also has an end looking to those upon whom it is enjoined, it is not, however, in their power to weigh or reject that end, for it is determined by him who legislates. 'Counsel is given only to those who desire it, but law also to the unwilling. Finally, the right of a counsellor ceases at the will of him to whom counsel is being given: the right of the legislator does not cease at the will of him on whom the law is imposed.' Add *Digest*, XVII. i. 2. 6.

2. The ancients are not entirely accurate, when they call laws *common agreements*, κοινὰ συνθήκαι and δμολογίαι,² as in Isocrates, *Against Callimachus*, a law on amnesty is called an 'agreement of the city', and in Aristotle, *Rhetoric to Alexander*, chaps. i, ii and iii, and in general among the Greeks. In Dionysius of Halicarnassus, Bk. X [iv], laws are called the 'common agreements of cities'. For leaving to one side the fact, that neither divine positive laws nor natural ones had their origin in the agreement of men, and hence that such a term can apply only to civil laws, still these last are not really agreements or conventions, although in constituting the civil power there were some agreements on legislation. But it is clear that the Greeks had before their eyes in this connexion their democratic constitutions, just as in their other political theories; and because in their states laws were passed, somewhat as a bargain is conducted with the magistrate proposing them, and the assembly approving and enjoining them, the name agreement was applied to them. And yet not even because a majority of the people must agree, can the laws of a democracy³ properly be called agreements, for that agreement is really only the manner in which the supreme power, represented in the general gathering of the people, expresses itself, that being considered the will and decision of all, upon which the majority has agreed. And so the power of a vote, which the individual members of an assembly cast in enacting some decree, is very different from the consent which a person gives on entering upon an agreement; for in the latter case a man who does not give his consent

¹ [In reference to a line of Juvenal, *Satires*, vi. 223 'Hoc volo, sic iubeo; sit pro ratione voluntas'.—Tr.]

² [For κοινὰς & συνθήκας read κοινὰς συνθήκας &.—Tr.]

³ [For *democraticae* read *democratice*.—Tr.]

is not bound, and the agreement cannot be entered into in any other way, but in the former case the man who does not agree is nevertheless bound by the votes of the majority.

The other differences between an agreement and a law are obvious. *For an agreement is a promise, a law is a mandate. In agreements the form is 'I will do thus and so', in laws, 'Do thus and so.'* Since agreements depend in their origin upon our choice, *it is first determined what is to be done before we are obligated in action*; but since a law presupposes the power of some one over us, *we are first obligated in action, and then what is to be done is determined.* And so a man is not bound by an agreement, unless he has obligated himself by giving his consent, but we are obligated by a law, because we owed beforehand obedience to its author. See Hobbes, *loc. cit.*, § 2. Add also the notes of Grotius on *Matthew, In Scripturis*, the words *ἡ καινὴ διαθήκη* [The New Testament].

3. Now since the term 'right' often signifies the same thing as law, especially when it is used for a complex of laws, care ought to be taken that we do not use it in the place of law itself, when it means the power, given or left by laws, to do something. So, for example, when the expression is used, that this or that action is right 'by the law of God', we are not to think that it has been commanded by the divine law, and so can properly be done by us, even though it is forbidden in the laws of men. For since a man has the power to do everything that is within his natural abilities, except what is forbidden by law, it has become customary to speak as if one had a right, by virtue of some law, to do whatever is not denied in that law. Now the word 'right' in this usage, means merely liberty, while the word law denotes some bond by which our natural liberty is restrained.

62 4. In general a law may most conveniently be defined as a decree by which a superior obligates a subject to adapt his actions to the former's command. We use the term *decree*, not because it exists in the mind and will of the one who gives the decree, but because it is communicated to the subject in such a way that he recognizes he must bend himself to it; and on that account it is equivalent for us to a command. We feel that there is little difference whether a law is called a decree or deliverance, provided it be not held that a law must be promulgated by word of mouth or in writing; for it is only necessary that the will of the legislator be made known to his subjects in some way or other, even if only by the intrinsic suggestion of one's inner light. And so we feel that the subtlety of Hobbes, *De Cive*, chap. iii, towards the end, is bootless, when he says that the laws of nature have the force of laws only so far, 'as they have been promulgated in Sacred Scriptures by the word of God; and not as they are certain conclusions arrived at by the reason regarding things to be done or avoided.' For, indeed, the dictate of reason teaches us not only that the observance of natural

laws is profitable to the race of men, but that God also wills and commands mortals to guide their actions by the rule of those laws; and this is enough for the essence of law. Although the reply might be made, that, as natural laws are the dictates of reason, they can be conceived of in no other way than as in some form of speech. Regarding the definition of Grotius, Bk. I, chap. i, § 9, who says that a law obligates to *what is right*, one should observe that he presupposes the existence of something just and right before a law and norm; and so a law of nature does not create right but merely point out a right already existing. What is to be thought of this proposition has been already set forth above [I. ii. 6].

It is, in conclusion, clear, that the term laws includes not only the things that pertain to justice properly speaking, as it regulates by a perfect obligation our attitudes toward others, but also the things which are concerned with other virtues and terminate in the agent himself. For the latter reason laws can be, and are, passed against drunkenness and other kinds of intemperance which are prejudicial principally to the addict himself. In this class falls the law of Zaleucus, Aelian, *Varia Historia*, Bk. II, chap. xxxvii: 'If any Locrian when ill drank strong wine without the prescription of a physician, even if he recovered he was subject to the penalty of death, because he had drunk it without orders.'

But this law is unquestionably too severe. Here belong also sumptuary laws, which set a limit to the cost of food, clothing, buildings, and other commodities; if a man break these, he is wronging no one, since his expense concerns only himself. And yet a citizen can undoubtedly be enjoined to practice frugality, which is of the greatest advantage to every man.

5. But, as we have already stated in our definition of laws, namely, that they come from a superior and have the power of obligating a person, we should, it seems, at this point show the nature and source of an obligation, and also how one can receive an obligation and how one can lay it upon another; or, what amounts to the same thing, how one can, by virtue of one's power, charge something upon another.

Now we defined obligation above, as a moral operative quality by which one is required to furnish or suffer something (considering, of course, an obligation as it attaches to the persons obligated. Richard Cumberland, *De Legibus Naturae*, chap. v, § 27, differs in defining an obligation as an act of a legislator, by which he points out that actions conformable to his law are necessary on the part of those for whom the law is passed). The Roman Jurisconsults called it a bond of the law, whereby we are bound by the necessity of doing something; for by it some moral bridle, as it were, is slipped over our liberty of action, so that we cannot rightly turn to any other quarter than that to which it

directs. An obligation, however, can in no way so bind the will that it cannot, indeed, go contrary to it, although at its own peril. This is the sense in which that dictum of Epictetus, in Arrian, Bk. IV, chap. xii: 'No man is master of another's moral purpose,' is true.

63 Now many other things influence the will to turn to one side rather than the other, but an obligation has this difference from them: they bear down the will as by some natural weight, and on their removal it returns of itself to its former indifference, while an obligation affects the will morally, and fills its very being with such a particular sense, that it is forced of itself to weigh its own actions, and to judge itself worthy of some censure, unless it conforms to a prescribed rule.

It is clear from this fact that an obligation contains a force sufficient to change the will, since nothing can constrain the human mind, as it deliberates on the future, to do or to avoid anything, except reflections on the good and evil which will befall others and ourselves from what we do; it being understood, of course, that its proper liberty is left to the will, and that such actions are to be performed as can properly be imputed to the agent. Again, an obligation differs in a special way from coercion, in that, while both ultimately point out some object of terror, the latter only shakes the will with an external force, and impels it to choose some undesired object only by the sense of an impending evil; while an obligation in addition forces a man to acknowledge of himself that the evil, which has been pointed out to the person who deviates from an announced rule, falls upon him justly, since he might of himself have avoided it, had he followed that rule.

6. There is but one reason why a man can receive an obligation, and that is because he has a will which can turn to one side or the other, and so can adapt itself to a moral rule, being in this way different from some other creatures, which are constrained by some intrinsic power to a uniform mode of action. It follows from this, that, in so far as no necessity is laid upon a man from some external principle, he is considered a free agent, with the power to do everything that lies within his natural strength. Indeed, when he has once decided upon something, or when he has resolved within himself on some choice, still in his decision, in so far as it is held to have proceeded from his will, there is by no means so great a power but that he can rightfully modify it at his pleasure, or change it entirely; unless there come some additional influence from without, which prevents the will, once it is determined and declared, from changing. For a man, when once he has declared a decision of his will, can create a situation in which he cannot later by any right depart from that decision.

Now it is understood that there has been a change of will, not only

when a man expressly¹ declares that his former pleasure is now displeasing, but also when he has done something which cannot be made to square with a former decision of his will. From this principle must be drawn the conclusions of the Jurisconsults on *repentance*. Since if we seek the final and general reason, why repentance is allowed in some acts and not in others, it will be found to be that, in some instances, an external bond has become attached, which does not allow a purpose once declared to be changed, while in the rest the will is allowed to exercise its inherent liberty. The former is usually the case when some other person would be seriously injured by such a change of purpose, and so occasion might arise for the breaking off of social relations and friendship among men. From such a declaration of the will the other man is said to have secured a right, which allows him to exact something from the first party, and, if this is not furnished, he may even exact it by force, coming either from himself or from a superior, according as they are in a state of natural liberty or of organized social relations. Therefore, when no right attaches to another from a declaration of my will, I am then free to repent. But a right has not been acquired by a second person, when a superior who exerts power over me has not allowed him the ability to exact what a first has decided. It is clear from this why positive laws can be repealed by him who made them, 64 because, of course, no one has acquired such a right from them, as will give him the power to demand that those laws shall stand for ever. Now although many states have tried to prevent any changes in their laws by the exaction of an oath to that effect; nay, no matter if an article be affixed providing that any later decree inconsistent with the same be null and void, it may be changed none the less, provided that no man has secured a right by virtue of this clause. For it is preposterous that an earlier statute should claim to annul a later, since absolute power cannot restrain itself, nor can what is revocable by nature be made irrevocable. See Cicero, *Letters to Atticus*, Bk. III, ep. xxiii. Thucydides, Bk. II [xxiv], tells how the Athenians deposited a thousand talents in their citadel, and threatened death to any one who suggested or moved that such money should be used for any other purpose than when a hostile fleet threatened the city. And yet those very same men, as Thucydides tells us later, Bk. VIII [xv], terrified at the revolt of the inhabitants of Chios, annulled that law. And when princes in some of their constitutions expressly add, that, should they in some particular order give a command that is contrary to the constitution, that command is not to be observed by their magistrates or judges, this cannot be taken to mean that the princes themselves are unable to abrogate those constitutions, but what they really mean is that such subsequent orders are not serious, or else that they escape from them without due

¹ [For *expressé* read *expressé*.—Tr.]

forethought. And sometimes by this adroit advice they free themselves from the importunity of bold petitioners whom they would scarcely refuse openly. Add *Code*, V. viii. 1 and 2.¹

But an accurate distinction should be drawn between the positive law itself, and that right the acquisition of which is occasioned by that law. The former may be annulled afterwards by the legislator, but the right still remains, which was acquired by virtue of that law,² so long as it was in force. For it would be the height of injustice to abolish along with a law all of its former effects. If, for example, it should be the law of a state, that, *As the head of a house may have disposed of his property by testament, so let the right to it stand*, certainly a legislator will be able to limit this freedom of testament, and to ordain that hereafter all inheritances³ shall be returned intestate. But it would be unjust to take away all the property received by inheritance from those who received legacies⁴ while the former law was still in force. Another instance is when Pope Boniface VIII, from hatred of Philip the Fair, King of France, annulled all the indulgences that had been granted up to that time to the people of France by his predecessors, an act which Henri Estienne (Stephanus), *Apology for Herodotus*, chap. xl, quite properly ridicules.

A distinction should be made also between laws and other acts of kings and princes, so that no one may believe that all their lawful donations, alienations, and agreements can be withdrawn by them or their successors, for by such acts others have secured a right which should not be taken from them without their consent. Hence⁵ it is clear that, when any one renounces his right, it will not be necessary to add expressly, that neither he nor his heirs will hereafter undertake anything opposed to such a renunciation, or that, if any attempt be made, the action is to be held null and void. For inasmuch as by such a renunciation a man fully relinquishes his right to a thing, and acknowledges that it has been transferred to some one else, even without that clause it was understood, that no effect will follow any disposition by him of that thing, in which he has no further right. It also follows that, because during the life of a testator no one has acquired any right by reason of his will, he can change his will, even though a clause may have been added to the effect that no second will shall be valid. For such a clause only leads to the presumption that any later expression of his mind is not to be taken seriously, but if the clause is recalled by a later will, the first will be null. And so it is the rule that, when a dispute arises over papers of conveyance and agreements regarding any matter, the later document will take precedence over the earlier.⁶

¹ [In the reference by title for *rescripta* read *rescripto*.—Tr.]

² [For *leges* read *legis*.—Tr.]

³ [For *hereditates* read *hereditate*.—Tr.]

⁴ [For *In de* read *Inde*.—Tr.]

⁵ [For *hereditatis* read *hereditates*.—Tr.]

⁶ [For *posteriori* read *posterius priori*.—Tr.]

7. It can be gathered from what has been said, why a man cannot become obligated to himself, or enter into an agreement with himself, or promise himself something which concerns only himself. For whoever obtains a right by an obligation is at liberty to relinquish it, provided no injury is thereby done to a third party. In this instance the person obligating and the person obligated, that is, the one obtaining a right and the one giving it, are the same, and so, no matter how much a man may strive to obligate himself, it will all be in vain, since he can free himself at his own pleasure, without having carried out any obligation whatever; and the one that can do this is actually free. Note, further, that no advantage attaches to such an obligation, since when one gives or denies oneself something, he neither gains anything in the former case, nor loses anything in the latter. Add Seneca, *On Benefits*, Bk. V, chap. vii ff. 65

But when it is said, for example, that a man is under an obligation to preserve himself, what is meant is that the exercise of that obligation inherent in man has its end in the man himself. But, in fact, it goes back to God, the author of natural law, whose right it is to demand the exercise of that obligation and to punish its neglect. And so a man is required to preserve himself, in so far as he is a servant of God, and a part of human society, of which God commands him to be a useful member. On the same count a master can rightfully punish his slave, and a state its citizen, if they render themselves unfitted for the work and duty owed by them.

And the law that a man cannot obligate himself, applies not merely to individuals, but also to groups and organizations as a whole. The statement of some that a man may swear to himself, that, for example, he will avoid this or that thing to which he is led by a depraved appetite, can only mean that he has taken some sort of a vow, the exaction of which belongs to God. Cf. Felden on Grotius, Bk. II, chap. xiii, § 1.

8. Another reason why, since the will of man is capable of conforming to a rule, such a rule can be laid upon it, with the effect that his will is obligated to follow that rule, is because man is not free from the power of a superior. These two factors make a man capable of receiving an obligation that comes from an external principle. For when the powers of an agent are by their nature so bound to a uniform mode of action, that they cannot by its inward motion take a different course, not a moral but a physical action is produced, which, properly speaking, arises from necessity rather than from obligation. But when a man recognizes no superior, there is no external principle so strong, that it can check his personal liberty. And however consistently a man might follow one line of action, and avoid certain deeds, it is understood that he is so doing out of his own good pleasure, and not from any obligation. It follows, therefore, that a man is capable of an obliga-

tion, who can recognize a prescribed rule of action, and who has a will that is free and able to turn to different courses; this will, however, should recognize, when a rule has been given by its superior, the obligation not to depart from it. And man has clearly been endowed with such a nature.

9. An obligation is properly laid on the mind of man by a superior, that is, by one who has both the strength to threaten some evil against those who resist him, and just reasons why he can demand that the liberty of our will be limited at his pleasure. For when a person has such power, after he has once signified what reward awaits those who obey his will, and what evil consequences those who resist it, there must necessarily arise in the faculty of reason a fear mingled with reverence, a fear occasioned by such a person's power, and a reverence arising from
 66 a consideration of the causes, which should be sufficient, even without the fear, to lead one to receive the command on grounds of good judgement alone. We are of the opinion, consequently, that the right to lay an obligation upon another, or, in other words, to command another and to prescribe laws, arises not merely from strength alone, or even from *ὑπεροχή* [superiority], or excellence of nature. Strength alone, of course, can so move me contrary to my inclination, that I should prefer to obey another's will for a while, rather than experience his power. But when that fear is once gone, nothing prevents me from following my own desire rather than his. And when a man can show no other reason but force, why I should order my ways according to his desire, I am in no way prevented, if it seems to me to suit my ends, from trying in every way to shake off his power and assert my liberty. Terence, *Adelphi* [69-71]: 'He who does his duty under the lash of punishment, has no dread except in the thought of detection; if he thinks he won't be found out, back he goes to his natural bent.' (S.)

10. At this point we should examine what Hobbes, *De Cive*, chap. xv, § 5, says: 'In the natural rule of God, His right to reign over and to punish those who break His laws, comes solely from irresistible power.' He undertakes to prove this statement, as follows: 'Every right over another arises either from nature or from agreement. A right is derived from nature by virtue of the fact that it has not been taken away by nature. Now since by nature all men had a right over all things, each man had a right, coeval with nature herself, of ruling over all others.' This right, however, was abolished among men because of the mutual fear arising from an equality of strength, which would have caused a war destructive to the human race. 'But if some one man had so far surpassed all others in power, that not even all of them together could have resisted him by their united strength, there would have been no reason at all why he should relinquish the right given him by nature. There would have remained, therefore, for him the right of rule over

the rest, because of the excess of power by which he would have been able to defend both himself and them. There remains, therefore, to those whose power cannot be resisted, and consequently to Almighty God, a right to rule, derived from their very power.'

Certainly several points in the foregoing deserve criticism. For, in the first place, it is questionable whether there is not an inconsistency in the two statements, 'The right to rule by strength alone has been granted by nature', and this right is derived from nature 'because it has not been taken away by nature'. For in general it does not immediately follow, that what has not been taken away by me has been granted by me. And since 'not taken away' and 'granted' are not the same thing, that right may appear to have been granted by some other principle than by nature. And further, the statement that 'Nature has given to all a right over all things', must be carefully interpreted. By right is meant the liberty for one to use his natural faculties according to sound reason. Therefore, the real meaning of his principle will amount to this: By nature, that is, in a state where there is no law, each man may use his natural strength against whomsoever his reason says it should be used, and especially for self-preservation. But it does not follow that a man can, by his natural strength alone, properly lay an obligation, in the strict sense of the word, upon another. To force a person, and to obligate him, are very different things; the former can be done by natural strength alone, but not the latter. For even Hobbes feels that, in a natural state, just as one has the right to force others, so others have the right to resist. And obligation cannot square with the right to resist, for an obligation presupposes such causes, as intrinsically affect the conscience of a man, that he does not judge by the use of his own reason that he can rightly, and therefore justly, resist. And although it is unreasonable to strive in vain against the power of a superior, and so run the risk of meeting with a greater evil (Pindar, *Pythian Odes*, ii [173]: 'As ye know, it is a slippery course to kick against the goads' (S.)), one still has the right to try every recourse, in the hope that another's force may be shaken off even by force, or avoided by subterfuge. But this cannot be reconciled with an obligation, in the proper sense of the term, and as Grotius has used it in his 67 work, as opposed to 'extrinsic' obligation.

And so bare force does not remove the right to resist, but only the exercise of that right. This can be made clear by an example from the animal world, with which we men live in a state without law. Whatever animals we can overcome by our strength, we break and use in our service. But if any have in some way been able to resist our strength, no man complains that he has been wronged by one of them. And one cannot reply that animals are incapable of receiving an obligation, and so can be restrained only by force, for Hobbes himself acknowledges,

De Cive, chap. viii, § 2, that a prisoner of war, although undoubtedly capable of an obligation, is under no bonds of obligation, so long as he is restrained by natural bonds alone, before an agreement and pledge have been given, and so such person can take to flight, or even use force against his captor, whenever he finds a convenient opportunity. Seneca, *On Anger*, Bk. II, chap. xi: 'Thus has nature ordained that whatever becomes great by causing fear to others is not free from fear itself.' (S.)

I need not say that Hobbes' principle, 'Nature has given a right over all things,' is absurdity and nonsense when applied to God. For how was nature able to give anything to God, since nature is either God Himself or His work? And so for these reasons, and because it does not seem consonant with God's goodness, we hold that the right to command, that is, the power of God, in so far as it denotes the power of imprinting an obligation in the minds of men, should in no way be derived only from His bare omnipotence.

Furthermore, the examples which Hobbes draws from the Sacred Scriptures furnish no foundation for that thesis. When, in the case of the calamities sent upon Job, God appeals to his power in justification of them, this does not prove that God has no right over His creatures save from His bare power. Nay, Job himself, at the very first, properly recognized God's right to deprive him of his property and children. 'The Lord hath given', he says, 'and the Lord hath taken away'; that is, Why may He not take back at His pleasure that which is His own, when He only granted it to us on sufferance? Add Seneca, *To Polybius*, chap. xxix. But when Job was overcome by his grief, and led to expostulate with God, the latter very properly alleged his power to silence Job's contumacious complaint, after Job had neglected to recognize the other reasons for his divine sovereignty. And this is the way we commonly deal with other contumacious subjects; when they refuse to listen to reason, we show them our power, so that they may recognize not merely the evil of their way, but also their folly in daring to turn upon us. And in the same way, when some one complains that the righteous are cast down and the wicked prosper, if he refuses to recognize the real causes for this, he is in the last resort made to face the divine power; as if we should say, 'If you feel that you have been wronged, go to and give battle to God.'

On the same grounds it appears that Hobbes was wrong in concluding that men were under obligation to render obedience to God because of their weakness. For this can only make a man decide that it is folly not to avoid some greater evil by obedience; it does not destroy his right to be able to desire, and to try every way possible, to escape from another's power. Such a right, however, is altogether removed by a real obligation.

Nor is this other conclusion of his correct, even though the antecedent is accepted without question; namely, that neither one of two omnipotent beings can be obligated to the other; therefore, men are obligated to God only because they are not omnipotent. I shall not raise the point that the supposition of two omnipotent beings is self-contradictory. Neither did our Saviour intend to assert his right against Saul, by the argument that it was hard for him to kick against the pricks,¹ *Acts*, ix. 5, but he was only reproving Saul for his mad designs. Nor did Ananias call Paul to the standard of Christ for the sole reason that it was beyond his power to destroy that religion. 68

Such a doctrine as that of Hobbes must be attacked the more steadfastly, since bold men are able to abuse it to our great peril. In Thucydides, Bk. V [cv], an Athenian ambassador says: 'We follow the custom of all men that by a law of their nature wherever they can rule they will. This law was not made by us, and we are not the first who have acted upon it; we did but inherit it, and shall bequeath it to all time.' (J.*) Dionysius of Halicarnassus, Bk. I [v]: 'For by a universal and unalterable law of nature it is ordained that superiors shall govern their inferiors.' (S.*) In Plutarch, *Camillus* [xvii], Brennus calls it 'a most ancient of all laws which gives to the stronger the goods of his weaker neighbours, the world over, beginning with God Himself and ending with the beasts that perish. For these too are so endowed by nature that the stronger seeks to have more than the weaker.' (P.) Livy, Bk. V, chap. xxxvi, gives the same thought more concisely: 'All things are the property of the brave.' (S.) Callicles, in Plato, *Gorgias* [p. 483 A ff.], advances two reasons for this position. He lays down as his premise the common opposition between nature and law. Thus, for example, by nature it is more base to receive an injury, 'for that is not the part of a man, but of a slave'; and yet in the eyes of the law it is more base to inflict an injury. Furthermore, lawgivers,² because they were weaker than the multitude, established such a principle and ordained honours and censures in such a way that the more powerful might not get the upper hand over them in any matter. '[. . .] Whereas nature herself intimates that it is just for the better to have more than the worse, the more powerful than the weaker.' And he says, that, when Xerxes led his hosts against the Greeks, and Darius against the Scythians, with no other reason than this, they did it 'according to the law of nature'. He regrets that the spirit of gifted young men is restrained by this teaching (about justice), maintaining that in him who breaks the bonds of laws 'the light of natural justice would shine forth'. On such grounds, he adds, Hercules drove off the

¹ [For *stimulum* read *stimulum*.—Tr.]

² [The paraphrase is at this point somewhat inaccurate, yet not to the extent of seriously vitiating the argument.—Tr.]

oxen of Geryon, neither as a purchase nor as a gift, but 'according to the law of natural right, and that the oxen and other possessions of the weaker and inferior properly belong to the stronger and superior'. (J.)

'Without doubt Odysseus would wish this were so, and the sons of Atreus would pay high for such a privilege.'¹ But one is more inclined to take the opinion of Plutarch, *Pelopidas* [xxiv. 3]: 'For the first and paramount law, as it would seem, namely, that of nature, subjects him who desires to be saved to the command of the man who can save him.' (P.)

11. There are others who deduce the origin of command, or of the power to lay an obligation upon another person, from *ὑπεροχή* (superiority), or eminence of nature, the action of which is sufficient of itself to produce obligation. They find an argument for this contention in the nature of man, in whose mind, considered the most excellent part of the body, there is a directing power, *τὸ ἡγεμονικόν*. A passage from Cicero is used to prove this point, *Tusculan Disputations*, Bk. III [v]: 'So that nothing is better than what is usual in Latin, to say, that they who are run away with by their lust or anger, have quitted the command over themselves.' (Y.) Aristotle is also appealed to, where he says that if a man should be found who excels in all the virtues, he should be chosen king. Furthermore, the most eminent nature of God would merit veneration, even had He not created the world. Nay more, they wish to add to this superiority of nature *ἀνυπευθυνία* (a freedom
69 from accountability), and for this reason if a man treats the beasts, to whom, of course, he is superior, in any way other than is fitting, he is free from censure, and they cannot complain of their hard lot, for when a man contends with another on the basis of rights, he thereby compares himself with the other, and wishes to be measured by the same law. But this is not possible for natures which are so different in worth, that one can be said to have been made for the sake of the other; and God ordained for man a right over animals, because of the excellence of man's nature. For this reason, if a man be punished by a magistrate for misusing his cattle, this is not done in the interest of the animals, but of the other citizens, since it is always to their advantage that a man should not abuse any of his property. They add, as well, that the body cannot complain, if it is weakened by labours at the order of the mind, since, forsooth, the mind is superior to the body.

But for our part, we are not yet convinced that the right to lay an obligation on a person, who has in himself the ability to direct his actions, can spring from mere superiority of nature. For such superiority does not always imply the ability to direct another of inferior nature, nor do different degrees of perfection in natural substances, carry with them an immediate subordination and dependence

¹ [Vergil, *Aeneid*, II. 104.—Tr.]

of one upon another. For, since the man upon whom an obligation is to be laid, has in himself the ability to direct his action, which he can feel is enough for himself, there is no apparent reason why he should be held to be convicted without further ado by the dictate of his own conscience, if he orders his life at his own pleasure, rather than that of some other person whose natural endowment is greater. And so for all of the impiety of the doctrine of the Epicureans, that the gods enjoy their happiness in the greatest peace, and have removed themselves far from all concern with the affairs of men, being neither pleased at the good deeds of men, nor angered at their evil acts, still their conclusion from such presuppositions was quite correct, namely, that all service to the gods and fear of them was foolish. For why should a person worship another who cannot and will not help or hinder him? For contemplation of an essence so noble can, indeed, excite admiration, but it cannot create obligation. We Christians believe in spirits more noble than man's estate, but none of us admits that they have any control over men; *Revelation*, xxii. 9. Marcus Antoninus [Aurelius], Bk. VI, § 44: If the gods take counsel about nothing at all—an impious belief—in good sooth let us have no more of sacrifices and prayers and oaths, nor do any other of these things every one of which is a recognition of the gods, as if they were at our side and dwelling among us. (II.)

Cicero, *On the Nature of the Gods*, Bk. I [ii]:

There have been those who have conceived that the gods take not the least cognizance of human affairs. But if their doctrine be true, of what avail is piety, sanctity, or religion? for these are feelings and marks of devotion which are offered to the gods by men with uprightness and holiness, on the ground that men are the objects of the attention of the gods, and that many benefits are conferred by the immortal gods on the human race. But if the gods have neither the power nor the inclination to help us; if they take no care of us, and pay no regard to our actions; and if there is no single advantage which can possibly accrue to the life of man; then what reason can we have to pay any adoration, or any honours, or to proffer any prayers to them; piety, like the other virtues, cannot have any connexion with vain show or dissimulation; and without piety, neither sanctity nor religion can be supported; the total subversion of which must be attended with great confusion and disturbance in life. (Y.)

Ibid., [xli]:

What piety is due to a being from whom you receive nothing? Or how can one be indebted to him who bestows no benefits? (Y.)

Ibid., II [xxv]:

Jupiter is called by our ancestors 'the most good, the most great', and 'the most good', that is, most beneficent, before 'the most great', as there is something more glorious in itself, and more agreeable to others, namely, to render aid, rather than to have great resources. (Y.)

Ovid, *From the Pontus*, Bk. II, el. ix [23-4]: 'Will there be any reason for us to grant their usual honour to the gods, if one robs them of their will to help?' (W.)

The reference to animals has no bearing on the point, for they are restrained not by an obligation, but by pure force, or by the attraction

of food. And they would certainly not be going contrary to nature, if they should try to throw off the yoke of men. It is a mere figure of speech to cite the command of the soul over the body, for command can only be understood as a relation between different and distinct
70 beings, while the body is subordinate to the soul by virtue of their physical connexion, and not because of any moral tie.

And finally, the statement that if a king were to be selected by free choice, the crown should be given to the noblest, is well borne out by Plutarch, *Apophthegms* [ii, p. 172 E]: 'Nobody ought to govern, unless he is better than those he governs.' And the words of Socrates in Xenophon, *Memorabilia*, Bk. III, p. 489 [ix. 10 ff.], should be taken in the same sense. But the authority of a king who is chosen in this way will not come from any right based upon his mere excellency, but from the agreement of those who selected him.

12. From what has been said, one must surely agree that mere strength is not enough to lay an obligation on me at the desire of another, but that he should in addition have done me some special service, or that I should of my own accord consent to his direction. Pliny, *Panegyric*, chap. xxxviii [7]: 'The law of nature has not, among men, given power and authority to the stronger, as it has among beasts.' For no man can well avoid having respect for the one from whom he has received many favours, and so if it appears that the same person wishes me well, and can take better care for my future than can I, and he also claims at the same time a right to direct my acts, there is no apparent reason why I should wish to question his power. And this is all the more true if I am indebted to him for my very being. *Acts*, xvii. 24 ff. And why should not He, who gave man the power of free action, be able from His own right to limit some part of man's liberty? But when a man of his own accord consents to the rule of another, he acknowledges by his own act that he must follow what he himself has decided. Although, if a lawful command is to come from consent, it is necessary that the well-grounded right of a third party be not prejudiced by such a new relationship, and that it be allowable for the one party to have such a subject, and the other such a sovereign. From these two sources, we believe, flows the force of obligations, which, as generally understood, restrain as by an inner bond the liberty of our will. But because the natural liberty of the human will is not destroyed by any moral bond, and because also among the vast majority of mortals the inconstancy or wickedness is so great that they prevail over these reasons for command, something else is needed to control the wild passions of men, with a greater force than a feeling of shame and an appreciation of what is right. And this is all the more necessary because the wickedness of most men tends to injure others, for a man could be left to his devices more readily if his sin hurt no one but

himself. Now we feel that nothing could have such an effect, but the fear of some evil to come, upon the breach of an obligation, from the hand of a stronger person, to whose interest it was that there should be no departure from that obligation. And so, in the final analysis, obligations get their stability from force, and from the consideration that the one who desires to procure their observance has so much power, either inherent in him or given him by others, that he can bring some grave evil upon the disobedient. Among evil folk, of course, a ruler who can be affronted with impunity, has but a precarious hold. But government is in a firm hand when the ruler bears a just title to his position, and has force ready to punish all rebels. Sophocles, *Ajax* [1073 f.]:

For in a state that hath no dread of law
The laws can never prosper and prevail,
Nor could an armed force be disciplined,
Lacking the guard of law and reverence. (S.)

Arrian, *Epictetus*, Bk. I, chap. xxix: 'No man is master of another man; his masters are only death and life, pleasure and pain. For, apart from them, you may bring me face to face with Caesar and you will see 71 what constancy I show.' (M.)

As a result of what has been said thus far, there should be some toning down of the statement which certain writers have expressed too crudely, namely, that right is the pleasure of the stronger. Laws, of course, can scarcely achieve their external end, unless they be girded with strength to prod up the unwilling. Thus Solon used himself to say that he accomplished his greatest reforms, 'combining both force and justice together.' (P.) Plutarch, *Solon* [xv]. And there is no argument more powerful in the affairs of men than the words of Scylla about Minos, in Ovid, *Metamorphoses*, Bk. VIII [59]: 'And he is strong both in his cause and in the arms that defend his cause.' (M.) For we piously recognize that the joy of conscience after the performance of our duty, no less than the torments and prickings of the mind that follow wrongdoing, all come from the power of Almighty God, for whom it is a light task to punish through their own selves all who disregard the power of other men. Juvenal, *Satires*, XIII [193 ff.]:

Yet, why should you deem those to have escaped scot-free whom their mind, laden with a sense of guilt, keeps in constant terror, and lashes with a viewless thong? Conscience, as their tormentor, brandishing a scourge unseen by human eyes! Nay! awful indeed is their punishment, and far more terrible even than those which the sanguinary Caeditius invents, or Rhadamanthus! in bearing night and day in one's own breast a witness against one's own self. (E.)

And certainly it is of the highest importance to all men for no one to question the existence of a divine judgement, inaccessible to corrupt influences, which must be undergone by those who have trusted in

strength, cleverness, or collusion, and neglected their duty. The words of Plutarch, *Against Colotes* [xxx, p. 1125 E], apply here: 'I am of the opinion, that a city might sooner be built without any ground to fix it on, than a commonwealth be constituted altogether void of any religion and opinion of the gods, or being constituted, be preserved.' (G.*) Upon the foregoing principles, therefore, rests the power of all who are going to be successful in laying down laws for others.

13. Now for a law to be able to exert its directive force in the souls of men, the one for whom it is made must have a knowledge both of the legislator and of the law. For how can a man render obedience, if he does not know whom he should obey, and what is his duty? But it will be enough, if he has once known these two things, for although a man may forget what he once knew, he is by no means freed from any obligation, since he could have remembered perfectly, if he had given proper attention to his obedience. And certainly no one can easily avoid knowing the lawgiver, for any one that can use his reason will know that the author of natural laws is the same as He who made the universe. Much less can the maker of civil laws be unknown to any citizen, since he is constituted as such by the consent of the citizens, which is either express or tacit, in that they in some way subordinate themselves to him. It will be explained in another place how the law of nature is known from an observation of human affairs.

Civil laws are made known to subjects by a public and clear announcement. In this announcement two things should be made clear: first, that the laws proceed from him who has the greatest power in the state; second, that the meaning of the law¹ be made known to all. The first becomes clear when the man who bears the supreme power promulgates the law either by his own lips, or through the instrumentality of those who have been authorized by him. The question whether such men have the authority of the sovereign to announce the laws, cannot be raised, if it is recognized that they are commonly used by the sovereign to announce his will, if the laws are brought into use in the courts, and if they contain nothing that is derogatory to the full power of the sovereign. For it is hard to believe that any minister would publish something of his own making, as a permanent decree of his prince, or wantonly arrogate to himself any such function, since there would be no chance of his attempt remaining unknown, or of his bold venture escaping punishment.

72 If the meaning of the law is to be properly understood, the men who promulgate it must make it as clear as possible; quite differently from Caligula, who has his laws written in small letters and posted at some distance above the ground. Dio Cassius, *Excerpta Peiresciana*, Bk. LIX. If the laws contain any obscurity, the question should be

¹ [For *leges* read *legis*.—Tr.]

referred to the legislator, or to those who have been publicly appointed to pronounce judgement according to them, for it is their task to apply the law by proper interpretation to particular cases, or, on the matter of particular facts, to show how the legislator disposed of them. See Hobbes, *De Cive*, chap. xiv, §§ 11-13; *Leviathan*, chap. xxvi.

Mention should here be made that the statement of those who hold that, if laws are to obligate the conscience of subjects, they must have the consent of the same, is true neither of natural laws, nor of the civil laws of a monarch or aristocracies, unless, indeed, that has been agreed to between rulers and subjects, or unless this be based on implicit consent, whereby a man is understood to have agreed to all the acts of some authority, if he has once recognized it. And yet it would be a great advantage in inducing subjects voluntarily to obey laws, if these were passed with their consent and approval, especially such laws as are to become a part of their customs and manners. This is illustrated by the saying of Pericles in Xenophon, *Memorabilia*, Bk. I [ii. 45]: 'I think that anything which any one forces another to do without persuasion, whether by enactment or not, is violence rather than law.' (D.) Cf. Sanderson, *On the Obligation of Conscience*, [= *Prelection* vii] §§ 22 ff.

14. Furthermore, just as he who is going to direct by laws the actions of another, must meet two requirements: first, that he himself know what should be¹ prescribed for another, and second, that he have the power to inflict some punishment, if that man does not conform to his command (assuming that the object of the law has the power and desire to disobey the orders); so every law has two parts. The first defines what must be done, or what must be avoided; the second states what punishment is proposed for him who fails to observe the positive command, or does what is forbidden. The latter part is usually called the *sanction*. The position of Richard Cumberland, *De Legibus Naturae, Prolegomena*, § 14; chap. v, § 40, leads us here to speak at some length on sanction, since, in opposition to all the Jurisconsults, he maintains that the sanction of laws is made not only by punishments but also by rewards, and, in fact, more fundamentally by the latter than by the former. His thesis is as follows: Touching the sanction of a law, it is impossible by any natural signs to persuade men more clearly and effectively [that they perform some task], or to show with authority that a particular duty is commanded by the Governor of the universe, than for Him to distinguish such acts by abiding and natural rewards. For, although in sanctioning laws, men usually employ negative terms and words expressing the like, yet, in the nature of things, that which leads them to action is a positive good, which they hope to acquire or retain by warding off whatever may not lead to it. Privations and

¹ [For *conveniat* read *conveniat*.—Tr.]

negations do not weaken the will of man, and the only reason he avoids some evil is because he may thereby secure some good. Any power that penalties or natural evils may have to move men to avoid them, lies entirely in the attractiveness of those advantages of which they would be deprived by penalties or evils. All the things which men are supposed to do so as to avoid death or poverty, should more properly be laid to their love of life and wealth, and there can be no fear of death, unless there is a hope of life. The nature of things moves our desires more by the love of a present good, or the hope of a future one, than by the hatred of a present evil, or the fear of a future one; and property is sought not
 73 because of its opposite, poverty, but because it is of itself agreeable with our nature. Civil laws owe their stability more to their end, which is the public good, a share in which belongs to every good citizen, than to their threats of penalties, which inspire with fear only a few, and these the dregs of society. Thus far Cumberland.

Our first observation to all this runs as follows: If we wish to include under the word sanction both the advantages and the rewards attendant upon observance of law, it is requisite that those advantages should come from observance of a law and be, as it were, purchased thereby. But it is clear that not all the good things we enjoy are given us because of our observance of laws, and these, therefore, cannot be counted as rewards. Thus we have life and being, along with the natural faculties which we possess, not as rewards for keeping a law, but God in His goodness freely conferred them upon us before we could even conceive of fulfilling a law, and the continuance of their enjoyment, proceeding as it does from the inward force of substance, is in no way derived from an observance of law, but is the kindness of the Creator, who 'maketh His sun to rise on the good and on the evil and sendeth rain on the just and on the unjust'.¹ In the same way a man does not attribute what he has gotten by his labour and industry, directly and in its origin to any observance of law, but to the Creator who gave him his strength, and reckons it among his gifts. But so much the laws *can* do: What we have by the free gift of our Creator, or have secured by our industry, they may keep safe for us from the assault of other persons, who might injure or destroy them, and may allow us to increase them in many ways. So far as such things can be given by a legislator, they alone can be considered rewards; and if they are to have any influence in disposing the minds of men to obey the laws, the lawgiver should point out that such an effect will follow such a cause.

It should be further observed that, although the will can be moved to action by showing it the good which will follow that action, this will not at once lay upon it any necessity of performance, unless

¹ [Matthew, v. 45, approximately.—Tr.]

some threat is added of punishment awaiting non-performance. And so when a good effect comes as a natural consequence from some action, it is only a proof of the most generous goodness of the Creator, who wishes to give us that good of His free will, who in His kindness invites and even persuades us to embrace it. And yet this is not necessarily an argument that He commands us to secure that good by our action, for He may well be satisfied with having given us an opportunity to enjoy the fruits of his kindness. But there can be no question that an action is commanded, if some evil be threatened in case of omission.

We may add that the minds of men are more powerfully moved by the infliction of evil than by the possession of good. It is, indeed, true that there is a great attractiveness about securing some good, especially if it be fresh, or brings with it liberation from some present evil. But the feeling of pleasure disappears in the course of possession, and after the quickening of the mind, which was caused by the lack of the good or its recent acquisition and enjoyment, passes away, practically all that remains is a kind of sluggish acquiescence. Hence many only then begin to appreciate their fortune, when they have lost it, or see some prospect of losing it. But the grief, which follows in the end all evils and privations of good, is not a mere privation, but is something quite positive, and of such power that it can destroy the sense and appreciation of all advantages, and even lead one to look sometimes to death as its relief.

And so there is a sufficient reason, I feel, for civil legislators to sanction their laws by punishments instead of rewards. But the observance of the laws of men is sufficiently profitable, because it ensures our retaining and enjoying the pleasures which accompany an ordered social life, and if the exercise of ordinary virtues were always sanctioned by special rewards, no source would be bounteous enough for their supply.¹ For the sluggishness common to most men had to be shaken off by a threat of punishment, especially since a violation of laws is connected with harm for others, and some imaginary advantage for the violator. And so, it seems, the allurements of sin can be most easily repressed by a representation of the consequent remorse. For this reason civil laws always contain a punishment for their violators, either stipulating the amount of the fine or punishment, or leaving the fixing of the amount to the decision of the judge and the executors of the laws. The Roman Jurisconsults, indeed, call some laws imperfect, when they have no sanction of a penalty. Such was the law of Cincius, which had no other enforcing clause than this: 'Whoever does otherwise shall be held to have done wrong.' But I should judge that in this law either the disgrace took the place of the punishment, or else the censors were empowered to put some mark of reprobation

¹ [Different editions vary in the order of this and the next sentence.—Tr.]

on its violators. Yet one may infer from Tacitus, *Annals*, Bk. XIII, chap. xlii, that offenders against this law were not entirely free from punishment. Cicero, *Laws*, Bk. II [ix]: 'The divine punishment of perjury is destruction—the human penalty is infamy.' (Y.) But another example of an imperfect law is found in Livy, Bk. X, chap. ix:

The Valerian law, after forbidding a person, who had appealed, to be beaten with rods and beheaded, added, in case of any one acting contrary thereto, that it shall yet be only deemed a wicked act. This, I suppose, was judged of sufficient strength to enforce obedience to the law in those days; so powerful was then men's sense of shame; at present one would scarcely make use of such a threat seriously. (S.)

You may include here a law of Zaleucus, mentioned by Diodorus, Bk. XII, chap. xx:

Let no citizen attack a personal enemy with implacable hatred, but let him enter a quarrel in the spirit of one who expects soon to return to relations of good-will and friendship with his adversary. And if any one do otherwise, let him be considered to have an unkind and cruel disposition.

You may, however, here consider the infamy the penalty, as in these other laws of his given by the same author, Bk. XII, chap. xxi:

Let no free woman, except she be drunk, be attended by more than one servant. Let her not go outside the city by night, except to commit adultery. Let her not wear golden ornaments, or dress embroidered with gold, except she be a harlot. And let no man wear a gold ring, or a cloak of Milesian style, except he be engaged in fornication or adultery. And so, by means of these disgraceful exceptions to the penalties of his laws, he easily turned men aside from harmful luxury and wanton living, for no one cared to win the sneers of his fellow-citizens by acknowledging shameless and disreputable conduct.

Add *Digest*, XI. vii. 14, 14; XLVII. xii. 3, 4.

So there are two parts of a law, one defining the offence, and one setting the penalty or the penal sanction; two parts, I say, and not two kinds of laws. For it is idle to say, 'Do this', if nothing follows; and it is equally absurd to say, 'You will be punished', if the reason is not added, why punishment is deserved. It must, therefore, be borne in mind that the whole power of a law properly consists in its declaring what our superior wishes us to do or not to do, and what penalty awaits its violators. And from this it is clear how a law may have a power of obligating. For the power of obligating, that is, the faculty of laying an intrinsic necessity on persons to do something, properly lies in him who has authority or sovereignty. But a law is only the instrument of this authority, by which the will of the sovereign power is made known to a subject, who upon such knowledge receives an obligation by the power of such sovereignty. This makes it apparent, further, that the common division of the power of a law into directive and coercive
75 is incorrect, unless by coercive power is understood the penal clause, for the efficacy of a law in directing depends on how far it embodies the will of the sovereign, and threatens punishments to the subjects. But the coercive power, that is, the power to demand of subjects that

they conform their actions to a rule prescribed for them, to threaten penalties, and to carry them out, properly belongs to the maker or executor of a law. Libanius, *Orations*, v [2, p. 51]: 'Surely the laws need judges to execute what the laws say. For laws have neither hands nor feet, nor will they hear if any man calls upon them, nor come to his aid; they help us only through the persons of those who render justice.'¹ Although it is a common thing for writers, in a figure of speech, to attribute to laws the effect which belongs to the ultimate authority. So, for instance, Apuleius, *De Mundo* [xxxv], says: 'What the law is in a city, the general in an army, that is God in the universe.' And, to the same effect, Livy, Bk. II, chap. i: 'The authority of laws is greater than that of men,' a principle which is true only of democracies, in that a magistrate may not depart from the written laws.

Now legislators as such are said to exercise moral compulsion, not because they can, by some use of actual violence, so constrain a man that he can in no way do other than as they command, but because, by threatening and pointing out a penalty to offenders, they make it difficult for any one to plan a deed of lawlessness, since it seems easier to him, in view of the impending punishment, to obey the law than to break it.

15. When the power to obligate is attributed to laws, it is at once understood that permissions are excluded from laws in their proper sense; although Modestinus, *Digest*, I. iii. 7, delivers the opinion: 'The virtue of a law consists in its power to command, forbid, permit, and punish.' For permission is properly not an action of the law, but an absence of action. What a law permits, it does not command or forbid; therefore it does nothing about it. For certainly, whatever is not forbidden or commanded, is understood to be left to any one's own pleasure, and so is permitted, even though the law has not mentioned it.

Certain authorities, however, maintain that there is some obligation in a permission, not affecting, indeed, the one to whom something has been permitted, but preventing a third party from binding the other in any way, if he wishes to do what the law permits him. But they would limit even this to what has been given a full and perfect permission, not to what has been allowed imperfectly, and by way of connivance. For example, civil laws allow a husband to kill a wife taken in adultery, and yet they do not forbid another from interfering with the infliction of death in such circumstances. And yet, if we wish to speak precisely, such an effect does not properly come from the permission of law, but from the proper use of one's liberty, for I enjoy

¹ [The same idea, as Barbeyrac observed, was admirably expressed before that time by Demosthenes, *Against Meidias*, 224, as follows: 'And what is the power of the laws? If any of you is injured and cries out will they run up and assist him? No; they are but written words and cannot do this. In what then consists their strength? In your making them effectual always for the benefit of those who need you.' (K.)—*Tr.*]

liberty in all things in which the law does not oppose me, and the principal effect of this liberty is that no one can interfere in my harmless exercise of it. And so it would appear to be little short of idle for laws expressly to permit anything, the licence to do which is clearly to be inferred from the lack of any command to the contrary, and about which no kind of question can arise. It is, also, not always necessary that, when a law forbidding something is repealed, the act formerly forbidden should then, by an express decree, be declared licit, since upon the removal of the prohibition, it is understood that natural liberty of itself regains its full power.

In two special cases, however, civil lawmakers generally make express use of permission. These are either, first, when licence or impunity is allowed to some act only to a definite degree; or second, when that licence or impunity must be secured on some condition. As an example of the former case, some offer the permission, by the laws of most peoples, of usury only within definite limits; of the latter, the purchase by women of the right to prostitute themselves, into the
76 propriety of which I do not now enter. See Evagrius, *Ecclesiastical History*, Bk. III, chap. xxxix, for the tax on courtesans, called *chrysargyros*, which was removed by the Emperor Anastasius.

Now a division is usually made in legal permission, into plenary, which confers the full right to act and makes the act lawful, and less plenary, which confers either impunity from punishment, or liberty from impediment, or both. Some things enjoy impunity among men, either because human courts cannot handle such cases, as, for example, the faults of kings, or because the law of man has reached no open decision on a matter, or else because it has declared the matter legal, or, finally, because civil laws wished to leave many things to a man's modesty and integrity. Add *Digest*, L. xxii. 144, and the comments thereon of Jacques Godefroy.

Some observe more accurately that permission of a law or of a civil court is given, either by action of the law or tacitly. In the former class they place the passing over of a thing, not, indeed, by mere chance, but in the formula and design of a law, which is so drawn up, for example, that the legislator shows that he intended to enumerate fully every particular. For in such a case, whatever he did not list among the prohibitions, he is understood to have permitted, provided it does not offend common decency. Those things are understood to be permitted tacitly, which the civil power passes over in tolerance, connivance, or dissimulation, either for the present or for an indefinite period, so that they grow into custom. But the permission of civil law cannot prevent an act from being contrary to divine law, or place it beyond the fear of a penalty from God.

But the further observation should be made, that, when something

is said to be permitted, which has not been definitely forbidden or commanded in a civil law, the wording of the law should not be made a subject for cavil, but its spirit should be examined. For there are many points to be gathered from the sense¹ of laws, and to be understood in the laws, as a necessary consequence, or upon analogy. And one must especially keep in mind natural law or decency, which is regarded as a constant supplement of civil law. Nor can the things which are allowed for the time being or from necessity, be judged on the basis of a true right. But all these observations are to be understood in connexion with an absolutely perfect permission. Cf. Boecler on Grotius, Bk. I, chap. i, § 9.

16. The matter of laws in general is whatever can be done by those for whom they are passed, at least at the time when the laws are promulgated. For if a man should later, through his own fault, lose his ability to fulfil a law, its force does not thereupon expire, but the right is given the lawgiver to inflict a punishment, since the man in question is no longer able to meet his laws. But when a subject cannot fulfil a law, or has lost his power to do so, through no fault of his, the passage of such a law is not only a vain, but also a most unjust thing. However, we shall speak in another place on what concerns in a special way the various kinds of laws.

17. Who can be obligated by a law may readily be gathered from the right of the legislator: It is he, of course, who is subject to the command of the legislator. And it is sufficiently clear from the law itself, whom the legislator wished to obligate. For all laws designate those who are to be obligated by them, either through an express determination in an all-inclusive phrase, or through a restriction to certain individuals, or through a condition or reason of some nature, whereby the subject knows he is obligated by that law, when he finds that it applies to himself. And so a law obligates all the subjects of a legislator with whom the reason of the law squares, and to whom the matter of the law can be applied, for, if this were not the case, riot and turmoil would arise among citizens, the very things which laws were especially designed to avoid. And so no man will be exempt from all law, unless he can prove that he possesses some special privilege; and yet it frequently happens that one may be freed from the letter of a law after its passage, and this is called *dispensation*. For if a legislator can entirely abrogate a law, he can surely suspend its effect on some 77 certain person.

Now dispensation differs from equity (for the two are sometimes confused), in that the granting of the former lies only in the power of a legislator, while the latter may and should be exercised by even a minor judge; and should he follow the mere letter of the law, in a case

¹ [For *seusu* read *sensu*.—Tr.]

which demanded equity, it must be concluded that he acted contrary to the purpose of the legislator. And so dispensation depends upon the free grace of the legislator, but equity depends upon the duty of the judge. And yet in granting a dispensation great foresight should be exercised, so that the power and the authority of the law be not weakened by promiscuous concessions; and also so that when it is denied without the most urgent reason to others of a like condition, this fact may not be a cause of envy and anger, since equals have not been considered worthy of equal consideration.

An example of a wise dispensation is found in Plutarch, *Apophthegmata Laconica* [lxxiii]; *Agésilas* [xxx. 4], when Agésilas suspended the laws for one day, using the expression, 'Let the laws sleep to-day' (as the words are given by Appian of Alexandria [*Bell.*] *Libycum* [cxii]), so that the soldiers who had fled from a field of battle would not incur disgrace. And in the same author, *Demetrius* [p. 900], when Demetrius wished to be initiated at one time into all the mysteries, and up to this time it had been customary to hold the lesser mysteries in the month Anthesterion, and the greater in Boedromion, Stratocles published a decree that the month Munichion in which Demetrius arrived in Athens should be called and held to be, first Anthesterion, and then Boedromion. Add *Idem*, *Alexander*, pp. 672 D, 679 A.

More plausible is what he tells in his *Demosthenes* [xxvii]: When Demosthenes was recalled from exile he was still under a fine, which, by a law, could not be remitted gratis, and so they 'tricked the law' in this way. They had a custom by which they paid a sum of money to the man who prepared the altar in the sacrifice to Zeus Saviour. This task and service they assigned to Demosthenes for fifty talents, the amount of his fine. A similar example is found in Diodorus, Bk. XIII, chap. c, and Plutarch, *Lysander* [vii. 2]. Since the law of the Lacedaemonians forbade that a man should hold the same office twice, the command of a fleet was given to Aracus,¹ but Lysander was sent along as his lieutenant, with the order 'that the commander should not fail to follow his advice'.² Add Valerius Maximus, Bk. VI, chap. v, § 3 ext. Perhaps the custom of the Spaniards, told by Gabriel Naudeus, *Coups d'État*, chap. iii, p. 193, should be included among subtle dispensations. When they think that a man has been guilty of treason, they appoint a secret court to try him, hold a secret trial and condemn him, putting the sentence into execution afterwards in any way possible, so that they may not seem to have put him to death without clear cause.

18. Law is very conveniently divided, as to its origin, into *divine* and *human*, the former having God as its author, the latter men. But if law is considered from the point of view of the necessary agreement

¹ [For *Arato* read *Araco*.—Tr.]

² [The quotation is from Diodorus.—Tr.]

that it has with its subjects, it is on that score divided into *natural* and *positive*. The former so harmonizes with the natural and social nature of man that the human race can have no wholesome and peaceful social organization without it; in other words, it has a natural benefit and utility from its own continued efficacy for the human race in general. A further reason for such a division is that the former can be discovered and understood from the mental endowment peculiar to man, and a consideration of human nature in general.

Positive law is that which is by no means derived from the general condition of human nature, but proceeds entirely from the pleasure of a legislator, although it should not lack reason and usefulness, at least for the particular society of men for which it is passed.

Some writers call positive law *voluntary*, not because natural law 78 also does not come from the will of God, but because no positive law had such an agreement with human nature, that it was necessary in general to preserve it, or that it could be known without express and special announcement. Hence the reasons for it are not sought in the universal condition of mankind, but in the special and sometimes temporary advantage of distinct social groups. Tacitus, *Annals*, Bk. XII [vi]: 'Men's manners should fit themselves to circumstances.' (R.) And so they are defined at the pleasure of superiors, after men have gathered into social groups. Help in understanding the nature of positive law may be derived from the words of Aristotle, *Nicomachean Ethics*, Bk. V, chap. x: 'Such rules of justice as depend on convention and convenience may be compared to standard measures; for the measures of wine and corn are not everywhere equal, but are larger where people buy, and smaller where they sell.' (W.)

Now *divine law* is sometimes *natural* and sometimes *positive*; but *human law*, properly speaking, is always *positive*. Each of these divisions will be considered more fully in its proper place.

CHAPTER VII

ON THE QUALITIES OF MORAL ACTIONS

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| <ol style="list-style-type: none"> 1. The number of the qualities of moral actions. 2. A necessary and a lawful action. 3. The nature of the goodness and evil of actions. 4. A good action has all requisites; an action to be bad may lack only one. 5. The cause of evil is by no means to be looked for in God. 6. The cause of justice lies either in persons or actions. 7. What is justice of actions? 8. Universal and particular justice. | <ol style="list-style-type: none"> 9. Distributive justice. 10. Commutative justice. 11. The position of Grotius on justice. 12. The position of Aristotle. 13. The position of Hobbes on justice and injury. 14. The nature of an unjust action. 15. The nature of injury. 16. An injury may come only from previous moral choice. Also the nature of fault. 17. No injury can be done to a person who is willing to receive it. |
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OUR next task is to examine the qualities of moral actions. Now according to their qualities, actions are called necessary or unnecessary, lawful or unlawful, good or evil, just or unjust. And so the moral qualities of moral acts will be necessity, licence, and their opposites, for which there are no proper words, goodness and evil, justice and injustice.

2. An action is necessary, which the one, for whom a law or a command of his superior has been given, is by virtue of that law or command bound to perform; for this necessity of moral actions consists in the fact that they should not be omitted nor done in any other way than ordered, provided it is within one's natural power to omit them, or do them another way. And yet the Roman Jurisconsults very often say that the things which lack such a necessity cannot be done. *Digest*, XXVIII. vii. 15.

Opposed to a necessary action is both a forbidden action, the performance of which is forbidden by laws or the interdict of a superior, and a lawful action, which the laws neither prescribe nor forbid, but which a man may undertake or avoid at his will. Cicero, *For Balbus* 79 [iii, at end]: 'For there are things which are not expedient, even if they be lawful. But whatever is not lawful is most certainly not expedient.' (Y.) Libanius, *Declamations*, xvi [xxiii. 20]: 'What¹ a man has not been ordered to do, this he has not been prevented from doing.' But in the usage of common speech, not only are those things said to be lawful which are forbidden by no human or divine law, and which can, therefore, be undertaken without any sin or criticism, but those things as well, which are not forbidden by natural laws, and are permitted by

¹ [For *que* read *quae*.—*Tr.*]

civil law, in so far as it imposes no penalty for them in a court of law, committing them merely to each man's sense of right. Cicero, *Tusculan Disputations*, Bk. V [xix]: 'It is unlawful for anyone to do wicked actions, but we slip into an inaccuracy of speech, for we call whatever a man is allowed to do, lawful.' (Y.) This is illustrated by the opinion of the emperor Severus in Lampridius, *Alexander Severus* [xxiv]:

He had in mind to prohibit catamites altogether [. . .] but he feared that such a prohibition would merely convert an evil recognized by the state into a vice practised in private—for men when driven on by passion are more apt to demand a vice which is prohibited. (M.)

We can call the former actions perfectly lawful, the latter imperfectly lawful. But some things are even called lawful, which all agree are most base, provided the one who is going to do them has such strength that he does not fear the restraint of men. Seneca, *On Clemency*, Bk. I, chap. xviii: 'Though the laws allow a slave to be ill-treated to any extent, there are nevertheless some things which the common laws of life forbid us to do to a human being; because he has the same nature as your own.'¹ (S.) Add Grotius, Bk. III, chap. iv, § 2; chap. x, § 2.

3. We call an action good morally, or in moral estimation, which agrees with law; that action evil, which does not agree with it. (For natural and material goodness, by which a thing or an action is understood to tend to a man's convenience or improvement, is discussed in another place; although it is connected with the above-mentioned moral good, in those things which are enjoined by natural law, and usually by civil law as well, and gives it some reasonable basis among rational creatures.)

The formal reason for the goodness and evil of actions lies in their bearing, or determinative relation, to a directing rule, which we call a law (and this, we understand, to necessitate and not merely to permit, and, if it be of men, is not to be opposed to divine law). For in so far as it accords with the terms of the rule, and is carried out in accordance with it, an action so based on a previous choice as to conform to this same rule is called good. In so far as it is undertaken against the terms of the rule, or departs from that, it is called evil, and is expressed in the one word sin. Now any directing rule, as, for instance, a mariner's compass, is called the cause of straight sailing and arrival at the harbour, not so much because the ship takes the course that follows its direction, as because the pilot follows its direction in his navigation. In the same way a law is called the cause for right action, not because an action, no matter what the intention, squares with it, but primarily because it is undertaken at the command of the law, and from dependence upon it, that is, with the intention of rendering obedience to it. Therefore if a man by chance, or with no thought of obeying the law, does what the law

¹ [This last clause is not in the original text of Seneca at this point.—Tr.]

commands, he can be said to have acted rightly (in a negative sense and not positive, that is, not evilly), but not to have acted well in a moral sense; just as a man who has brought down a bird by the random discharge of a gun, can scarcely be said to have shot with any art or skill.

4. Since, further, the law determines either the quality, that is, the disposition of the agent, or the object, or the end, or, finally, the peculiar circumstances of an action, it follows that an action is morally good or evil, either because the agent is or is not disposed, as the law requires, or because an action is or is not directed towards an object, with such purpose, and under such circumstances, as are set forth in the law. It should be observed in this connexion that an action to be
80 good must agree with the law in all material requisites, and in respect to its formality it should be performed not in ignorance, nor for any other cause than that of offering the law its required obedience. And so an action may be good in its material aspect, but be imputed to its agent as evil, because of his evil purpose. Thus the man deserves no reward, who, in intending to do some harm, confers some advantage, like the man in Valerius Maximus, Bk. I, chap. viii, § 6 ext., who in attempting to kill Jason opened an abscess. And so the person sins, who uses his legitimate power for an evil end, as, for example, a judge who exercises his power to inflict punishment on criminals, to the satisfaction of his private grudges. Consequently, among the Carthaginians, 'their generals were crucified, if they had conducted their campaigns with success, but with bad counsel.' Livy, Bk. XXXVIII, chap. xlviii; Valerius Maximus, Bk. II, chap. vii, § 1 ext.

On the other hand, an action which may be evil in its material aspect cannot be good because of the good intention of the agent. It is clear, therefore, that no man can use his own sins as means to secure some good end, and that evil should not be done that good may come of it. For it is enough to make an action evil that it fails to accord with the law in even a single material or formal requisite; and so an action is without further ado evil, if the quality of the agent, or the object, or the end, or any of the circumstances, or the intention differs from those prescribed by the law. So it is idle to say, as do some, that an action can be good as to the substance of its operation, although the agent had not a lawful end in view, for the end is one of the most important parts in the essence of an action, because it is bound up with the intention, which is a principle most seriously affecting the quality of an action. And so it is a sin to direct an action not merely to an evil end, but also to an end different from that prescribed by the laws. *Matthew*, vi. 5. Juvenal, *Satires*, VII [215-16]: 'It is the motive cause that gives the quality to the act.' (E.) Nay, not only an accomplished evil act, which has attained its end, but even an evil act scarcely commenced, is

reckoned a crime, which civil laws sometimes punish¹ as severely, or almost as severely, as a completed one, according as they think it expedient to repress an offence at its beginning. Seneca, *On the Steadfastness of the Wise Man*, chap. vii: 'All crimes, as far as concerns their criminality, are completed before the actual deed is accomplished.' (S.)

5. Since the goodness or evil of an action consists formally, as we have said, in its agreement or disagreement with a moral rule, the action depends for its effect upon him by whom that action, prescribed or forbidden by law, is performed. His determination, therefore, so constitutes it in the class of moral entities, that it can be imputed to him alone and to no other man. And so they entertain an idle fear who have placed the formal reason of an evil action² in the absence of agreement with law, so that they may not seem to make God, the creator of all things, also the author of evil. Of course, the positing of any form necessarily implies the privation or absence of the opposite form; yet how mistaken is the man who seeks the essence of a thing in this absence! He has not made much progress who has discovered that straightness is the absence of crookedness, and crookedness the absence of straightness. But such inventions or fears have come from an ignorance of moral affairs. For although God is the creator of all physical entities, He should not be held to be the author of all moral or intellectual entities, or those of man's invention. They who think it a splendid achievement of their intellect to have, in some way or other, implicated God in the causes of sin, must, indeed, be affected with some utterly depraved itching of mind, for whoever has any understanding of things moral will feel that nothing is more absurd than to inquire as to whether that person be the cause of an action who forbids it by law, and punishes it when performed contrary to his commands. The fact that God has some share in the physical part of an action, can 81 no more be a reason for His being called the cause of sin than, for instance, can a man, who gave some article to be fashioned by a workman, be called the cause of some blemish in the latter's careless work. For you to give the word cause a meaning so improper, and so different from its common use, is to show a lack of reverence for God, combined with a desire for vain display. Philo Judaeus, *De Profugis* [xvi]: 'What accusation can be more disgraceful than to say that the origin of evil is not in us but in God?' (Y.) Maximus of Tyre, *Dissertations*, III [xiii, 9 a and b]:

These names (doom, fate, fury) seem but to be the euphemistic excuses of human wickedness, charging responsibility for the same upon the divine power, the fates, and the furies. But a fury and doom, and the divine powers, and all the other designations of a guilty heart, have been fashioned in the mind within us, &c.

¹ [For *paene* read *poena*.—Tr.]

² [For *actiones* read *actionis*.—Tr.]

Idem, Dissertations, XXV [xli. 5 a]: 'The fault is his who chose the evil; God is not responsible.'¹

6. Let us now discuss justice, regarding which it should be noted, first of all, that the meaning, in which it is attributed to persons, is very different from that whereby it signifies an attribute of actions. For when we use it in describing persons, to be just means that one delights in acting justly, that he applies himself to justice, or that he tries in every thing to do what is just. And to be unjust means to neglect justice, or feel that it should be measured not by a man's obligation, but by his convenience. And for this reason many actions of a just man can be unjust, and of an unjust man just. A man should, therefore, be called just, who does just things in obedience to law, and unjust things only because of his weakness; he should be called unjust who does just things because of the penalty attached to the law, and unjust things because of his evil nature, or in order to secure glory or some other advantage. Hobbes, *De Cive*,² chap. iii, § 5. The words of Pliny, *Panegyric* [lvi], are based on such a definition: 'Even bad men do many praiseworthy things; only the best of men deserves praise in his own person.' Compare the statement of Philemon in Stobaeus [*Anthology*, III] ix [21]:

He is a just man, not the one who *does* no wrong, but he who, when he *may* do wrong, is unwilling to do so; not the one who refrains from taking little things, but he who is strong to refuse to take the great things, although he might seize and possess them without risk of harm; no, not even the one who observes all these requirements, but he who has a sincere and genuine character and wishes to be, and not to seem, just.

Archytas³ [in Stobaeus, *Anthology*, III. i. 114]:

Just as a man who has been guilty in some particular circumstances of a lack of self-restraint, or of injustice, or cowardice, is not to be classified among wicked men; no more is he to be classified among good men, on the basis of a single successful performance. [. . .] But the correct judgement is that drawn not from a single occasion but from a man's entire life.

Another illustration is the censure passed by Agathias, Bk. V [v], on the inhabitants of Byzantium, who were terrified by a severe earthquake and vied with one another in good deeds:

All this was done for a limited time, so long as their fear was fresh and strong. As soon, however, as the evil began to abate and come to an end, most of them made haste to return to their former habits. Now such a sudden impulse of the mind cannot properly be called justice, nor substantial and effective piety, such as is commonly formed in men by right opinion and constant application, but rather a reckless contrivance and cheating bargain-
82 counter device, instituted to escape and avoid a momentary danger. Good deeds that come of necessity we experience only so long as the fear lasts.

It is clear from this that the definition of justice commonly used by the Roman Jurisconsults, namely, that it was a 'constant and abiding desire to give every one his due', applies only to the justice of persons,

¹ [Maximus is here merely paraphrasing Plato, *Republic*, Bk. X=617 E.—Tr.]

² [For *vive* read *cive*—Tr.]

³ [For *Archias* read *Archytas*.—Tr.]

and not of actions. This circumstance, I feel, is very unsatisfactory, since jurisprudence is chiefly concerned with justice of action, and takes cognizance of justice of persons only in passing, and in a few particulars.

7. Now justice of actions differs from goodness of actions mainly in this, that goodness denotes simply an agreement with law, while justice includes further a relation to those towards whom the action is performed. Consequently, in our opinion, an action is called just which is applied from previous choice to the person to whom it is owed, and therefore, on this definition, justice will be the right application of actions to a person. It is our decision to make a division of it primarily on the ground of the matter which is owed, or which is applied to another as from an obligation.

We note, by way of introduction, that some actions can be called pure and some mixed. The former are performed, on the motion of some power which is applied to an object for a definite reason; such are an exhibition of honour, acts of respect, affection, aversion, consolation, praise, reproach, &c., the effect of all such being that the object is affected, or is thought to be affected, by the action in a certain way, leading either to satisfaction or dissatisfaction. But the latter are connected with the transfer of some advantage or disadvantage for the person towards whom they are said to be exercised, and so their effect consists mainly of some operation, whereby the person or property of some man is actually bettered or injured. Again, there are actions which are concerned with business, and are valued at a certain rate; while upon certain others men usually set no value. The distinction between these two kinds of actions will be discussed at length below.

It should be observed, in conclusion, that some things are due us by a perfect, others by an imperfect right. When what is due us on the former score is not voluntarily given, it is the right of those in enjoyment of natural liberty to resort to violence and war in forcing another to furnish it, or, if we live within the same state, an action against him at law is allowed; but what is due on the latter score cannot be claimed by war or extorted by a threat of the law. Writers frequently designate a perfect right by the additional words, 'his own,' as they say, for example, a man demands this by *his own* [suo] right. But the reason why some things are due us perfectly and others imperfectly, is because among those who live in a state of mutual natural law there is a diversity in the rules of this law, some of which conduce to the mere existence of society, others to an improved existence. And since it is less necessary that the latter be observed towards another than the former, it is, therefore, reasonable that the former can be exacted more rigorously than the latter, for it is foolish to prescribe a medicine far more troublesome and dangerous than the disease. There is, furthermore, in the case of the former usually an agreement, but not in the latter,

and so, since the latter are left to a man's sense of decency and conscience, it would be inconsistent to extort them from another by force, unless a grave necessity happens to arise. In civil states this distinction arises from their civil laws, which either allow or deny an action, although in most instances states have followed in the footsteps of natural law, except where their own reasons persuaded them to take another course.

83 8. When, therefore, actions or things are extended to another, which are due him only by an imperfect right, or when actions are performed for another which have no relation to business, it is usually said that universal justice is observed; as when one comes to the aid of a man with counsel, goods, or personal assistance, and performs a service of piety, respect, gratitude, kindness, or generosity, for those to whom he was obligated to perform the same. The only concern of this kind of justice is that one should furnish what is due another, without observing whether the service furnished is equal to, or less than, that which was the reason for the obligation. Thus an office of gratitude is fulfilled if as much is shown as one's faculties permit, although the kindness done may have far surpassed that measure. But when acts which concern business relations are performed for another, or acts by which something is transferred to another to which he had a perfect right, that is called particular justice.

9. Now¹ this perfect right arises either for individuals from an agreement, tacit or expressed, made with some society to the end that they may become members of it; or for a society from the same agreement with individuals, that it will join them to it as members; or it arises from any kind of an agreement with any number of individuals about things and actions which concern business enterprises. When those things are fulfilled, which are due for the reasons given just above, from the agreement of a society with a member, or of a member with a society, it is called distributive justice. For whenever a person is received into a society an express or tacit agreement is entered into between the society and the member to be received, by which the society undertakes to give him a *pro rata* share of the goods which belong to the society as such, and the member, on his part, promises to undertake to bear his just share of the burdens which make for the preservation of the society as such. The determination of the proportionate share of the goods to go to the member is made on an estimate of his labour, or of the amount of his expense in the service of the society as such, in proportion to the labours or expenses of the other members of the society. On the other hand, the determination of the proportionate share of the duties falling to the member is made on an estimate of the advantages which he receives from the society,

¹ [For *propro* read *porro*.—Tr.]

in proportion to the advantages received by the rest of the members of the society. And so, since one member usually contributes more to the preservation of a society than another, and one usually derives more advantage from it than another, the reason is clear, why, in a society of many members, and where an inequality exists among them, a comparative equality must be observed in distributive justice. And this consists in maintaining a clear ratio between the worth or merit of one, compared with the worth of another, and his reward, as compared with the reward of the other. For, as Philo Judaeus says, *On Monarchy* [ii. 13]: 'For it is an unequal measure to give equal honour to persons who are unequal in rank.' (Y.) Arrian, *Epictetus*, Bk. III, chap. xvii: 'It is a law of nature for the better to have the advantage of the worse in that in which he is better.' (M.) So, for example, if six rewards are to be distributed between Gaius, Seius, and Titius, if the desert of Titius is threefold that of Gaius, and twofold that of Seius, Titius should have three, Seius two, and Gaius one. Nor does this equality require that a person's reward shall exactly equal his desert, but it is enough if the proportion of the worth of one member to the worth of another should be observed in the portion he shall have of the common good, compared with the portion of the other. And the same rule should be applied in imposing tasks.

But what Hobbes, *De Cive*, chap. iii, § 6, says, in order to overthrow this respective equality¹ which is observed in this kind of justice, namely, that I can distribute of my own more to him who deserves less, and give less to him who deserves more, provided I give what I have agreed upon, while he offers as proof the words of our Saviour, in *Matthew*, xx. 13, certainly has nothing to do with the case. For in the passage which he cites, it is shown that a man does not sin against commutative justice (which governs a contract of hiring, leasing), if, in his generosity, he gives some a higher wage than is due them, or if, in a spirit of liberality, which is allowable in universal justice, he adds somewhat to the wage which is due by virtue of commutative justice; provided, of course, he does not fail to give the rest the wage which they had agreed to. But what has that to do with our distributive justice, which demands that a fair share shall be apportioned of a thing to which several have a right, that is perfect, but unequal, in regard to quantity? And the word *distributive*, used in the passage cited, by no means indicates that the instance was concerned with distributive justice, but merely that there were many workmen to each of whom a wage had to be given by commutative justice.

Now with regard to the difficulty which Grotius, Bk. I, chap. i, § 8, raises, we should observe that his expletive [*expletrix*] justice does by no means exactly agree with commutative, nor his attributive with dis-

¹ [For *aequalitate* read *aequalitati*.—Tr.]

tributive; and that his division is not on the same basis as ours. For our division is taken primarily from the matter which is due, and from the origin of the obligation, but his from the manner and the degree to which something is owed. And so it is clear why the distribution of the profits in the contract of a society belongs, in his opinion, to expletive justice, in mine to distributive. When geometrical proportion is observed in the contract of a society it is only from accident, since it is not necessary that members should have contributed unequal shares, but that they were able to contribute equal shares, and so there will be a simple equality in the division of the profit.

As for the example of Grotius: 'If only one person can be found who is fitted for a public position, the award will be made to him on the basis of a simple proportion only,' (K.), we must inquire further, whether¹ he has a perfect or an imperfect right to that position. If it is the latter, the case will be one for universal justice, if the former, we agree with what he says about proportion, that usually, but not always, a geometrical proportion is employed in distributive justice. But we have not taken our distinction between the two kinds of justice from the use of a different proportion. And so also the assigning of legacies belongs not to distributive but to universal justice; and when a state pays from its treasury the amount that some citizens have expended for a public undertaking, this is an exercise of commutative and not distributive justice, because the reason for the obligation does not come from an agreement by which the state received the citizen into its fold, but from a special and very different contract.

10. But whatever be done that is owed by virtue of a mutual agreement, in cases concerning things and arts connected with business, that is called commutative justice. Since such agreements have as their object that, in return for my contribution or act in the business transaction, I shall receive from another an equivalent contribution or act, or one that at least seems so to me, the reason is plain why this form of justice requires a simple equality which is commonly called an arithmetical proportion, yet scarcely such in the eyes of mathematicians, although Plutarch, *On the Love of Brothers* [xii], uses the term arithmetical proportion in this popular sense. Therefore, the thing or act concerned with business should correspond exactly, so far as its moral worth is concerned, with the other which is given or furnished in consideration of it. For a little later I shall discuss at length the objection of Hobbes, *De Cive*, chap. iii, § 6: 'If we sell our merchandise for as much as we can get, no injustice is done the buyer, since he wanted and asked for it.'

Vindictive justice, which in our opinion forms a distinct class, will be more conveniently discussed in another place.

11. It will also be worth while to present the views of Grotius on

¹ [For *ad* read *an*.—Tr.]

justice, for he disregards the difference between universal and particular justice, and divides it into *expletive* and *attributive*, this distinction being based on the difference of right, which one man has to receive something from another, such right being either perfect or imperfect, and being also called aptitude. Hence, according to him, an act belongs to expletive justice, when something is rendered another, which was owed him by virtue of a perfect right, and which he could demand on his own right; but it belongs to attributive right when that is performed which was owed him only by virtue of an imperfect right. The reason for such a nomenclature seems to be as follows: What is owed me by a perfect right is in a sense conceived to be already my own, and hence, so long as it is not furnished me, I may be said to be lacking something of my own. And so even titles are assigned to my possessions, and can be passed on to another by way of payment. If, therefore, I receive something due me by virtue of a perfect right, I get nothing new, but only a thing is supplied which was lacking, and whose place was being filled in the meantime by an action. For example, a man who has borrowed a book from my library does not add to my library when he returns it, but only fills a place that was empty. But I cannot consider those things as mine, and count them among my possessions, which I have only an imperfect right to receive, for the securing of them depends on the honour of some one else, who cannot be forced by any violent means to furnish them. Hence it would be ridiculous if a beggar should try to make over to a cobbler, in payment for a pair of boots, some alms which he hopes to receive from a man of means. Therefore, when one man gives another something on the basis of an imperfect right, he actually gives him that which he was unable before that time to consider his own. And for that reason Grotius calls this justice the companion of those virtues which are of advantage to other men, such as generosity, sympathy, kindness, and the like, for men enjoy only an imperfect right to have such things. But when Grotius assigns to this justice that also of state-providence [*providentia rectrix*], I feel that this belongs more to the distribution of those rewards to which citizens have only an imperfect right. These can, indeed, be distributed with greater liberty than can those which are owed on a contract, but it would be very wise in dealing with such rewards to take strict account of each man's merits, so as to prevent complaints and rivalry. A passage of Isocrates, *Areopagiticus* [21 f.], illustrates this, where he speaks of the former leaders of the Athenian state:

And what chiefly assisted them in managing the state aright was this: Of the two recognized principles of equality, the one assigning the same to all, the other their due to individuals, they were not ignorant which was the more useful, but rejected as unjust that which considered that good and bad had equal claims, and preferred that which honoured and punished each man according to his deserts. (F.)

Grotius gives the following reasons for not using the nomenclature of Aristotle. The word *συναλλακτική* does not exactly suit commutative (therefore, expletive) justice, because that the holder of my property should return it to me is not due to a *συνάλλαγμα* [commutative contract], and yet it belongs to expletive justice. That is, although I have a perfect right to claim my property from any holder of it, still my action is not based on a *synallagma*, or express contract, into which I entered with him to restore my property, but I must needs only prove that the ownership belongs to me. An act of expletive justice which is not concerned with a *synallagma* is, therefore, possible. And the word *διανεμητική* 86 (distributive) does not correspond to attributive justice at every point, because the term implies several people among whom there must be some distribution, while attributive justice is exercised even when only one person is furnished a thing for which he alone was worthy.

12. The real position of Aristotle on the kinds of justice, so far as I can follow him, is as follows: Universal justice, which is, in his words, *Nicomachean Ethics*, Bk. V, chap. v, 'the exercise of complete virtue in relation to others,' is the virtue which belongs to all men. There are three kinds of particular justice. The first is distributive, *διανεμητική*, which is seen 'in the distribution of honour or wealth or any other things which can be divided among the members of the same community'. The second is corrective, *διορθωτική*, which concerns the righting of private transactions, *συναλλάγματα*, and this again according to him, is either voluntary or involuntary. The voluntary transactions are based upon free consent, such as buying, selling, leasing, hiring, lending without interest, depositing money, lending at interest, giving security. The involuntary transactions are seen in crimes, where what is properly an involuntary transaction takes place, because, for example, in a case of robbery my property has passed to a thief against my will, and so an inequality has arisen, in that he has more than he should, and I have less. This is corrected by taking from him what he has in excess of his due, and giving it to me. Suppose, for example, that some one, through the deception of the merchant, pays nine units of value for something that is worth six. Now the purchaser has three units of value, but the merchant has nine, while the just price of the article was six. Between these numbers, three, six, and nine, there is an arithmetical proportion, because the difference between the third and the second number in the series [and that between the second and the first]¹ is the same. This is the reason, I presume, why that correction of his is taken to be based on arithmetical proportion, in the strict sense of the term. See Joh. von Felden on Grotius, Bk. I, chap. i, § 8. And these two kinds of justice properly or especially concern those who exercise command in states. For upon them lies the duty, and not upon private

¹ [Supplied by Barbeyrac.—Tr.]

citizens, to distribute the public goods among the individual citizens, to correct the inequalities that appear in the contracts or arise from misdemeanours, and to make them just. Aristotle, *Nicomachean Ethics*, Bk. V, chap. vii: 'Injustice then in this sense is unfair or unequal, and the endeavour of the judge is to equalize it.' (W.)

The third kind of justice is retaliation, τὸ ἀντιπεπονηθός, which regulates the manner in which men exchange things among themselves, whereby things which are different and unequal are compared and finally made equal, on laws of a geometrical proportion. For instance, when a horse and a pair of shoes are to be exchanged, it must first be decided how many pairs of shoes the horse is worth, and, if it is set at twelve, the 'retaliation', τὸ ἀντιπεπονηθός, would be observed if one took twelve pairs of shoes for one horse. See Aristotle, *Nicomachean Ethics*, Bk. V, chap. viii, and the remarks of Michael of Ephesus, *ad loc.* And the exercise of this kind of justice falls as much upon private citizens as upon officials. But our statement, that according to Aristotle one kind of justice applies to all men, while the other applies only or largely to magistrates and judges, will be easily recognized by any who have gone deeply into his works on morality, and observed how he always has before his eyes some one of his own Greek states, when he discusses virtues. And since in these not all citizens had the same functions, it is not strange that he has recounted some virtues which belong only to a particular class of citizens.

13. Hobbes, *De Cive*, chap. iii, § 6; *Leviathan*, chap. xv, appears to recognize but a single uniform justice, which is nothing else but the keeping of faith and carrying out of agreements, a view borrowed from Epicurus in Diogenes Laertius, Bk. X [50-1]. Hobbes says, that consideration is taken of commutative justice, in contracts of exchange, purchase, renting, hiring, making, and paying back loans, &c. But distributive justice, although there is properly no such a thing, is exercised by an arbiter, when he gives to each one of a number who had 87 deposited something with him, his own proper share. Nor is there any other equality to be observed than the following: Since we are all equal by nature, one should not claim for himself more right than he allows another, unless he has obtained the right for himself by agreements. And since, in his opinion, an injury, whether due to a positive action, or to an unjust omission, is the same thing as the violation of an agreement, he concludes that an injury can be done only to the person with whom some one has made an agreement. He seeks the reason for this position from his well-known theory, that a right to all things has been given by nature; but he has stretched this right beyond its proper limits, in maintaining that without an agreement, whereby a man takes from his own right and transfers some of it to another, a man has the right to do whatever he pleases to another, and does him no injury,

provided he observes only his own right. Cf. Gassendi, *Syntagma Philosophiae Epicuri*, Pt. III, chap. xxvi-xxvii. But we shall show further on in detail, that this 'right to all things' can be extended only to mean, that nature allows a man to use all means, which sound judgement decides will tend to his firm and lasting preservation; and this use of reason Hobbes himself, chap. i, § 7, posits in his definition of right.

Now sound reason will never dictate that, out of pure wantonness, one should so affront another, that the latter cannot help being incited to have recourse to war, and to desire to return the injury. Furthermore, it certainly implies a contradiction to say that among a number of men with equal rights each has a right over everything and to everybody, since the right of one man over everything cannot avoid absorbing the rights of the rest, if it is to have any effect; and it is no less absurd to imagine a right which in turn has no effect against others. For in questions of morals, 'not to be', and 'to have no effect', are much the same thing. But what kind of a right is that which another has an equal right to resist? Who would say that I have a right to command a man, if he can, with an equal right, disregard my commands? or that I have a right to lay stripes upon another, if they can be returned upon me by an equal right, and that with interest? It is certain, therefore, that there is by no means any right for a man to do such things to another, and that he who does so, since he does it *without right*, does an *injury*. And, on the other hand, the second party has a right that such things shall not be done him by another; and when they have been, he has been injured. And so that right, the violation of which constitutes an injury, has not been acquired by a mere agreement with others, but has been bestowed by nature herself, without any interference of man. The statement is, therefore, untrue, that an injury can be done no one unless some agreement has been made with him, or something has been given him by way of a gift. We shall show in another place that Hobbes is also mistaken in asserting, *Leviathan*, *loc. cit.*, that justice, as well as ownership, owes its origin in the final analysis to commonwealths. Indeed, the statement that all justice can be resolved into performance of agreements, is so far from true, that, on the contrary, before it can be known whether an agreement should be carried out, one ought to make sure that the agreement was entered into at the command, or at least with the permission, of natural laws. Add Cumberland, *De Legibus Naturae*, chap. viii, § 6.

From what we have said it is understood that, although injury and damage are very different, and although it is possible that by the same action injury may be done one man and damage another, it can by no means be admitted, as Hobbes, in the passage just cited, wishes to infer, that only damage and not injury is done a man who has suffered some loss or damage by one with whom he had no agreement.

Nor are the examples conclusive with which he would prove his contention. He says: 'If a master commands a servant who is under an agreement to obey him, to pay some money to a third party, or to do him some service, should the servant not obey him, the servant does damage, indeed, to the third party, but an injury only to his master.' 88 And yet if the servant has not paid the money when ordered to do so, the creditor will not suffer damage, since he still can bring suit against the master, and no more has he suffered damage, if his servant has not done him the benefit, when so ordered, although the servant is guilty of theft or some other crime, if he has seized and appropriated what he was supposed to give others on his master's account. For beyond the fact that the third party does not, strictly speaking, suffer damage by a failure to receive a service which was not owed (see Grotius, Bk. II, chap. xvii, § 2), he will still be able to complain of the knavery of the servant to his master, and the latter will certainly not allow him to do such things with impunity. And even if the servant was far from doing the third party an injury, he still had no right to do what he did, since he supplies the third party with sufficient cause to make a complaint against him.

A second illustration, in his *Leviathan*, runs as follows: 'Private citizens may repay the debts they owe each other but not the robberies, murders, and other acts of violence by which they have been injured, since the failure to pay a debt injures only the parties concerned, but the crimes named above injure also him who represents the person of the state, namely, the legislator.' This we agree to, provided the conclusion is not drawn, that crimes do not work an injury on him who is hurt. But in the way this is proposed in his *De Cive*, *loc. cit.*, it can by no means be allowed. He says: 'If a man in a state hurts another with whom he had no agreement, he does damage to the one he has hurt, but he does an injury only to him who holds the power of the entire state.' And can it be that the citizen who wrongs me injures not me but only my sovereign? And even if we should fully concede that those who live in a state of natural liberty have a right over everything, can such a right be possible among citizens of the same state, who recognize a common ruler? He adds: 'If he who has received a damage should complain that he had been injured, one could reply: "What business is it of yours that I should follow your wish rather than my own, since I do not prevent you from following your own pleasure and not mine?"' It is certainly untrue that 'such a reply is quite proper, provided there have been no special agreements between them'; nay, men would judge that a person had lost all common sense, if he thought he could turn aside another's complaints with such a reply.

But Hobbes, *loc. cit.*, observes quite properly: 'The word justice implies a relation to law, the word injury both to law and to an in-

dividual.' For when something unjust has been done, all men can call it unjust, that is, it is unjust to all, but an injury may have been done not to me, or to him, but to a third person, and sometimes to no individual, but only to the state, as, for instance, by a death when one has been challenged in a duel, for not even the victim can complain because of such an injury, since he was willing to encounter the risk of a contest which is forbidden by law. But the lawgiver assuredly will have the right to vindicate his law which has been violated.

14. Now that the character of justice has been established, it is easy to define injustice and its various kinds. An action is, therefore, unjust, which is performed with evil intent upon a person to whom a different action was due, or which denies a person something which was due him. It is, indeed, injustice to do a man some evil which we had no right to do, or to deny, or take from a man some good thing which was due him, for the nature of good is such that it can be done for someone without cause, provided a third party suffers no injury thereby; of evil such that we can without injury avoid punishing a man as he merits, provided others suffer no damage thereby. Hence an unjust act either does to a man what should not have been done, or takes from him what should not have been taken, or denies to him what should have been given him, for even the denial or omission of an obligated action is considered in moral matters an action.

15. Now an unjust act, which is done from choice, and infringes
 89 upon the perfect¹ right of another is commonly designated by the one word, *injury*. That this term may be clear, it should be borne in mind that an injury may be done to a man in three ways: first, by denying to him what by right he should have (M. Antoninus [Aurelius], Bk. IX, § 5: 'There is often an injustice of omission as well as of commission.' (H.)); second, by taking from him that which he already possesses; and third, by doing him some evil, which one had no right to do. Regarding the first kind of injury it should be observed that something is owed a man, either by the mere law of nature, such as deeds of humanity, beneficence, and gratitude, to which, however, he has no perfect right; or by a covenant, which is, in turn, either particular, or such as is expressed in our obligation to civil laws, which binds us to do for others what the laws require. When things of the latter kind are denied a man, it is properly called an injury, but not so in the other case, although they constitute an offence against the law of nature. Nor can the law of nature compel a man to observe its obligations, especially when no supreme power lies in it, unless a strict necessity happens to arise, since, indeed, the character of nature's offices requires that they be rendered without compulsion or fear of punishment. And to this extent, therefore, the statement of Hobbes is true, that: 'An injury can be done

¹ [For *perfectum* read *perfectum*.—Tr.]

only to the person with whom there is a covenant.' But when some evil is wrought upon a man who has given neither consent nor cause, by taking from him something which he already had, or by inflicting some positive injury, it is certainly always an injury, whether there be a covenant or not, for nature gives every man the right that he be done no harm by another unless he has already been in the wrong, and no man unprovoked may hurt another, further than the due exercise of government shall require. We add the word 'unprovoked', because the condition, τὸ πρότερον, namely, that it be first, is required in order to make an action an injury. Aristotle, *Nicomachean Ethics*, Bk. V, chap. xv: 'A man who retaliates because of wrong done to him, and retaliates on the same scale, is not regarded as acting unjustly.' (W.)

16. A further requirement for a real injury is, that it proceed from previous choice and determination to hurt or injure another. The mishaps, therefore, which occur by mere chance, through an ignorant and unwilling agent, do not come under the head of injuries; as, for instance, when a soldier, while practising with a javelin in his regular grounds, happens to hit a passer-by, or when a man trimming his trees on his own property, unexpectedly lets fall a branch on a person who had no right to be there. Antiphon, *Orations*, VII [3 B], employs the following defence for a man who hit a boy with his javelin:

He was not doing anything that was forbidden, but he was following instructions; he was hurling the javelin not among persons who were taking exercise, but he was in his proper place among the javelin-throwers; neither did he miss the mark and shoot among persons who were some distance away. And yet, although he was doing correctly just what he intended to, he was not the agent of an involuntary act, but the victim, in that he was prevented from succeeding in achieving his purpose.

The same point is covered by Aristotle, *Nicomachean Ethics*, Bk. V, chap. x: 'The definition of an act of justice or injustice depends upon its voluntary or involuntary character.' And further: 'When the hurt is done contrary to expectation, it is a mishap; but when, although it is not contrary to expectation, it does not imply malice, it is a mistake.' (W.) Michael of Ephesus makes the following comments on this passage [*On the Nicomachean Ethics, Commentaria in Aristotelem*, vol. XXIII c, p. 53, 8 ff.]:

Of hurts some arise from ignorance and are involuntary, others with our knowledge and are voluntary. Of those which arise from ignorance some are unforeseen and surprising, others are involuntary, indeed, but not unforeseen and surprising. Now after saying that hurts arising from ignorance fall under the general designation of errors, Aristotle goes on to make a subdivision, and asserts that those which come about unforeseen we ought to call misfortunes, and those which do not come about unforeseen ought to be called errors, using the same name for them as for the whole class. Those which come about unforeseen, would be the rare and unexpected; for example, if some one should open the door suddenly, and his father who was standing nearby be hit, or if some one were shooting with bow and arrow in a spot which no one ordinarily traversed, and suddenly a person who was passing through by some accident, was hit by the missile. For such events are

unforeseen and unexpected. [. . .] But actions which are not, indeed, unforeseen, but where the agent is ignorant, ought to be called errors. For the man who casts a javelin along a road, or in a spot where it is perfectly possible that people may be, and strikes somebody, has committed an error, and such hurts are called errors. For, says Aristotle, a man commits an error when the moving cause of the fault rests with him; and it rests with him in this instance, in so far as he was casting his javelin into a place which people habitually passed through.

A trespass, *ἀμάρτημα*, of this kind is properly called by the Jurisconsults a fault [*culpa*] which they define as something committed through carelessness and awkwardness, when a man neglects and fails to know, what he should and could have known and observed. They give it three degrees, according as we can conceive of three degrees in proper care, the failure to observe which is fault. There is, first, the care common to all men, not sharpened by a keen mind or attentiveness, but arising, as it were, from common sense. Then there is the care¹ of a more educated man, beyond common care, exercised by any one in his personal affairs, which nature requires of each man according to his wit and capacity. And there is, finally, a most exact care, which is observed by only the most careful householder in his affairs. To the last is commonly² opposed what is called a very light [*levissima*] fault, to the second a light [*levis*], and to the first a serious [*lata*] fault. Regarding serious fault, they observe that it is equivalent to deceit in contracts and similar affairs, and when the case concerns the reparation of damage, but not in crimes, although in such it only lessens, but does not remove the offence. The effect of light and very light fault they show in general, when they discuss engagements in contracts.

Now when a man, through violent passion and an only partial intent, is driven to hurt another, such a hurt cannot escape the brand of injury, although the man may not at once be called unjust, because of inflicting it. Aristotle concludes, therefore, *Nicomachean Ethics*, Bk. V, chap. x:

When a person acts with knowledge, but without deliberation, it is an act of injustice, as in all human actions which arise from anger and other necessary or natural emotions; for in doing such hurt, and making such mistakes, we are unjust, and they are acts of injustice, but it does not follow that we are at once unjust or vicious, as the hurt is not the consequence of vice. But when the action is the result of deliberate purpose, the agent is unjust and wicked. Hence it is rightly held that such actions as arise from anger are not done of malice prepense; for it is not he who acts in anger, but he who provoked the anger, that begins the quarrel. (W.)

17. Finally, an action to be called an injury must be done to one against his will, for it is a well-worn dictum that an injury cannot be done a man who wills it [*volenti non fieri iniuriam*]. Aristotle, *Nicomachean Ethics*, Bk. V, chap. xi: 'Thus a person may be hurt, and may
91 suffer what is unjust, voluntarily, but he cannot be the voluntary

¹ [For *diligentiae* read *diligentia*.—Tr.]

² [For *suevit* read *suevit*.—Tr.]

victim of injustice.' (W.) The reason for this is, because the good of which I deprive another at his wish, or the obligation which I do not fulfil at his wish, is considered a present from him to me. Who will say that I have committed an injury, when I have only accepted what is given me? Nor can what a man wishes to have brought upon himself be held an evil, since, indeed, an evil necessarily involves an abhorrence on the part of the will, it being understood, of course, that the man enjoys the full use of his reason, and has not been completely carried away by some violent passion. Add Ant. Matthaeus, *De Criminibus Prolegomena*, chap. iii, § 2-3. The definition of Hobbes, *De Cive*, chap. iii, § 7, suffers from the difficulty that, under his theory, an injury can only arise from the violation of an agreement. And Aristotle draws the conclusion, *Nicomachean Ethics*, Bk. V, chap. xv, that the man who has been so angered as to commit suicide, has wrought an injury not upon himself, but upon the state, which he has deprived of the services of a general, soldier, workman, or some servant of this nature. And so a state which has been injured by such a man used to punish him by attaching some disgrace to his corpse or his memory. Add Michael of Ephesus, on Aristotle, *Nicomachean Ethics*, Bk. V, chap. xv. Although the statement of Aristotle, *loc. cit.*, that 'the law does not allow *κελεύει* [suicide], and whatever it does not allow it forbids', is false, unless the verb *κελεύειν* (command) be taken in the sense of 'permit'.

CHAPTER VIII

ON THE QUANTITY OF MORAL ACTIONS

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| 1. The absolute quantity of moral actions.
2. The intention required by God.
3. The intention sufficient for courts of law. | | 4. The nature of a perfect or complete action.
5. The relative quantity of actions. |
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IT is now our purpose, in connexion with the quantity of moral actions, to note in a few words how they are estimated and given, as it were, a quantitative rating. Now we find¹ that the voluntary actions of men can be estimated, either *absolutely*, in themselves, or *relatively*, towards one another. As regards an absolute estimation a very great distinction is drawn between a good action and a bad one. For if we consider a good action formally and precisely, we observe nothing that shows a characteristic of quantity, since the goodness itself consists in its coinciding or agreeing with law, which is understood to be incapable of measurement. And so one good action, formally and precisely considered, is no better than another, even if, judged by their matter and their object, as well as by the degree of obligation, one is more excellent and noble than another. But since an evil action departs from the letter of the law, its departure can be conceived to be greater or less, and on this account a sin, considered formally and in itself, can be estimated as greater or less, just as one curve departs more than another from a straight line. For the course of argument used by Zeno in Diogenes Laertius, Bk. VII [120], amounts to nothing:

They lay down the position that all offences are equal. [...] For if one thing that is true is not more true than another thing that is true, neither is one thing that is false more false than another thing that is false; so too, one deceit is not greater than another, nor one sin than another. For the man who is a hundred stades from Canopus, and the man who is only one, are both equally not in Canopus; and so too, he who commits a greater sin and he who commits a less, are both equally not in the right track. (Y.)

Now if one wishes to compare with other kinds of quantity this deviation of a sin from the law, it seems to be like an angle, the sides of which are straight lines and the size of which can be measured by the arc, cut by the two sides of a circle described with its centre at the intersection of the line. And so, when in my youth I was studying the elements of this science, I used to explain the quantities of sin somewhat on the basis of a circle. But I now prefer to present them in a plain way, since such kinds of exposition are generally considered more appropriate to youth than to maturer years.

¹ [For *Deperhendimus* read *Deprehendimus*.—Tr.]

2. But since an action to be good must not only do what the law commands, but must also do it with a purpose that conforms with that law, it is clear, first of all, that if any action is held entirely good, what the law requires must be fulfilled in all its parts, and secondly, that the only thing moving the mind of the agent be the desire to show ready obedience to the lawgiver. And so, since we are commanded by the law of God to love Him with all our heart, with all our soul, and with all our strength, and our neighbour as ourselves, it is obvious that no action can be approved of God as entirely good, unless it is undertaken with the most perfect purpose, and unless the agent has no other goal in his mind than to satisfy the desire of the most Good and Great Creator. And this must be observed all the more carefully, since the least wandering or vacillation of our heart cannot escape that καρδιογνώστης [Knower of Hearts]. He who recognizes this truth will be loath to boast in the sight of God of his own perfection.

3. But in a court of law so exact a care need not be observed, for, inasmuch as legislators have, as the end of their laws, the benefit of the state, which for the most part depends on the external incidents of an action, whatever may be the intent of the agent, they usually are satisfied, if merely the form of an act follows the letter of the law. Especially since they cannot penetrate the depths of men's minds, nor apprehend the intent of the agent, other than by surmises and by signs apparent to the senses, which by no means give men a certain apprehension of what had been going on in the mind. Therefore, they measure the quantity of actions only with the senses, or in so far as the powers of man's wit and the usage of civil life allow, and so they bother themselves very little as to how perfect and sincere may have been the intent of the agent, provided the bare deed deserves approbation.

But men take greater cognizance of intent in the case of evil acts and, indeed, when no intent can be shown, as is the case with things which are undertaken from ignorance or by mistake, the act will be held to be involuntary, and since such an act is not usually imputed to the agent, so also it is understood to be void of moral quantity. But in general any moral act, undertaken of free choice, is considered so much the worse as the intention of the agent was more steadfast and complete. This intention judges have usually weighed by various conjectures and indications, since they cannot penetrate the innermost secrets of the heart, a point which is set forth more fully in another connexion.

4. Now as concerns the matter of moral actions, a good action is considered perfect in its kind which has reached, as it were, its full completion, and which is lacking in no expected part. Of actions which fall short of this perfection, one is considered inferior, as it departs from such perfection, whether one part was lacking from the whole, or

whether it was merely undertaken and not completed. But, on the other hand, an evil action, which fully succeeds in its proposed purpose, is considered the worst in its kind, and each is less evil the farther it falls short of full completion.

But it must be noted concerning the objects of actions, as they are stated in laws, that they fall into a twofold division. For some admit of distinctions and others do not; that is, some are of such a nature that
 93 an action must entirely attain them, or entirely fall short of them, or accomplish just the opposite; but in some objects a part of them may be attained and the rest missed, or the opposite be partly secured.

Again, a second distinction is observable among objects of actions, for some of them, as constituted in laws, embrace like species, as it were, the things into which they can be divided. Thus the positive law of the fifth¹ commandment in the Decalogue, as promulgated of God by Moses, gives the command to aid your neighbour in whatever bodily needs he has. And this goes on to include within it, like species, preservation of life, body, health, prevention of sorrow, and the giving of food in time of famine. And the opposing law, which forbids you to injure the body of your neighbour, includes within it, death, mutilation, wounds, stripes, and threats. See *Digest*, XLVII. x. 15, 1. Also the affirmative law of the sixth² commandment, enjoining chastity, contains purity of thoughts, modesty of speech and movement, abstinence from illicit intercourse; and the opposing law forbidding unchastity includes adultery, fornication, obscene movements and speech, and impure thoughts. Now, to illustrate this, unchaste words have, properly speaking, no relation to adultery in degree³ or part, but because the divine lawgiver desired for brevity's sake to include many acts under one special law, the man who has committed fornication has as surely and completely sinned against the sixth [seventh] commandment, as he who has committed adultery. Therefore, in the case of such objects, if what the law prescribes is not done, it must be either omitted entirely or else its opposite must be performed.

But some objects of actions, determined by laws, are so divisible that they contain the particulars, into which they can be divided, like integral parts, where the whole need not be fulfilled or avoided, or even the contrary done, but only a part of it can be accomplished and the rest omitted. If, for instance, the law commands that a labourer be paid all his wages, part of it can be paid and part be held back. But when I not merely hold back from a man what I owed him, but also take something from him, or do him some wrong, the action belongs at once to another species, and does not touch the example just cited.

¹ [The sixth as we generally count it.—Tr.]

³ [For *gratus* read *gradus*.—Tr.]

² [The seventh as we generally count it.—Tr.]

5. Since, furthermore, one action may concern some more worthy object, another a baser one, and more good or evil may result from one than from another, it follows that for this reason among good actions one may be far nobler than another, and, *vice versa*, among evil actions, one may be considered far worse than another. This is illustrated by Horace, *Satires*, Bk. I, sat. iii [115-17]: 'Reason will never prove to us that the offence is one and the same, to cut a tempting cabbage in a neighbour's garden and to rob a temple in the night-time.' (W.) Add Cicero in his *For Murena* [xxix-xxxi], where he wittily attacks the famous dictum of the Stoics, that all sins are equal. And yet the saying of Horace is not to be regarded beside the point, *Epistles*, Bk. I, ep. xv [I. xvi. 55-6]: 'When you filch only one bushel of beans from a thousand, that makes my loss less serious, not your offence.' (W.) This belongs, however, to the relative measurement of actions, which is treated fully below, Bk. VIII, chap. iii.

CHAPTER IX

ON THE IMPUTATION OF MORAL ACTIONS

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| 94 1. Imputation from act.
2. Imputation from favour.
3. Imputation from debt.
4. What can be effectively imputed. | 5. The nature of merit.
6. How the effects of moral actions are destroyed. |
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WE have already said enough above, to point out what is required for an action to be imputed to a man, or, in other words, to be considered as belonging to him. It remains for us to see on what ground it may be imputed to him in act, to such an extent that it produces a moral effect in the agent himself or in another. Now, in the first place, the actions which are determined by law must be distinguished from those that are left to every man's choice. The former kind of actions is said to be imputed to an agent, when the legislator, who determined them by his law, distinctly says that the agent is their author, and at the same time gives notice that their effects belong to him in act, or reside in him. The latter kind of actions is said to be imputed, when the man who performed them for another's benefit, without pain of necessity, or hope of reward, states that he undertook the action for the other's sake, and wished thereby to put him under obligation to himself. The latter use of the word 'impute' is more common among Latin authors, the former is extremely common among theologians and writers on moral science. But there is a clear distinction between these two kinds of imputation, since the former passes from the author or custodian of the law to the agent, while the latter is laid by the agent upon the person for whose sake and benefit the action was undertaken.

2. The first kind of imputation is commonly subdivided into imputation arising *from favour*, and imputation arising *from debt*. The former is when a man out of kindness confers upon another the effects of an action performed by a third party, which effects the second party otherwise had no right to claim for himself, or when he of his own pleasure causes another's action to yield him larger effects than the action would otherwise have produced in itself. This last imputation, however, is possible only in things favourable, but not in things distasteful. For just as it is the nature of benefits that they can be given one gratis and without cause, so, if any one is unwilling to do some good thing for another under the name of a simple kindness, he can do it under the head of an imputed action, which did not otherwise belong to him, or was not able of itself to give him the right to demand such. But reason does not permit me, on the same ground, to

lay upon another the effects of an evil action, which have no connexion with him, since those effects would otherwise not attend upon his natural condition. And so it is improper, that, for what was clearly another's fault, a man should be robbed of what nature has given every man as such, or that he should be loaded with things which nature in her generosity to all men alike has intended that he should not endure without cause. So, for example, a ruler may impute the merits of the father upon a son, who is still undistinguished by any personal graces, and because of them grant him honours not otherwise deserved. And yet it is unreasonable to punish the innocent son for the sin of his father. But it may happen that the sin of the father will be the reason why some advantages are not conferred on the son, or why he is deprived of things which would have passed to him, or would have remained in his possession, only under certain conditions. Still he can by no means, because of this fact, be visited with such an evil as his status would otherwise naturally repudiate. For in such a case nature did not guarantee the children that they would secure all their father's estate, or be admitted to special honours. These things were in store for the children only on the condition that the parents handed them down unencumbered, or did not impair their own freedom by some kind of crime. Nor is that man given a worse chance than the lot of mankind allows, who receives no estate from his parents, and must, therefore, be the builder of his own fortune.

But innocent children may, because of grave offences on the part of their parents, be so far proceeded against, that they may be forced to leave the state, for no man has a right from nature to spend his entire 95 life in this or that state, such a right being acquired from some deed of his own, or the deed of another. The retention of this right is based upon a condition, and the right is lost when some crime has been committed by a man's parents. It is not unreasonable, indeed, that the possession of a certain right should depend for its cause upon some condition, although, of course, no one can deny that the laws of some states are unjustifiably severe upon this point.

3. It is an imputation from debt, when those, to whose interest it is that an action take place or not take place, avow that an action belongs to the agent, and that the effects which have been assigned that action, shall properly be his. Consequently, if a law has specified a particular reward for a good action, it is obvious that the reward may be rightfully claimed by the man, who, in the acknowledgement of the enforcer of the law, has performed that action. But when a man has merely been ordered to do something on the authority of his commander, and without any promise of reward, he should be satisfied with the bare approval of his superior, and regard it a sufficient reward to have avoided the latter's displeasure, which would surely have

awaited his failure to comply. On the other hand, when an illegal action has been performed, the man who has been recognized as its author has every reason to fear the penalty defined in the law. But if others, who have no part in the custody and execution of laws, approve a good deed or condemn a bad one, that affects the agent in no way other than in his mere reputation. This is illustrated by the well-known saying of Diodorus Siculus, *Excerpta Peiresciana* [X, frag. 12]: 'Now praise is a reward of virtue, even though it costs nothing, and censure is a punishment of worthlessness, even though it inflicts no blows.'

It should be noted further, that, when it is to the interest of several persons that an action take place or not take place, if one of their number does not impute the action to its agent, he does in no way diminish the right of the others, since it does not depend on his example. I can, for instance, forgive him who has injured me contrary to law, so far as it concerns me, but my example takes nothing from whatever claim the officers of the state may have. In the same way the mercy which God shows sinners does not destroy the right of a court of law. But if all who are concerned make no accusation, the deed is held to be null so far as concerns its moral effects. Now the performance or non-performance of a deed concerns those who constitute the object or the directors of the deed, that is, those against whom a deed is undertaken, and who will receive some benefit or damage from it, or who have the power to guide the action. Therefore, if he who has been damaged, the magistrates and God also, pardon a wrong, it will be considered morally as not having been done.

4. There is a great difference between the kind of imputation just described, and one by which an agent is said to impute an action, which he could have avoided, to the one for whose benefit it was undertaken. A man who has exactly performed the commands of his superior can expect approval of his deed from others, and especially from him who gave the order, but he can by no means lay claim to any reward other than was expressed in the law. See *Luke*, xvii. 9-10. For the same reason a man cannot claim that, because he refrained from an evil act which was forbidden both by law and by his superior, a right should be imputed him to produce something; but he will be content with his superior's approval of his obedience. For had he done otherwise than the law commanded, a severe penalty would have rightfully befallen him, and his avoidance of this will be his reward. And so in Seneca, *Controversies*, Bk. IV, cont. vii, the man who, on being caught in adultery by a tyrant, drew his sword and killed him, and then asked a reward for his having assassinated the tyrant, is met with this reply: 'He is trying to put us under obligation to him, because, when he was caught in adultery, he was not willing himself to die.' And Cicero,

Philippics, II [iii], very properly denies that he is under any obligation to Antony, because he was not killed by him: 'But what sort of kindness is it, to have abstained from nefarious wickedness?' (Y.) Others give as a reason for this position that the failures to perform moral actions are merely non-entities which have no positive qualities. But the reply may perhaps be made that they can be considered also as moral entities, in so far as they are regarded as restrictions and coercions of a natural faculty.

But when I do something for another man's sake, which I could rightly and conveniently have avoided, and avoid what I could conveniently have done, there is good reason why I should impute it to him, that is, demand as my right that he recognize the deed in question as coming from me, and that he be under obligation to me in proportion to the advantage which he receives from it. But for such an imputation to be justified, it is necessary that the agent have deliberately planned some benefit for another from his deed, and that a desire on the part of the recipient was expressed or implied, since a favour that was done against one's will cannot rightly be imputed. And it would be an act of effrontery for one to impute to me what he did without any thought of my interests, or even with the intent to injure me, just as he would be a fool to claim a reward from the man whom he had restored to health by lancing an abscess, otherwise incurable, when he made an attempt upon his life. Although Tacitus, *Histories*, Bk. I [lxxi], says that: 'Marius Celsus, with unshaken constancy, confessed the crime of adhering faithfully to Galba, and challenged his gratitude for the example he had set.' (O.) Add *Genesis*, xlv. 5; l.¹ 20. And after Eudoxia had married the Emperor Theodosius, she sent for her brothers who had driven her from her home, and, so far from being angered at them, actually thanked them for being the cause of her high position: 'For had she not been driven out by them she would never have come to Constantinople,' Zonaras, Bk. III, on Theodosius the Younger.

But when those who are concerned by common consent define the rate at which a thing should be imputed, an agreement now arises in which the imputation reaches, as it were, its limit, and beyond which it can find no way to go in the matter at hand. Cf. *Matthew*, xx, 13-14. Hobbes' remark, *Leviathan*, chap. x, bears on this: 'Merit presupposes a right arising from the thing promised.'

5. From all this it is a light task to apprehend the nature of merit, and of meritorious acts, the efficacy of which, as some would claim, will be found to avail even against God. Now the source of merit lies in one's doing a service which is not owed, and which another had no right to acquire of us, for, when a man does what he was absolutely

¹ [For L. read l.—Tr.]

obliged to do, he merely fulfils his obligation, and has no further claim from which any merit can arise. Seneca, *Controversies*, Bk. I, cont. viii [I. vi]: 'Allow me to bestow some favour upon my country; all my service hitherto has been merely in obedience to the law.' Julius Capitolinus, in his life of Antoninus Pius [ii], after giving as the reason for the emperor's surname, the fact that he gave his arm to his aged father-in-law in a meeting of the Senate, adds: 'Which act, indeed, is not sufficient token of great dutifulness, since a man were rather undutiful who did not perform this service than dutiful if he did.' (M.) Nor is it right to give a man credit for doing something that he did not owe to a person, against the latter's will, especially if the other received no advantage from it. Therefore, it is clear that no mortal can secure any merit before God, even if he could fulfil to the letter the divine law, and that, accordingly, God cannot be in any way a debtor of men, except through a free promise which His goodness would not allow Him to break, it being understood that no right, in the proper sense, could accrue to mortal man from such a promise. So also no actions, enjoined by a superior, can of themselves produce any merit which stands towards him who enjoined them. And although both God and men, by virtue of their power to command, often confer certain rewards on those who obey their commands, so as to incite them to prompt¹ obedience, they maintain that they are held to the payment of these rewards, only by their promise, and not by the merit of the agent, or, as it were, by a contract. And so these benefactions usually pass under
 97 the name of a free reward, and not of payment. Euripides, *Rhesus* [162-3]:

Each deed that hath reward
 Assigned it, is with double pleasure done. (W.)

But if the legislators, nevertheless, state that some reward can be claimed from them for the performance of a specially designated action, there can be no question of the agent's claiming it lawfully and on his own right. And yet the mere omission of acts that are forbidden by law can in no way lead to merit, or furnish any reason for praise or self-satisfaction. The words of Philostratus, *Life of Apollonius of Tyana*, Bk. VI, chap. xi [VI. xxi], bear this out:

Justice is something more than not being unjust, [. . .] for good sense is something more than not entertaining nonsense, just as courage is something more than not running away from the ranks; and so temperance is something more than the avoidance of adultery, and no one reserves his praise for a man who has simply shown himself to be not bad. For because a thing, no matter what, is equidistant between praise and punishment, it is not on that account to be reckoned off-hand to be virtue. (C.*)

Add *Luke*, xviii. 11. Ammianus Marcellinus, Bk. XXX, chap. xi: 'For not to seize what is another's merits no praise.'

¹ [For *promptitudini* read *promptitudini*.—Tr.]

The only actions now remaining, therefore, by which merit towards other men can be acquired, are those which are not owed them, at least by a perfect obligation, whether no obligation binds one to their performance, or whether native reason, indeed, commands or advises them, while their application to distinct persons is left to our judgement, or whether they are merely not enjoined by civil laws. For a man has so complete a right to the things which I owed him by virtue of a full obligation, that, when they are done for him, I have lost nothing which I had a right for the time to keep, or to use at my discretion; and, indeed, had such duties been denied or held in abeyance, the man would have suffered injury and damage. Since, therefore, these things already, after a fashion, belong to the man, and I cannot dispose of them at my own pleasure, they will be of no aid in producing further merit. But if I do something for a man without being perfectly obligated thereto, inasmuch as this involves a loss for me and a gain for him, it leaves me with a perfect or an imperfect right to receive from him some equivalent. And precisely this is merit. Add Seneca, *On Benefits*, Bk. III, chap. xxi-xxii.

When we determine by an express agreement the exact amount necessary to balance this merit, it is properly called *wages*. But when the fixing of the amount as to kind, time of payment, and quantity, is left to the judgement and fair dealing of some one else, it is called *reward*. This takes a corporeal form, such as money and land; or incorporeal, such as the concession of privileges and immunities; or moral, such as honours and orders; or emblematic, such as statues, tablets, wreaths, and the like. Add Michel Montaigne, *Essays*, Bk. II, chap. vii.

And so merit comes only from actions that are not owed others, primarily as they are of advantage to them. And in the same way base actions, and especially those by which loss or injury is done another, give rise to demerit, by reason of which one is compelled to make good to another that loss. But in general evil actions cause guilt, which is understood to make a man liable to punishment, a topic which will be treated more specifically in another place [VIII. iii].

6. Now just as an imputation from act gives use to effects of moral actions, so its cessation, and, as it were, recall remove them; and this seems to be equally true both of good and evil actions. Mere imputation must necessarily attend both good and evil actions, so long as they are such, or so long as they are enjoined or forbidden¹ by law. But when a law has been annulled, the corresponding imputation for the action concerned ceases to be possible. He alone can remit the imputation of an action not due, to whose interest it is that the effects of the action should in fact take place. And so, if the performer of a task remits the

¹ [For *inter dicuntur* read *interdicuntur*.—Tr.]

imputation, wages can no longer be asked, although such a remission is not within the power of the person for whom the task was performed. The creditor may mark off a debt, but not the debtor. In the same way, to remove the efficacy of the imputation of an evil action lies within the power of those persons to whose interest it is that those same effects should become a reality, that is, in the power of him who was hurt, of the legislator, and of the guardians of the law, but not in the power of him who did the wrong.

The writers on civil rights list five ways by which a crime is made null in a court of law. The first is when the punishment prescribed by the laws has been undergone, for no one is punished twice for the same offence, especially when the penalty was adequate. Although, indeed, many penalties leave after them a stigma. See Suetonius, *Claudius*, chap. xvi. And often, even after the penalty has been exacted, the moral punishment or disgrace and marks of shame abide. Second, when the judges have cleared a man, he is held innocent in a civil court. The third is when the accused has died; although, in instances of the worst crimes, now and then, severities are inflicted upon the bodies of the dead, and upon their property and memory, in order to instil fear in others. The fourth is when, in the course of time, crimes are wiped out, to the extent that the guilty party may no longer be haled into court on their account. Seneca, *Oedipus* [826]:

What long hath lain concealed
I bid thee suffer to remain in doubt. (M.)

Although Lysias, *Orations*, XII, denies that a crime can be blotted out by the lapse of time. The last way is when pardon for a crime has been granted by him in whose hands is vested the supreme power in the state. These five ways are treated in full by Antonius Matthaeus, *De Criminibus*, XIX. i on *Digest* XLVII.

Now just as the effects of an evil action lie, as it were, dormant, so long as it is unknown, or generally disguised, or pardoned in advance, as it were, so, when once those effects have become a matter of public notice, their moral effects can, indeed, be blotted out, but not so their physical ones, if there be such. For what has once been done in a physical way cannot be undone, although action can be taken, whereby it will have no further moral effects in civil life. Thus, if a man has been scourged for some crime, he still carries the stripes which his back received, but the disgrace can be removed by a decree of the rulers of the commonwealth. However, if all imputation has been fully removed, the act is held morally as not to have been done. On these grounds we are to explain the passage of Ovid, *From the Pontus*, Bk. I, el. i [62 ff.]: 'It is a smaller thing to suffer the punishment than to have deserved it. . . . The punishment can be removed, the fault will remain for ever.

Death at least by his coming will put¹ an end to my exile, my sin even death will not remove.' (W.)

It should be observed, in passing, that those persons labour under a great delusion who maintain that, to destroy the guilt of an evil action, there is needed besides non-imputation or forgiveness, the infusion of some contrary quality, or of a display of justice; very much as we destroy the spots on a wall by covering them with a coat, or dissipate a foul odour by burning incense. They have been brought to this misconception by their ignorance of things moral, and because they thought that moral qualities can be produced or destroyed by the same means as are physical qualities. The absurdity of this position could easily have been seen from what has just been said.

¹ [For *facile* read *faciet*.—*Tr.*]

[99]
SAMUEL PUFENDORF
ON
THE LAW OF NATURE AND NATIONS

BOOK II

CHAPTER I

IT DOES NOT SUIT THE NATURE OF MAN TO LIVE WITHOUT LAWS

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| 1. The question is raised whether law is appropriate to man. | 5. The nobility of man prevents his having such a liberty. |
| 2. The general character of liberty. | 6. Depravity of liberty. |
| 3. The character of liberty as it appears in God. | 7. The varieties of mental equipment. |
| 4. The character of the liberty of animals. | 8. Its weakness and natural rudeness. |

Now that in the first book things moral in general, and the terms in most frequent usage have been explained, a task which, if scattered¹ throughout our work, would have destroyed the continuity of our study, we must now approach more closely our real subject, and inquire,² first of all, whether it would accord with man to pass his life without any law. From the answer to this question it will be clear why the most Good and Great Creator did not grant man a liberty to do everything entirely as he pleased, or according to his changing mood, without any restraint of right, rule, or necessity. For since God has endowed man with a will, that is, a faculty to direct himself by an internal impulse to the things which seem to suit him, and to turn away from what he does not like, and, indeed, in such a way that this same will is wholly free from any compulsion,³ one may well raise the question, whether it did not become His goodness to allow man a full and unembarrassed use of a will characterized by such flexibility. For why did God give him a flexible will, if it immediately had to follow set rules? As chains and bonds prevent the free movement of our limbs, so the freedom of the will seems to be entirely done away with, if we can will to do many things which must of necessity be avoided, and be unwilling to do many things which must of necessity be undertaken.

2. Now to go back some distance in examining this matter, it seems best to show, first of all, that an unlimited liberty would be disadvantageous and prejudicial to the nature of man, and that, therefore, it is conducive to his welfare for him to be, as he is, constrained by laws. And at the same time it will also be clear how far he should be free from the curb of all restraint. It must be understood that liberty in general is regarded as an internal faculty to do or to avoid whatever any one wishes. By the term *faculty*, we mean that he who enjoys liberty has not only the power to do something, and the force to move himself, but also to cause movement in other things, or in some way

¹ [For *sprasin* read *sparsim*.—Tr.]

² [For *in quirendum* read *inquirendum*.—Tr.]

³ [For *cogisit* read *cogi sit*.—Tr.]

to affect them. By the term *internal* it is understood that the movement and power comes from an internal force, and not from a violent external compulsion, as when a piece of wood is moved by an impulse from without. The clause *whatever any one wishes*, suggests that the motion is not undertaken rashly and on a blind impulse, but that it is understood that the agent, to some extent at least, has become acquainted with the object, and has determined upon the act, after 100 some deliberation, and therefore the immediate reason for his action was because he conceived the matter in a certain way. But it is understood, at the same time, that other obstacles which might stand in the way of the motion, or turn it in another direction, ought to be absent if free play is to be given liberty.

3. From these remarks it follows that if one observes closely this universal order of things, he will find many which enjoy no liberty at all, such as all inanimate objects, and those which have life without sensation. Others enjoy liberty, but in different degrees. A liberty unfettered and free from every encumbrance and restriction belongs to the most Good and Great God alone, and is conceived as the most noble attribute of the perfection of His being, admitting no circumscription, and indissolubly bound up with His omnipotence. And so when God does not do certain things, or does not always do everything, the reason is not to be found in any deficiency in His liberty, but in His own good pleasure. *Psalms*, cxv. 3; *Ephesians*, i. 11. And when it is said that He cannot do some things, this is not due to any external impediment, either natural or moral, but to His own pleasure, which we mortals conceive as appropriate to His greatness and excellence. And in such a sense we must take the common maxim, 'God is a law unto himself.'

Likewise, when justice is attributed to God, it must not be understood as inferring any obligation or right residing in another, as the nature of human justice implies. But since He has shown both in His creation and in the revelation of Himself, that such a manner of acting is proper to His most perfect nature, we mortals apply that word to Him, which we use to describe such things as are lawfully performed by us towards others. And so when we say that the promises of God do not fail, this is true, not because His liberty has been limited by an obligation due to a promise, but because it pleases His divine excellence that no man shall expect in vain what he was bidden by Him to expect, or because the failure of a promise implies some imperfection, a thing that is utterly incompatible with the nature of God. And for this reason we mortals do not claim the divine promises as by any right of ours, but we reverently accept them as gratuities proceeding from His most free pleasure. For it is not with Him as with the promises of men. In the command, 'Pay what thou owest,' the promise becomes an obligation, and what was at first an act of liberty changes to one of

necessity; but the promises of God, as well as what He vouchsafes without a promise, retain the perfect nature of gifts.

In some such stammering way as this are we men able to conceive the liberty which belongs to God, although the only certain thing is that such divine liberty surpasses by indefinite degrees the condition of man. Add Richard Cumberland, *De Legibus Naturae*, chap. vii, § 6.

4. We observe that brute beasts, which are below our condition of life, also enjoy liberty to some degree. But with them it is only of a low kind, since their strength and the dullness of their senses is confined within narrow limits, while their appetite is so base that it concerns itself with but few objects and with them in a very cursory manner, and is stirred only by the crude and everywhere obvious things which serve the belly. They have, furthermore, no customs, or law, or right which they are obligated to observe, either among themselves or towards men. Among a few there are some rudiments of marriage, but it is found only in the mere act of bodily conjunction, and some show¹ of affection, but not in any bond of fidelity. As for the most of them no vestige remains of affection, once their desire has been satisfied, nor any care for shame or kinship. Many of them have a strong love for
 101 their offspring, which, however, lasts only until it can shift for itself; after this the parents take no further thought for their offspring, their love is entirely forgotten, nor do the offspring make any return to their parents, as if from a feeling of obligation, or bother themselves to render them any assistance. The beasts which live on flesh, tear and devour without scruple whatever pleases their appetite, and many of them in their savagery are brought to mutual destruction. Since they know no laws of ownership, on the gnawings of hunger they often fight fiercely for what is common to all, and no sense of propriety prevents their seizing what others had stored up for their own use. There is, indeed, no regard among them, no honour, no rule, no prerogative other than that acquired by mere superiority in strength.

Among some animals, indeed, likeness of kind often begets a form of friendship and society, and many, therefore, are accustomed to live in herds, while some, more ferocious than others, give vent to their savagery on other species rather than on their own. So Juvenal, *Satires*, XV [159 ff.], says:

The wild beast of similar genus spares his kindred spots. When did ever lion, though stronger, deprive his fellow-lion of life? In what woods did ever boar perish by the tusks of a boar larger than himself? The tigress of India maintains unbroken harmony with each tigress that ravens. Bears, savage to others, are yet at peace among themselves. (E.)

But aside from the fact that the above sentiment is expressed with considerable poetic licence, this relationship is scarcely a strong bond of lasting peace, since, forsooth, it is broken the instant a consideration

¹ [For *specie* read *species*.—Tr.]

of the belly interposes. Puppies play happily together, but throw a piece of meat among them, and at once you will see them fighting with one another. When some animals seem to show obedience, love, faithfulness, or gratitude towards me, it is due to mere habit, or the enticement of food. Remove these, and when their strength is sufficient, or there be something about a man to excite their appetite, they will not spare him. The conclusion is that no internal and moral restraint curtails the liberty of animals, but, on the other hand, their external movements are very often controlled by man through the use of force.

If, now, one asks why animals enjoy a liberty unrestrained by law, the simplest reply is, because God did not endow them with a mind that can comprehend law. For there seemed no need of great care in fostering and guarding the security of animals, which are not only produced by nature, in such great numbers, with high fecundity and little effort, but which also are without an immortal soul, their life coming only from a minute disposition and motion of particles of matter. And the Creator is pleased to manifest His power in producing and destroying them. Nor was there any great need of restraining the brute creation by laws, since their appetites are aroused only by hunger, thirst, and sexual passion, and can be slaked by the ready and copious provisions of nature; while man has strength and wit enough to prevent their licence, as it were, from doing him too great harm. Add Charron, *De la Sagesse*, Bk. I, chap. xxxiv, n. 11.

5. Now why the Creator was unwilling to endow man with a lawless liberty of this kind, and why such a liberty would be utterly inappropriate to him is clear for many reasons drawn from the natural or acquired condition of human nature. The dignity of man's nature, and that excellence of his in which he surpasses other creatures, required that his actions should be made to conform to a definite rule, without which there can be no recognition of order, seemliness, or beauty. And so man has that supreme dignity, the possession of an immortal soul, furnished with the light of intellect and the faculty of judgement and choice, and most highly endowed for many an art. For this reason he is called 'a creature above all others precious and endowed with lofty reason, fitted to rule over the lower animals'.¹ Solinus, chap. iii [i. 53], calls man an animal 'which the nature of things 102 has set over all other animals by virtue of his passing judgement upon sense perceptions and his capacity for reason'.

Now that the soul was destined for a far more noble end than merely to serve as the salt for this trivial body, is gathered from the fact that it is especially distinguished by such faculties as seem to be of little or no value in preserving the body, since it could be maintained by a much less elaborate provision. For the power of the human soul is

¹ [Ovid, *Metamorphoses*, I. 76-7.—Tr.]

chiefly concerned with such things as relate to the service of God, and to social and civil life. This end the soul attains chiefly by its power to proceed from known principles to unknown, and to decide what is suitable for it and what is not, to form universal ideas through induction, to devise signs by which the ideas of the mind can be imparted to others, to understand numbers, weights, and measures, and compare them, to understand and observe their order and its meaning, to excite, repress, or allay affections, to remember a multitude of things, and to call them back, as it were, for the eye to gaze upon, to turn its sight upon itself and to recollect its own dictates and compare them with its actions, from which recollection and comparison the force of conscience comes. There would be little or no use of all¹ such faculties in a life lawless, brutal, and unsociable. Add Richard Cumberland, *De Legibus Naturæ*, chap. ii, § 4, who also farther on, § 33, adds some excellent considerations from the structure of the human body. Now the more splendid the gifts which the Creator has bestowed upon man, and the greater the intellectual qualities with which He has endowed him, the more base it would be for such qualities to waste away in disuse, to be expended at random, and to be squandered without order and without seemliness. And surely it was not for nothing that God gave man a mind which could recognize a seemingly order, and the power to harmonize his actions therewith, but it was of a surety intended that man should use those God-given faculties, for the greater glory of God and his own richer felicity. You may find an illustration of this in the words of Manilius, *Astronomica*, Bk. II [105-8]: 'How, beholding this, should one hesitate to link man with heaven? Nature has given to him forethought and speech and apt intelligence and swiftness of spirit. Into him alone has God descended and dwells in him, and seeks Himself in man's seeking of Him.'

6. Another reason why it was not felt that man should be allowed so great a licence as the beasts was his greater proneness to evil. No one will be surprised at this when he has probed to the depths the nature and pursuits of mortals. Beasts are excited by their appetite and lust, the latter of which stirs them only at certain seasons, and is indulged in not for superfluous pleasure, but only for the procreation of their kind. When this end is obtained their passion is quieted, and, as it were, lulled to sleep. Oppian, *The Chase*, Bk. III [151 f.]: 'It is not the work of beasts, when the belly is full, to go to couch and do the deed of love.'

But man's desire is by no means enflamed only at certain seasons; it stirs him much more often than seems necessary for the preservation of his species. So also the hunger of animals is most easily satisfied by the food which nature has strewn before them on every hand, and which needs no further preparation and no garnish, and when this hunger is

¹ [For *monium* read *omnium*.—Tr.]

satisfied no further cares disturb them. Nor do beasts break out into strife and reckless injury of one another, unless driven to it by hunger and simple lust, while the appetite of man longs to be whetted and not merely satisfied. Nature has given the beasts no need for covering themselves, while man has made the tenderness of his body an occasion to parade his vanity and pride. Furthermore, man is filled through and through with a great conglomeration of affections and desires unknown to beasts. A craving for luxuries, ambition, honours, and the desire to surpass others, envy, jealousy, rivalries of wit, superstition, anxiety about the future, curiosity, all these continually trouble his 103 mind, none of which touch the senses of brutes. Manilius, *Astronomica*, Bk. IV [4 ff.]:

Why should we still tread on the unfinished round
Grown gray in care, pursue the senseless strife,
And seeking how to live, consume a life?
The more we have, the meaner is our store;
The unenjoying craving wretch is poor.
But heaven is kind; with bounteous hand it grants
A fit supply for nature's sober wants.
She asks not much, yet men press blindly on,
And heap up more to be the more undone.
By luxury they rapine's force maintain;
What that scrapes up flows out in luxury again.
And to be squandered or to raise debate
Is the great only use of an estate. (C.)

Libanius, *Declamations*, IX [345-6]:

Is not man a gentle animal, as far as words go; but in actual fact, wild and fierce? For when did lions take the field against other lions? What war is there between beasts of the same species, or perjury, or violation of agreements, or such monstrous perfidy and avarice, what gold or love of wealth? what gorging and drunken sprees do they know, and what adulteries?

If, therefore, one will but consider the nature of the contentions and wars that are waged continually among men, he will appreciate that most of them are undertaken because of wants which are unknown to beasts. Add Charron, *De la Sagesse*, Bk. I, chap. xxxiv, n. 12, and chap. xxxix, n. 11.

With affections of such ferocity and variety what would have been the future of man had no right been established to compose them? You would see a pack of wolves, lions, or dogs fighting among one another to the death. Every man, indeed, would have been a lion, a wolf, or a dog to his neighbour, and something even worse than these, for there is no animal that can and does more injure man than man himself. And since men cause so many injuries to each other even now, when law and punishment hang over them, what would the future hold, if there were no control over anything, if no direction from within curbed the desires of man? Add Aristotle, *Problems*, § xxix, qu. 7; Pliny, *Natural History*,

Bk. XVIII, beginning. Iamblichus, *Protrepticon*, chap. xx [p. 123 A]: 'That men should live together and at the same time contrary to law, would be utterly impossible. For in that case they would suffer more than if each man lived altogether by himself. Now for these necessary reasons law and justice rule among men, and may never leave or be removed from them.' Manilius, *Astronomica*, Bk. II, p. 47, ed. Boecler, v. 13 ff. [592 ff.].

7. Man has, furthermore, a nature far more diverse and varied than any of the animals. The different kinds of animals have in general similar inclinations, and are moved by emotion and appetite, if you know one you know them all.¹ But among men there are as many minds as there are heads, and to each one his own way seems best. Horace, *Satires*, Bk. II, sat. i [27-8]: 'For every thousand persons there are a thousand tastes.' Philemon in Stobaeus, *Anthology* [chap.] ii [III. 26]: 'Now even if one bring together thirty thousand foxes, one will find but a single nature and character² among them one and all. But with us men there are as many different characters as is the number of our several bodies.' Pliny, *Panegyric* [lxxvi. 4]: 'Nothing displeases us more than what takes place as though it pleased everybody.'

Nor are all men moved by a simple or uniform desire, but by such as are manifold and confused. Nay, the same man is often different from himself, and intensely loathes at one moment what he greatly desired at another. 'He is driven too and fro by a strong tide of troubles, and turns his rapid mind now here, now there, and hurries it to various objects, and ponders all again, and yet again.'³ (B.) Add Charron,⁴ *De la Sagesse*, Bk. I, chap. xxxviii. There is, furthermore, no less a variety in their interests, institutions, and inclinations to employ their vigour of mind, as may be observed in the almost infinite manners of men's lives. Quintus Calaber [Smyrnaeus], Bk. I [464 f.]:

Yea, of one blood be all the race of men,
Yet unto diverse labours still they turn. (W.)

104 Now the more voices there are, the more dreadful and unpleasant the sound in the ear, unless they unite in harmony. In the same way the greatest confusion would have prevailed among men, were not their dissimilarity of customs and appetites reduced to a seemly order through laws. And yet this variety in another way yields man a remarkable grace and reward, since out of it, if properly guided, a marvellous orderliness and beauty may arise, which could not possibly have come from complete uniformity. And besides, there were likely to be fewer clashes in so great a number of men, if their inclinations and desires turned to different interests. In the same way nature was wisely provident in designing such a remarkable difference in the features of

¹ [From Terence, *Phormio*, 265.—Tr.]

³ [Vergil, *Aeneid*, VIII. 19 ff. (B).—Tr.]

² [For *penorem* read *tenorem*.—Tr.]

⁴ [For *Charon* read *Charron*.—Tr.]

men. For since different duties have to be performed by different people, and since we must act in a different way towards different people, the greatest confusion would arise if all men looked exactly alike, and one could not be distinguished from another except by certain marks of identification which would give abundant opportunity for all kinds of frauds, since they would depend upon human convention. Add Richard Cumberland, *De Legibus Naturae*, chap. ii, § 28. And another secret, as it were, lies in this diversity of appearance, since one appearance may suit one man better, another some one else, and so each man may find a guise which seems the fairest to himself, and suits his fancy best.

8. And finally, the weakness of man made it necessary that he should not live without law. It is only a few days until an animal is developed enough to be able to look out for its own maintenance, and it is not dependent on the aid of other animals to find it. But weakness attends a human being for a long period after his birth. Quintilian, *Declamations*, cccvi: 'We human beings are but a feeble animal at this first. For the young of wild beasts and cattle are immediately on their feet and rush to the teats; but we have to pick up an infant and guard it against the cold. And even then it often expires between the hands of its parents and the bosom of its nurse.' Theocritus, *Idylls*, xxvi [xxv. 50]: 'For in all men the Gods implant this need of their brother men.' (W.) Add Pliny, *Natural History*, Bk. VII, Introd. How many years are necessary, how diligently must knowledge be acquired, to make a man able to secure food and clothing by his own powers! Imagine, if you will, a man who has been reared by another so that he is without the power of making his wants known, and can merely move himself where he pleases, without any information and training of the mind, whose knowledge is limited to what has come from his own natural endowment. Imagine such a man left in the open, away from any assistance or company of his fellows. What a miserable animal you will behold! A dumb and ignoble creature, with no power other than to dig up plants and roots, to slake his thirst at any spring, river, or pool he may happen upon, to crawl into caves so as to avoid the inclemency of the weather, to cover his body with moss or grass, to pass his time in an intolerable inactivity, to tremble at every sound or at the passing of another animal, and finally to perish of hunger and cold or to be torn to pieces by some wild beast. And so man owes it to his intercourse and relations with other men that he does not pass an existence more miserable than that of any other living being. The saying: 'It is not good for man to be alone'¹ is applicable not only to the state of matrimony but also to the association with other men in general. But a society of men cannot be constituted nor maintained

¹ [Genesis, ii. 18.—Tr.]

in a peaceful and firm state without law. And so if man was to be prevented from being the most degraded and miserable of all creatures, it was not fitting that he should live without law. Plutarch also shows how a perfect liberty is not best for man, *On Listening to Lectures* [i, p. 37 D]:

105 [. . .] Reason under whose subjection alone men are properly said to live in freedom. For they only live at their own will who have learned to will as they ought; and that freedom of will which appears in unconstrained appetites and unreasonable actions is mean and narrow, and accompanied with much repentance. (G.)

From all this it is apparent that the term 'the natural liberty of man', such as in fact agrees with him, and is not conceived merely as an abstract idea, should under all circumstances be understood as something conditioned by a certain restraint of sound reason and natural law.

CHAPTER II

ON THE NATURAL STATE OF MAN

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| <ol style="list-style-type: none"> 1. Different aspects of the state of nature. 2. Its miserable condition. 3. Its rights. 4. Degrees of a natural state. 5. Does it lead¹ to war? 6. Hobbes' reasons for asserting that it does. 7. The relationship² existing between men leads to the opposite belief. | <ol style="list-style-type: none"> 8. Objections to Hobbes' arguments. 9. The use of reason should not be denied the natural state. 10. Mere barbarous customs do not make up a natural state. 11. Natural peace has no need of agreements. 12. Natural peace is little to be relied upon. |
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By the natural state of man we do not understand that condition which nature intended should be most perfect and for his greatest good, but that condition for which man is understood to be constituted, by the mere fact of his birth, all inventions and institutions, either of man or suggested to him from above, being disregarded, since they give a very different aspect to the life of man. By them we understand not only the different forms and general culture of the life of man, but especially civil societies, at the formation of which a suitable order was introduced into mankind's existence. To get a more distinct idea of this state we will consider it *in itself*, especially as to what advantages and rights accompany it; that is, what would have been the condition of individual men had mankind discovered no civilization and introduced no arts or commonwealths; and secondly, *in relation to other men*, whether it bears a resemblance to peace or to war; that is, whether men who live in a state of mutual natural liberty, wherein no man is subject to another, and they have no common master, should be considered foes or friends. This last state is either *full*, that is absolute, in that it concerns all men absolutely alike, or *limited* and restricted, concerning only a certain part of mankind. The human race, indeed, can be considered in one of two ways, either as all men and individual men enjoy a natural liberty, or as they are understood to have gathered together with some persons into a civil society, but bound to other men by nothing but the bond of a common³ humanity.

2. Now in order that we may form some conception of this natural state, as it would have been without any aid or invention coming from the hand of man or given by God, we must imagine man as dropped from somewhere into this world and left entirely to his own resources, with no help from his fellows after birth, and, furthermore, endowed with no more gifts of body and mind than are now generally discovered

¹ [For *idoleum* read *indolem*.—Tr.]

³ [For *communi* read *communis*.—Tr.]

² [For *conatio* read *cognatio*.—Tr.]

106 in men without previous culture, nor aided by any special attention from God. Such a condition must be regarded as most miserable, whether you imagine man to have come from the beyond as a babe, or as a man already endowed with his full stature and strength. As an infant he must certainly have perished, unless by some miracle an animal had given the poor babe nourishment from its own body, but this association with brutes would certainly have given their foster-child much of their own savagery. Were he a full-grown man, we would have to imagine him naked, able to make only inarticulate sounds, devoid of all knowledge and customs of men, in constant fear, 'amazed at the changing light of this earth,' as Manilius describes him, Bk. I [68]. At the gnawing of hunger he would seize anything he chanced upon and try it as nourishment, the first water he found would quench his thirst, caves or dense forests would be his only shelter from the storms. If, furthermore, we imagine many such men left entirely to their own resources on this still virgin earth, what a miserable and animal-like existence would they lead, until by their own experience and ingenuity, or, as the opportunity arose, by observing the cunning of some animals they slowly advanced to a kind of ordered life, and 'by taking thought fashioned different arts'.¹ Any one will recognize the truth of this if he is willing to note all the things which we now use in life and consider how difficult it would have been for any one to discover them all by his own powers, had not the guidance and labour of other men preceded him; nay, most of them would never have occurred to the vast majority of men. And so it is not strange that pagan writers, who were unacquainted with the divine account of the true origin of the human race, give so wretched a picture of the primitive state of man.

Horace, *Satires*, Bk. I, sat. iii [99 ff.], describes it in the following words:

When living beings first crawled on earth's surface, dumb brute beasts, they fought for their acorns and their lair with nails and fists, then with clubs, and so from stage to stage with the weapons which² need thereafter fashioned for them, until they discovered verbs and nouns by which to make sounds express feelings. From that moment they began to give up war, to build cities, and to frame laws that none should thief or rob or commit adultery. (W.)

And Lucretius says, Bk. V [925 ff.]:

But the race of men was much harder then in the fields, as was seemly for a race born of the hard earth. What sun and rains had brought to birth, what earth had created unasked, such gift was enough to appease their hearts. Among oaks laden with acorns they would refresh their bodies for the most part. But to slake their thirst streams and spring summoned them. Nor³ as yet did they know how to serve their purposes with fire, nor to use skins and clothe their body in the spoils of wild beasts, but dwelt in woods and the caves on mountains and forests, when constrained to shun the shock of winds and the rain-

¹ [Vergil, *Georgics*, I. 133.]

³ [For *Necdum* res read *Necdum res*.—Tr.]

² [For *quae post* read *quae post*.—Tr.]

showers. Nor could they look to the commonweal, nor had they knowledge to make mutual use of any customs or laws. Whatever booty chance had offered to each, he bore it off; for each was taught at his own will to live and thrive for himself alone. And Venus would unite lovers in the woods; for each woman was wooed either by mutual passion, or by the man's fierce force and reckless lust. . . . But much greater was another care, inasmuch as the tribes of wild beasts often made rest dangerous for wretched men. . . .

Then after they got themselves huts and skins and fire, and woman yoked with man retired to a single [home], and the chaste delights of single love were known, and they saw children sprung from them, then first the race of man began to soften. For fire brought it about that their chilly limbs could not now so well bear cold under the roof of heaven, and Venus lessened their strength, and children, by their winning ways, easily broke down the haughty will of their parents. Then, too, neighbours began eagerly to form friendship one with another, not to hurt or to harm,¹ and they commended to mercy children and the race of women, when with cries and gestures they taught by broken words that 'tis right for all men to have pity on the weak. Yet not in all ways could unity be begotten, nor could breeding have prolonged the generations till now.² . . . But the diverse sounds of the tongue nature constrained men to utter, and use shaped the names of things, &c. (B.*)

A similar account is found in Diodorus Siculus, Bk. I, chap. viii:

Men at first led a rude and brutish life, wandered up and down in the fields, and fed upon the most agreeable herbs, and the natural fruits of the trees. And since they were attacked by wild beasts, they were taught by their own advantage to help one another, and as they came together out of fear, they began to recognize little by little one another's forms. 107

And a little further on:

But forasmuch as what was useful for man's life, was not at the beginning found out, this first race of mankind lived a laborious and troublesome life, as being as yet naked, not inured to houses, nor acquainted with the use of fire, and altogether destitute of delicacies for their food. For not knowing as yet how to house and lay up their food, they had no barns or granaries where to deposit the fruits of the earth; and therefore many, through hunger and cold, perished in the winter. But being at length taught by experience, they fled into caves in the winter, and laid up such fruits as were fit to keep; and coming by degrees to the knowledge of the usefulness of fire and of other conveniences, they began to invent many arts and other things beneficial for man's life. (B.*)

Add I, xliii.

Cicero tells us, *For Publius Sestius* [xlii]:

Who of you is ignorant that the nature of things has been such, that at one time men, before there was any natural or civil law fully laid down, wandered in a straggling and disorderly manner over the country, and had just that property which they could either seize or keep by their own personal strength and vigour, by means of wounds and bloodshed. And there is no point in which there is so much difference between this manner of life, polished by civilization, and that savage one, as the fact of law being the ruling principle of the one, and violence of the other. (Y.)

He speaks to the same effect in *On Invention*, Bk. I [ii]. Euripides, *Suppliants*³ [202 ff.]:

Praise to the God who shaped in order's mould
Our lives redeemed from chaos and the brute,⁴

¹ [Many modern texts read *violari* 'to be harmed'.—Tr.]

² [Pufendorf omits two lines at this point, and changes the course of Lucretius' argument.—Tr.]

³ [For *Supplicus* read *Supplices*.—Tr.]

⁴ [For *Abelluino* read *A belluino*.—Tr.]

First, by implanting reason, giving then
 The tongue, word-herald, to interpret speech;
 Earth's fruit for food, for nurturing thereof
 Raindrops from heaven, to feed earth's fosterlings,
 And water her green bosom; therewithal¹
 Shelter from storm, and shadow from the heat,
 Sea-tracking ships, that traffic might be ours
 With fellow-men of that which each land lacks. (W.)

The poets usually give the gods the credit for the discovery of the things most useful to man. See Oppian, *On Fishing*, Bk. II, lines 16 ff.

Fanciful as such descriptions are, yet these authors in a way were not mistaken, because, if one presupposes such an origin for the human race as they describe, the face of nature must have been much as they picture it. And this is the reason why, in their ignorance of the state of Paradise, they imagined that a certain temperateness of air and a spontaneous fertility of the soil prevailed at the beginning of the world, for they believed that man, so late an arrival, would not have been preserved, had the seasons been as inclement then as now, and had man been compelled to secure his sustenance with all the labour that is now required. Ovid, *Metamorphoses*, Bk. I, line 107; Vergil, *Georgics*, Bk. II, line 336. Lucretius, Bk. VI [816-17]: 'But the youth of the world called not into being hard frosts nor exceeding heat nor winds of mighty violence.' (B.)

For although we know that primitive man by the aid of God learned very early the most necessary arts (see *Genesis*, iii. 21, 23; iv. 2, 17, 22), to which the sagacity of men added a considerable number of others; still his condition would have been wretched and base, if no states had been formed, if every one had governed his household at his own pleasure, and had allowed his sons at manhood to go forth into a state of natural liberty. In such a case the characterization could have been applied to all mankind that Euripides applied to the Cyclopes in his *Cyclops* [120]: 'Shepherds—and not for nobody they don't care.' (W.)

Hobbes has vividly described the inconveniences of such a state, *De Cive*, chap. x, § 1:

Outside a state we are protected only by our own strength, but inside a state by the strength of all. Outside a state no man can be certain of the fruit of his labours, inside a state all can. To sum up, outside a state there is only the rule of passions, war, fear, want, squalor, loneliness, barbarity, ignorance, ferocity; inside a state the sway of reason, peace, security, wealth, comforts, companionship, refinement, knowledge, and benevolence.

Cf. Polybius, Bk. IV, chap. xlv, where he recounts the miserable
 108 state of the Byzantines caused by an interminable war with the Thracians. I myself believe that the complaint of the masses about the burdens and drawbacks of civil states could be met in no better way than by picturing to their eyes the drawbacks of a state of nature.

¹ [For *Adhaec* read *Ad haec*.—Tr.]

These are properly understood by those who have accepted as a proverb the saying: 'Were there no courts of justice every man would devour his neighbour.'

3. Now the rights attendant on this natural state of man can be easily gathered, in the first place, from the desire common to all animals, whereby they cannot but use every means to preserve their body and life, and to avert everything that would destroy them, and, in the second place, from the fact that those who enjoy¹ this state are subject to no man's orders. For it follows from the first consideration that men, constituted in a natural state, may use and enjoy everything that is open to them, and may secure and do everything that will lead to their preservation, in so far as no injury is done to the right of others. And from the second, that they may use their own judgement and decision, provided, of course, that it is framed on this natural law, just as they use their own strength, to secure their own defence and preservation. And in this respect also the state of nature has come to be described as a natural liberty, since every man, antecedent to any act of man, is understood to be under his own right and power, and to be subject to the power of no other man. And so every man is considered equal to every other man, since neither is the subject of the other.

A remark of Hobbes, *De Cive*, chap. i, § 7, must be understood and corrected in the light of what has just been said. He writes: 'The first principle of natural law is that every man preserves to the limit of his strength his own life and body, and bends every energy² to defend and preserve his body and members from death and pain.' The conclusion from this is that 'since a right to some end is useless, if it cannot employ the means necessary to the end, every man has the right to use all means and prosecute every act without which he cannot preserve himself'. But since no man in a state of nature has another as his superior, to whose desire he submits his will and judgement, it follows that 'every man is by natural right a judge', that is, every man decides at his own pleasure, 'as to whether the means which he shall use, and the action which he shall take, are necessary or not to the preservation of his life and his members.' For even though one man may decide to advise another, the latter can use his own judgement to decide whether such advice is agreeable to him or not, since he has not subjected his will and judgements to the former. And therefore he will do what the former advises, not as if the counsel had been dictated by the former, but only because it seems best to him; consequently he will act on the decision of his own judgement. From all this Hobbes concludes: 'Nature has given every man a right to all things, that is, in a pure state of nature, and before men had mutually bound themselves by any agreements,

¹ [For *tegunt* read *degunt*.—Tr.]

² [For *oper am* read *operam*.—Tr.]

every man had the right to do to all others whatever he pleased, and to hold, as well as to enjoy, whatever he would and could. And so from this it is clear that in a state of nature utility is the measure of right.

However paradoxical all this may seem at first glance, one can by no means conclude that a man has any licence to do whatever he pleases to any one he pleases, if one bears in mind that the man described by Hobbes in such a state is still subject to the rule of natural laws and right reason. But since such a licence is a vain thing, and could not be considered by any sane man a sufficient means for his continued preservation, it must be concluded that nature never has granted it. And if any man should presume to use it, he would find it fraught with great peril to himself. Consequently, the real meaning of what Hobbes has said is this: Nature put within the reach of all men the things which
 109 make for his preservation, before men divided them among themselves by agreements; and he who has no superior can of his own will, and at the dictate of sound reason, do whatever will work for his continued preservation. If, however, the real position of Hobbes is as harsh as his words appear at first blush to be, and will not allow this favourable interpretation of ours, let him see to it himself how he can avoid a just criticism.

It is certain, however, that the author of the *Theologico-Political Treatise*, whom Samuel Maresius calls the ex-Jew Spinoza, has described that right to all things, which accompanies a state of nature, in most repellant language; and it will not be inappropriate to consider his position at this point. 'The right and institution of nature', as he understands it, 'are nothing other than the rules of nature of each individual thing, according to which we hold that everything is determined by nature to a certain way of living and working; for example, fishes are determined by nature to swim, the large ones to live off the smaller; therefore fishes are using this greatest natural right when they possess the water, and the large ones live off the smaller.' We should observe that in this passage the word 'right' does not mean a law, according to which a man must act, but the faculty of acting, and what a person can do without injury, and therefore it cannot be properly inferred that a person ought necessarily to do everything he has the right [in this particular sense] to do. Furthermore, just as it is an improper use of the term 'natural law' to describe thereby whatever is done in a fixed and determined manner, so also it is improper to apply the word 'right' to the power and manner of acting to be observed in animals that are not endowed with reason. For he alone can be properly said to have a right to act, who acts on the basis of previous reason.

Spinoza continues: 'Nature, considered absolutely, has the greatest possible right to all things, that is, the right of nature extends so far as

its power extends, for the power of nature is the very power of God who has the supreme right over all things.' Now, if by the phrase 'nature considered absolutely' is understood God along with all created things, we accept his statement, and are willing to attribute to God the supreme right, such, however, as is suited to the perfection of His being. But if by the term 'nature' is meant the sum of created things, as distinct from God, then we deny that the power of nature is the same as and co-extensive with the power of God. For the power of nature is, indeed, produced by God, yet not in such a way as to exhaust the power of God, for it was limited by the bounds which He has set.

Spinoza's inference from his principle is: 'Since the entire power of nature is nothing other than the sum of the powers of all its individuals, it follows that each individual has the greatest possible right to all things, that is, the right of each individual extends as far as his determined power.' But I do not think that there is a logical sequence in an argument like this: 'The power of all nature is only the power¹ of all its individuals; therefore, any individual has supreme right to all things.' Is it not rather true that each individual has a certain definite bit of right, and therefore single individuals can by no means claim for themselves a right which belongs to each man from the whole of nature?

He continues: 'And because it is the supreme law of nature that each thing shall endeavour to the limit of its ability to continue in its own state, and without regard for anything other than itself, it follows that each individual has the supreme right to this, that is, to existence and freedom of action, as has been determined by nature.' In addition to an improper use of the phrase 'law of nature', it is certainly untrue of men that their nature is so determined that they endeavour to preserve themselves *without regard for anything other than themselves*. But, properly speaking, in contradistinction from free agents, those things are said to be determined *by nature* which are bound to a uniform manner of acting, and therefore men in regard to actions, which can be 110 controlled by them, are not limited by nature, but by law to something definite; consequently, men do not forthwith have a right to do whatever is within their natural power. But the idleness of all such arguments will be clear if circumlocutions are dispensed with, and they are set forth as follows: 'God has supreme right over all things; the power of nature is the power of God; therefore, nature has a right over all things: But the power of nature is the united power of all individuals; therefore, each individual² has a right over all things.' I leave it to any competent person to decide whether there is a proper sequence in this argument.

Spinoza is also wrong in saying: 'No difference should be recognized on this point between men and other individuals of nature' (here

¹ [For *potentiâ* read *potentia*.—Tr.]

² [For *indevidua* read *individua*.—Tr.]

the point should have been raised only about the right of men), 'neither between persons endowed with reason, and those who do not exercise reason, nor between the simple and insane, and the sane.' Now although some may be quicker and others slower in the use of their reason, still, any one possessed of the slightest use of reason can at least understand that he has no need for an unlimited right to everything, merely in order to preserve himself, and that such a right could not properly belong to him. It is idle to discuss the right of those who have no use of reason, and it will not be possible to draw any conclusions on the natural condition of man from examples of men mentally diseased; nay, such persons can be saved by some method other than the possession of a right over all things. The reason advanced by Spinoza for this view is also vain: 'For whatever anything does by the laws of its nature, it has the highest right to do, since, indeed, it can act in no other way than as it is determined by nature.' But we deny that a man, through doing anything by the laws of his nature, assumes a right over all things, or that he has been determined by nature to exercise such a right.

Therefore, Spinoza's conclusion is wrong: 'So long as men are supposed to live by the rule of reason alone, those of them who have not yet learned its use, or who have as yet no habit of virtue, and live by the laws of appetite alone, live by supreme right as much as he who directs his life according to the laws of his own reason. That is, just as a wise man has supreme right over all things which reason suggests, or of living by the laws of reason, so an ignorant and senseless man has supreme right over all things which his appetite suggests, or of living by the laws of appetite.' But a state of nature and its rule presupposes a reason in man, and a wise man is not expected to live under one kind of laws and a dull man under another, while those who are ruled only by their appetite are subject to no right or law. No living by right or law is possible for a man whose appetite departs from law, but his every act is a violation of laws.

The conclusions based upon his premises are just as faulty: 'The natural right of each man is determined not only by his sound reason, but by his desire and strength. For not all men are determined by nature to act according to the rules and laws of reason; rather all men are born ignorant of everything, and before they can work out a sound manner of life and acquire a habit of virtue, a large part of their life, even though they have received an education, is already past; but nevertheless they must live in the meanwhile, and preserve themselves to the best of their ability, and that only on the impulse of their appetites, since nature has given them nothing else, and has denied them the real power to live by sound reason. Consequently, all men are no more bound to live by the laws of sound reason than are cats by the

laws nature has given lions.' Now in order that one may be expected to live according to reason, it is not necessary that he shall be determined by nature to act according to the laws of reason, that is, so that he cannot do otherwise; but it is sufficient if he has enough natural power to enable him to protect himself from injury and hurt, and that is easy enough. Also the manner of preserving himself is not so difficult that 111 man must needs have a right over all things. And there cannot be expected of one, who, because of his childhood, is still ignorant of all things, a more careful direction of his actions than befits his mental capacity, and the slight development of his reason. But nature has taken care that the acts of such a person shall be capable of doing as little harm as possible to others, by giving him but little strength, and by entrusting to others the direction of the acts of such children.

And finally, the following conclusion is false: 'Consequently, whatever any one, considered to be under the control of nature alone, thinks is useful for himself from the guidance of sound reason, or the command of his passions, *that* he has a supreme right to seek and secure by any device which is best suited, whether it be by force, or fraud, or supplication, or any means whatsoever, and he may hold as his enemy the man who tries to prevent him from satisfying his desire.' And again: 'It follows from this that the right and the institution of nature, under which all men are born, and for the most part pass their lives, is averse to nothing except what every man does not desire, and is unable to prevent, not even averse to strife, hatred, anger, or anything that the appetite desires.' This assertion is absolutely untrue as regards men, and, if it be applied to all kinds of animals, in the sense that there is no way of living, or of preserving oneself, which is not exercised by every animal on the instinct of its own nature, then it is beside the point, since the question to be decided is whether men have a right to do anything to other men. And yet the following words show that Spinoza has the latter idea before his eyes: 'And it is not strange, for nature is not summed up in the laws of man's comprehension, which have as their object only the real advantage and preservation of men, but her laws look to the eternal ordering of an infinite number of things, which belong to the sum of nature and of which man is but a little part.' And yet he confesses a little later on that it is more profitable for men to live according to laws and certain dictates of our reason, which aim at the real benefit of man. But what was the point of creating a right for man, the use of which he had of necessity to disavow if he wished to live in safety? Other animals which live under a right to all things do not have to renounce it in order to secure their own safety, and neither would man, did such a right really belong to him by nature.

4. But we maintain that the race of man never did live at one and

the same time in a simple state of nature, and never could have, since we believe on the authority of Holy Writ, that the origin of all men came from the marriage of a single pair. Now Eve was subject to Adam by the right of the husband, *Genesis*, iii. 16, and their offspring were, immediately after birth, under the father's power and the control of the family. But the entire human race might have been in that state, if what has been said by certain heathen writers were believed, and in the beginning they had come forth from the earth like frogs, or had sprung like the brothers, in the tale of Cadmus, from scattered seed. I fancy the latter account may portray the state of nature and the war of all against all, as it is depicted by Hobbes, when 'the same dire madness raged in them all, and in mutual strife by mutual wounds these brothers of an hour perished,' (M.), Ovid, *Metamorphoses*, Bk. III [122-23].

Therefore, a state of nature never actually existed, except in some altered form, or only in part, as when, indeed, some men gathered together with others into a civil state, or some such body, but retained a natural liberty against the rest of mankind; although the more groups there were in this division of the human race, and the smaller their membership, the nearer it must have approached a pure state of nature. So when at the first mankind separated into different family groups,
 12 and now have divided into states, such groups live in a mutual state of nature, in so far as no one group obeys another, and all the members have no common master. In this way, in early times, when brothers left their father's house and set up each for himself an independent family, they began mutually to live in liberty and a state of nature. And so it was not the first men but their descendants who began in fact to live in a state of nature. Now this state, limited in the way just specified, lacks those inconveniences¹ which are attendant upon a pure state of nature, this applying especially to such as have formed themselves into states; furthermore, it is felt that the height of mortal achievement has been attained, when security rests upon the strength of the entire state, and where one recognizes no man on earth² to be his superior. And so commonwealths and their officials may properly claim for themselves the distinction of being in a state of natural liberty, when they are girded with the powers which allow them its secure enjoyment, while it is a thing of little joy or use for those who enjoy individually a pure state of nature to have no superior, since the weakness of their own resources makes their safety hang by a thread.

They are mistaken who maintain that such a natural liberty does not exist, or at least is not properly called natural, using the following reasoning: 'Since nature has for its end an ordered society, and since order is not possible without government, as there is also no society

¹ [For *in commodis* read *incommodis*.—Tr.]

² [For *inhisce* read *in hisce*.—Tr.]

without government, so government should properly be called the natural thing.' To prove their argument Cicero is quoted, *On Laws*, Bk. III [i]:

Nothing is so conformable to justice and to the condition of nature[. . .] as sovereign power; without which, neither house, nor commonwealth, nor nation, nor mankind itself, nor the entire nature of things, nor the universe itself, could exist. For this universe is obedient to God, and land and sea are submissive to the universe; and human life depends on the just administration of the laws of order. (Y.)

And so Hobbes is criticized, because he called such a state truly natural, which, according to his picture, was not worthy of man or true to his life, being more suitable to the life of beasts, to the nature of which both reason and speech are foreign. Surely there is no reason, they point out, no nature, capable of right and sound judgement, that will say all men can do, attempt, and possess all things. Such desires may belong to a depraved nature, but cannot be the dictates of a right reason, which, in striving for society, necessarily strives for an ordered society, which allows no licence for such disorderly movements. For what order can there be which does not look toward some first principle? And this first principle is all-important, and designed to control all things, that is, it is government, or the highest power in society, and unless this is present, no society is sought by any being which makes use of reason and discourse. Nature has advanced to the point where it proves that government is a natural thing in every society, but liberty, scorning every government, is at constant odds with nature. See Bocler, *On Grotius*, Prolegomena.

It is easy from what has gone before to frame a reply to such remarks. By a purely natural state is meant the condition of man when it is separated from all things which have been added to it by human institution, with the understanding that nature never intended man to spend his days in that state. For example, complete ignorance may be said to be natural or congenital with man, although his acquisition of extensive knowledge is not contrary to nature. Furthermore, we attribute to man no such natural liberty as is free from the obligations of natural law and divine rule. But a liberty which scorns all control by man can no more be said to be at odds with nature than it can be said to allow an infinite increase. Government, indeed, is a natural thing, and it was nature's intention that men should set up governments among themselves. But it was no less the purpose of nature that he who holds supreme authority over other men should be free from any interference on their part, and should thereby enjoy natural liberty; unless, indeed, we choose to admit into the same order something superior even to what is supreme. And for this reason it is in accordance with nature that the man who has no master should govern himself and his actions by the dictates of his own reason. 113

5. It is a question of greater importance whether a natural state, as it concerns other men, bears the character of war or peace; or, what amounts to the same thing, whether those who live in a natural state, that is, who have no common master, and neither obey nor command one another, should be considered as mutual enemies, or, indeed, as peaceable people and friends. In this connexion Hobbes' opinion should be considered, where he calls a purely natural state one of war, not a single war, but one of all men against all other men, and so he maintains that those who have united to form one commonwealth, drop that hostile state toward one another, but all other men remain their enemies. *De Cive*, chap. ix, § 3: 'Each man is an enemy to that other, whom he neither obeys nor commands.' He should have added, 'and with whom he has no common master.' *Ibid.*, chap. xiii, § 7:

For the state of commonwealths considered in themselves is natural, that is to say, hostile. Neither if they cease from fighting, is it therefore to be called peace; but rather a breathing spell, in which one enemy, observing the motion and countenance of the other, values his security not according to the pacts, but the forces and counsels of his adversary (and, he should have added, 'according to his own resources').

This is very much like the state of fishes as described by Oppian, *On Fishing*, Bk. II [44 ff.]: 'For they all swim about hostile and savage to one another: for the stronger ever feeds upon the weaker; each darts at the other, intent upon his death. One furnishes food for another.' And again: 'The others live in a state of mutual hostility. Therefore, you will never see fish asleep; rather are their eyes and senses always alert and wakeful,¹ since they always fear the approach of a stronger, and set upon the weaker.' Add Polybius, Bk. XV, chap. xx. Hobbes adds, *Leviathan*, chap. xiii [7]:

War consisteth not in battle only, or the act of fighting, but in a tract of time, wherein the will to contend by battle is sufficiently known. [. . .] For as the nature of foul weather lieth not in a shower or two of rain, but in an inclination thereto of many days together, so the nature of war consisteth not in actual fighting, but in the known disposition thereto [. . .]

And, indeed, Hobbes is not the first to say this, for the same sentiment is already to be found in Plato, *Laws*, Bk. I [p. 625 E F], where Clinias the Cretan explains why the Cretan lawgiver introduced so many military institutions, and adds: 'He seems to have thought the world foolish, in not understanding that war is always going on among all men and cities [. . .], for what men in general term peace is a name; in reality, every city is in a natural state of war with every other, not, indeed, proclaimed by heralds, but everlasting.' (J.*)

At this place it is to be noted, in passing, that several writers have not been as precise as they should have been in discussing this point,

¹ [For *in somnes* read *insomnes*.—Tr.]

when they allege that by a natural state is meant one in which we are understood to live to ourselves, or are constituted without any society, 114 and that this is a state of war, that is, of intent to take what another has, and to drive the owner away from it. And so they mean that if men lived without union they would be constantly embroiled in quarrels, that is, if men did not live a social life, they would live in a state of constant discord. But it is not proper to oppose a state of nature to a social life, since even those who live in a state of nature can, and should, and frequently do, lead a mutually social life. But since almost all the questions which the directors of states are expected to raise, and actually do raise, in their relations with neighbouring states, lead back to this one point, I feel it will be worth while for us to examine in a somewhat more detailed fashion the arguments which can be raised on both sides.

6. Now Hobbes, *De Cive*, chap. i; *Leviathan*, chap. xiii, endeavours to show in the following way, that a natural state is a state of war. The reason why man naturally fears man, and so is in a state of war with him, is because men have both the ability and the desire to harm one another. He proves their ability to do harm by the fact that men of mature years have very much the same strength, for although one man very often has a stronger body than another, it is still possible for the weaker, by craft or the help of others, to overcome the stronger, since his vital parts are just as exposed to death as are those of the weakest man. Seneca, *On Anger*, Bk. I, chap. iii: 'No man is so low in station that he cannot hope to inflict punishment even upon the greatest of men'; we are all strong to do harm. Nor can the natural cunning, which is commonly to be seen in one man more than another, keep a man safe from such danger, if he has no means of defence other than his own strength. Furthermore, since death, which is the greatest evil that men are able to inflict on each other, can be inflicted just as well on the strong by the weak, as on the weak by the strong, it follows that those who can do each other the greatest harm possible must in effect be equal in strength. But the desire to work harm exists in some men from necessity, in others from their evil cravings, for inasmuch as some would have everything permissible for themselves, claim a position above all others, and set upon others for no good reason, the rest, no matter how retiring they are, or willing to share with others whatever they themselves enjoy, are led to the necessity of defending themselves against such aggression. There are, indeed, many persons, of whom Manilius, *Astronomica*, Bk. V [495 ff.], says:

They make no difference between war and peace.
 Their friends and enemies alike they awe,
 They everything to wild contention draw,
 Their will their ruler and their sword their law.

Bk. V [120 f.]:

Whose births delight in tumults, hate soft peace¹,
Seditions seek, and live averse to ease. (C.)

The desire to work harm, continues Hobbes, arises also from a clash of minds, since every man thinks he is wiser than any other, and is extremely restive when a similar claim is made by his neighbour. As a result, hatred is caused not merely by opposition to a person, but even by failure to agree with him, for since two contradictory statements cannot be true at the same time, when a man does not agree with another, he accuses him of mistaken judgement, and if he disagrees with the other on many points, he obviously regards as a blockhead the man who is not able to understand such a plain statement of fact, as each one feels his own opinion to be. Cicero, *On Duties*, Bk. I [xxvi]: 'To be imposed upon, to mistake, to falter, and to be deceived, is as ungraceful as to rave or be insane.' (E.) Pertinent also is Horace, *Epistles*, Bk. I [II. i. 83 ff.]: 'Either they think nothing can be right but what has pleased themselves, or else they think it shame to be led by their youngers, and to confess in their old age that what they learned before their beard grew is poor stuff.' (W.) And Juvenal, *Satires*, XV [35 ff.]: 'Each place hates its neighbour's gods, since it believes those only ought to be held deities which itself worships.' (E.)

Since now, all pleasure of a man's mind consists in his ability to advance himself above others, there needs must come times when
115 manifestation of one's contempt for others must be seen, whereby the feelings of men are aroused as in no other way. Cicero, *On Duties*, Bk. I [viii]: 'Where the object of ambition is of such a nature as that several cannot obtain pre-eminence, the contest for it is generally so violent that nothing can be more difficult than to preserve the sacred ties of society.' (E.) Nor is it only 'in the levity of the Greeks that there is such perversity, that mankind attacks those men with evil speaking with whom they disagree as to the truth of a proposition'. (Y.*) *Idem*, *On Ends*, Bk. II [xxv]. Add Charron, *De la Sagesse*, Bk. I, chap. xl, n. 6-8.

The last and most frequent reason why men desire to harm one another is because several set their desires at the same time on one and the same thing, which they either cannot or will not share in common, or divide. This, of course, must go to the strongest, but who is strongest must be decided by fighting. So Xenophon represents Socrates as saying; *Memorabilia*, Bk. II [vi. 21]:

Man is made up of contrarities. Inclined to friendship from the want he finds in himself of friends, he compassionates the sufferer; he relieves the necessitous; and finds complacency and satisfaction, whether his turn is to receive or confer an obligation. But as one and the same thing may be an object of desire to many, strife, enmity, and ill-will

¹ [For *nulle* read *nullo*.—Tr.]

become thereby unavoidable; benevolence is extinguished by avarice and ambition; and envy fills the heart, which till then was all affection! (F.)

Seneca, *On Anger*, Bk. III, chap. xxxiv: 'The desire of the same thing, which should be a bond of affection, is the cause of strife and hatred. For since what you desire is small, and cannot be given to one without being taken from another, it gives rise to struggles and quarrels among those who desire it.' Add Charron, *De la Sagesse*, Bk. I, chap. xxxix, n. 8.

For these reasons, therefore, he says, mankind cannot avoid being for ever in mutual fear and suspicion. And since one's natural feeling, as well as one's reason, assures every man that his safety is his supreme good, and allows him, for the purpose of securing it, to use every means, the propriety of which is left to each man's judgement, because he has no superior, therefore every man must necessarily desire to overcome others rather than expose himself to their attacks. And the result of this is finally a kind of state of limitless warfare, conducted by all men against all others, which has as its corollary that each man is allowed to do to another, either secretly or openly, anything which he thinks will be for his own advantage. And although in this warfare reason may now and then fail him, he would still be doing another no real injury, since, of course, justice and injustice are terms which concern only those who have united to form states; although a man may sin against reason in using ineffective means to secure his preservation.

7. Such ideas as these may seem tolerable in a way, if they are thrown out as a kind of hypothesis. And one might infer from *De Cive*, chap. viii, § 1, that they were used in this sense by Hobbes, where he says: 'Let us return again to the state of nature, and consider men as if but now sprung out of the earth, and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other, &c.' And yet, in another place, chap. xiii, § 7, and *passim*, without any suggestion of hypothesis, but in all seriousness, he calls the status of commonwealths *natural*, or, as he explains it, *hostile*. These statements may be reconciled thus: It is, indeed, a hypothesis that all men at one and the same time ever lived together in a state of nature, such as would be the case if, at some future time, a great host of men should suddenly spring from the ground; but as a matter of fact such a state of nature does exist between some men who are, indeed, not subject to one another, and have no common master, as is now the case with all nations. And he says this in so many words in his *Leviathan*, chap. xiii: 'But though there had never been any time, wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority, because of their independency, are in continual jealousies, &c.'

But the main argument for the opposite opinion is the origin of

the human race, as the infallible authority of the Sacred Scriptures teaches it to us, for they show that the natural state of men was one of peace rather than war, and that men were more like friends to one another than enemies. To the first man, made by the hand of God from clay, there was united a mate whose substance was drawn from
 116 man himself, so that he might cherish her forthwith in a tender love, since she was of his own flesh and bone. And God joined her to him by a further and most holy bond. Since from this pair all mankind is descended, the human race is related by no mere general tie of friendship, such as may come from similarity of appearance, and is spoken of in *Digest*, I. i. 3, but by the tie which comes from common ancestry and blood, and which is marked by a kindly affection for one's own. A memory of this relationship has practically vanished among those who are far removed from the parent stock, and yet, when a man disregards it, and adopts an attitude of hostility towards others, it is proper to feel that he has departed from his primitive and natural state.

There will be no point in objecting that, even from such a creation, it follows that the natural state of man was one of war, on the ground that if societies were necessarily coexistent with the creation of men, so as to enable them to live at peace, it must follow that, without a society, men would not have lived at peace, and societies had to arise at the same time with men, so that they might not live in a state of war.¹ Our reply to this is that we are concerned here with a state of nature, not as may be conceived in the abstract, but as it actually is. Furthermore, since the first men lived in a state which was by no means one of hostility, but was charged with pure friendship, and since the rest of men have sprung from such a state, it is clear that, if men really want to bear in mind their first beginning, they should be regarded not as enemies but as friends. In fact, societies were at the beginning introduced among mankind, not with the purpose of avoiding a natural state, but because the human race could not be increased and preserved without them. And a natural state grew out of this condition, because as men multiplied they could no longer be embraced in one society. And so there is no point in asserting that, had there been no social state, men in the beginning of things would have lived at enmity with one another, unless you wish to imagine that, in the beginning, a multitude of men, in no way related to one another, suddenly sprang into being. Aristotle's words bear on this matter, *Rhetoric*, Bk. I, chap. xi [25]: 'Then since that which is according to nature is pleasant, and kindred things are natural to each other, all things akin to one and like one are pleasant to one, as a rule—as man to man.' (J.) Cicero, *On Ends*, Bk. III [xix]: 'There is such a recommendation by nature of one man to another, that one man ought never to appear unfriendly to another, for

¹ [For *pacate* read *impacate*, as Barbeyrac properly corrected the expression.—Tr.]

the simple reason that he is a man.' (Y.) Note also what he says in his *On the Nature of the Gods*, Bk. I [xxvii]: 'But do not you see what a soothing flatterer, what a sort of procuress nature is to herself? Do you think there is any creature on the land or in the sea that is not highly delighted with its own form? If nature, therefore, has instructed us in the same manner, that nothing is more beautiful than man, what wonder is it that we, for that reason, should imagine the Gods are of the human form?' (Y.) Quintilian, *Declamations*, V: 'There is a general kinship of all mankind, since they are derived from one parent, even nature.' Add Marcus Antoninus [Aurelius], Bk. IX, § 9, where he presents at length the argument that the similarity of our natures works toward a mutual harmony. Furthermore, Richard Cumberland, *De Legibus Naturae*, chap. ii, § 18. The statement of Belisarius, given by Procopius, *History*, Bk. II [xv. 22], must be taken as applying only to a particular instance of love or hate: 'Men are, by nature, neither drawn to their fellows nor made hostile to them. Their individual deeds, according as they draw us to them by their agreeableness or repel us by their differences, make some men objects of our love, others of our hatred.'

8. But neither are we at a loss for answer to Hobbes' arguments. Any men who are separated by some space cannot directly harm one another, for if a person at some distance harms me, he does it through some one near at hand, nor can my possessions be damaged except by some one near by. Therefore, since those who are widely separated cannot do mutual harm, so long as they do not come in contact with one another, there seems to be no good reason why such persons should not be reckoned as friends rather than enemies. If any one feels that they would be better called neutrals, he should recognize that absence of the will and power to do harm may be regarded as friendship. Furthermore, that equality of strength, which Hobbes proposes, is more likely to restrain the will to do harm than to urge it on. Surely no man in his senses wants to fight with a person as strong as he is, unless he is under some necessity, or in circumstances which look favourable for his success, since only fools or rash persons will unnecessarily enter a conflict where their blows are certain to be returned with equal force, and where the equal strength of both parties¹ makes the outcome uncertain. For certainly, when a person enters a conflict with a man who is a match for him, where the lives of both are put in hazard, neither gains as much from victory as the one loses who is killed, and the advantage resulting from killing one's opponent is not as great as the risk run of losing one's own life; besides, the peril which my life runs is a greater disadvantage than any advantage I may gain from the fact that the life of my foe was in equal peril, while his security is not increased by reason of mine

¹ [For *purgantium* read *pugnantium*.—Tr.]

having been endangered, but each side is the loser, and yet the loss of one is not to the advantage of the other. Richard Cumberland, *De Legibus Naturae*, chap. ii, § 29. So the Scythians in Curtius, Bk. VII, chap. viii [27], say: 'The firmest friendship is that between equals; and these appear to be equals who have not to their peril tested each other's strength.' Also Caesar, *Civil War*, Bk. III [x.7], advises Pompey, 'This was the one time for treating of peace, when each had confidence in himself and both seemed on an equality.' (P.) Florus, Bk. IV, chap. x: 'After the Parthians and Romans had made trial of one another, and Crassus and Pacorus had given proof of their mutual strength, their former friendship was renewed with expressions of equal regard on either side.' (W.) In Thucydides, Bk. III [xi], mutual fear is said to form the most secure basis for an alliance: 'For he that would transgress is deterred by the feeling that he has no superiority wherewith to make an attack.' (S.)

But the reasons adduced by Hobbes for the desire of men to do harm to one another are only particular ones, such as arouse individuals against individuals, and are by no means important enough to make a universal war of all men against all others unavoidable. Nor is it always true that inoffensive men live in the midst of aggressive and wicked ones, or that the latter are always eager to harass the former. A clash of minds, furthermore, is rarely seen among any others than some few superior men; such a failing does not affect the larger part of mankind, or if so but lightly. Nor, in conclusion, has the Creator been so niggardly in his provision for the necessities of mortals that many must always struggle in order to secure the same thing. Indeed the general perversity of men is sufficient to explain why a man should be guarded in his trust of another, and in baring his flank to him, as it were, especially if he is not well acquainted with him, as Plautus says in his *Asinaria* [495]: 'Man is no man, but a wolf, to a stranger.' (N.) But no reasoning man will admit that this suspicion and mistrust will cause a person to attack and oppress another, unless the latter has shown an intention to harm him. Cicero, *On Duties*, Bk. I [vii], is quite right in defining injuries as often 'proceeding from fear; as, for instance, when a man who is contriving to injure another is afraid, unless he executes what he is meditating, that he may himself sustain some disadvantage'. (E.)

Furthermore, the position of Hobbes is untenable, since he maintains that this natural state of his is only destroyed by subjection to the power of another, or by coming together into the same commonwealth. But it is contrary to the judgement of all nations to maintain that even those states which are joined by treaties and friendship are in a mutual state of war. Nor should we say that a peace, which is not in every way trustworthy, is not peace at all, any more than that no man

can enjoy the favour of another, because the affections and will of men are variable.

9. This further point should be carefully observed, namely, that we are not discussing the state of some animal, which is directed only by the forces and tendencies of the senses, but of one whose chief adorn- 118
ment and master of the other faculties is reason. Now this reason in a state of nature has a common, and, furthermore, an abiding, and uniform standard of judgement, namely, the nature of things, which offers a free and distinct service in pointing out general rules for living, and the law of nature; and if any man would adequately define a state of nature, he should by no means exclude the proper use of that reason, but should have it accompany the operation of his other faculties.

Now since man can heed not merely the craving of his passions, but also the call of a reason which does not measure itself simply by its own advantage, he is dissuaded from such a war as is described by the phrase 'of all men against all others', into which his base passions drive him, by his reason adducing an excellent twofold argument: It shows him, namely, that to undertake a war without provocation, is both improper and unprofitable. For a man can surely appreciate the fact that he did not come into being by his own powers, but he was made by another, who is his superior, and so has power over him. Now when he feels himself moved by a twofold principle, of which one side is wholly concerned with present considerations, while the other centers upon future and not present concerns, when by the craving of the former he sees himself driven into dangers, perplexities, and disgrace, but led by the latter to safety and respect, surely it is not difficult for him to conclude that his Creator's wish is for him to accept the guidance of the latter and not the former. And when there is added to this consideration the obvious advantages of that peace to which his reason urges him, man cannot avoid inclining naturally to peace; especially so, since, if he neglected reason and followed his passions, he will realize afterwards from the progress of events, that he followed the worse course, and will wish that what he has done contrary to reason could be undone.

We conclude from all this that the natural state of men, even when considered apart from commonwealths, is not one of war, but of peace; a peace founded on the following laws: A man shall not harm one who is not injuring him; he shall allow every one to enjoy his own possessions; he shall faithfully perform whatever has been agreed upon; and he shall willingly advance the interests of others, so far as he is not bound by more pressing obligations. For since a natural state presupposes the use of reason, any obligation which reason points out cannot, and must not, be separated from it; and since every man is able of himself to appreciate that it is for his advantage to conduct himself in such a way as to profit from the friendly attitude of men rather than incur their anger, he can

easily judge, from the similarity of nature, that other men feel the same way. And so it is quite wrong for a person in his description of this state to suppose that the majority of men, at least, neglect the guidance of reason, which nature has set up as the final director of men's actions; and equally wrong is it to designate as natural a state which is in the main produced by the neglect and misuse of a natural principle. All these points are proved at length by Richard Cumberland in his *De Legibus Naturae*, to which I would refer those who are not entirely convinced by what I have written.

10. Nor is it to the point for one in reply to us to harp upon the barbarity that prevailed among most of the ancient peoples, 'whose delight it ever is booty to amass and live on plunder,'¹ and among whom an accepted way to secure property and make a living was by brigandage. Thus Aristotle, *Politics*, Bk. I, chap. v [viii], includes among the occupations of herdsman, farmer, fisher, and hunter, also the *βλος ληστροικός*, that of a brigand. And continues:

And so, in one point of view, the art of war is a natural art of acquisition, for it includes hunting, an art which we ought to practise against wild beasts, and against men who, though intended by nature to be governed, will not submit; for war of such a kind is naturally just. (J.)

119 Many ancient writers bear testimony to the same effect. See Homer, *Odyssey*, Bk. III, line 73, and Bk. IX, line 252, where Didymus says: 'It was not dishonourable among the ancients to play the pirate, but honourable.' Diodorus Siculus, Bk. III, chap. xlix: 'The Libyans observe no law of any kind or the terms of any pact in their relations with strangers.' Caesar says of the Germans, *Gallie War*, Bk. VI, chap. xxiii [6 and 1]: 'They attach no disgrace to robberies which take place beyond the bounds of their own states, and claim that they serve to exercise their young men and to reduce their sluggishness.' And again: 'They hold it most worthy of their states to have the largest regions about them which have been laid waste by their devastations. They regard it a sign of their valour for their neighbours to withdraw defeated from their fields, and for no one to dare to dwell near them.' Mela, Bk. III, chap. iii, has much the same to say about the Germans: 'Right they place in might, to such a degree that they are not ashamed even of brigandage, only they are good to guests.' But Tacitus, *Germany* [xlvi], only mentions the Venedi as 'overrunning in their predatory excursions all the woody and mountainous tracts between the Peucini and Fenni'. (O.) Plutarch, *Marius* [vi. 1], says of the Spaniards that at the time of Marius brigandage was one of their most highly regarded occupations. Thucydides, Bk. I [v], has the same to say of the ancient Greeks. Some writers adduce *Digest*, XLVII. xxii. 4, where agreements of those 'who form an association for robbery' are

¹ [Vergil, *Aeneid*, IX. 612 f.—Tr.]

held valid, although Salmasius, *De Usuris*, Bk. I, chap. xii, feels that the reading should be ἢ εἰς καπηλείαν, 'or for petty trade.' So also Polybius, Bk. III, chap. xxiv, records that a clause in the treaty between the Romans and Carthaginians provided that 'The Romans shall not maraud, nor traffic east of the Fair Promontory, Mastia, and Tarscium' (S.), as if both these occupations were at that time equally lawful. Justin, Bk. XLIII, chap. v, says that the Phocians supported themselves by robbery at sea, 'which was considered a glorious thing in those times.' Sextus Empiricus, *Pyrrhoneiae Hypotyposes*, Bk. III, chap. xxiv [214]: 'Freebooting among many barbarians is not regarded as anything unusual; and they say that the Cilicians thought it so highly reputable, as to judge worthy of special honour those who met their death thereby.' And Nestor, as the poet tells us, after entertaining Telemachus and his friends, says: 'Or at adventure do ye rove, even as sea-robbers?' [Homer, *Odyssey*, III. 74] 'Yet had piracy been something out of the way, he would not have entertained them in such a fashion, because of his suspicion that they might be men of that sort.' Evidence to the same effect comes from *Digest*, XLIX. xv. 2: 'If there be a nation with whom we have neither friendship, nor hospitality, nor treaty entered into for the sake of friendship, its members are not our enemies without more ado.' (Cf. *Digest*, L. xvi. 118.) 'But any possession of ours that falls into their hands belongs to them, as does a freeman of our nation, who has been captured by them, belong to them.' Dio Cassius, Bk. LIV [xxii], has the following to say of the Rhaetians:

They often overran a good part of the adjacent territory of Gaul, and carried plunder even out of Italy. Such of the Romans or their allies as used roads going through their country met with depredations. These actions of theirs were of course more or less like those of any nation which has not accepted terms of peace. (F.)

Isocrates, in his *Panathenaicus* [§ 227], says of the Triballians:

They are more of one mind among themselves than are any other men, yet destroy not merely their neighbours and those who live in bordering lands, but even every one else upon whom they can lay their hands.

Add Grotius, Bk. II, chap. xv, § 5, where the further observation should be made, that such a mutual hostility between ancient nations seems to have been due, in no little degree, to the belief commonly held in antiquity that each people had its own special gods. Add Juvenal, *Satires*, xv.

A sufficient reply to these statements may be found in the fact that, amongst most of the nations of antiquity, the dictates of sound reason had been lost through depraved habits and customs. Yet it does not follow that there was no man among those peoples humane enough to realize that by such robberies he was violating the laws of nature, or that a state of this kind, into which fierce men had thrown themselves while neglecting the noblest part of their being, should be considered

120 natural. For promiscuous thievery and robbery does not follow from a natural state, just as it is obviously not true of the relations of commonwealths, although they are natural. Nor must we allow Hobbes' assertion, *De Cive*, chap. v, § 2: 'Under such conditions ληστική [robbery] is not contrary to the law of nature.' For if some men without provocation, but led by their evil natures, had tried to take some of our property, we would have had the right, by the law of war, to prey upon *them*, indeed, but not upon a third party who had done us no previous harm. Surely, if others impudently violate a law of nature, we may not without further ado imitate their wickedness. Nor can we allow the further point which he makes, namely, that 'such a kind of existence was not without some sort of glory for those who conducted themselves with bravery but not cruelty'. Since in some instances 'it was customary for those who were stealing everything else to take no lives, and to abstain from oxen fit for the plough and all implements used in agriculture'. Yet he would say they were not led to do this by the law of nature, but because in this way they had an eye to their own glory, and to the avoidance of the charge of cowardice because of unnecessary cruelty. As if there were any glory in committing but half a crime upon recognizing the disadvantage of carrying it through to the end!

11. Now by our assertion that the maintenance of peace toward all men as such is a natural state of man, we mean that it has been instituted and sanctioned by nature herself without any human intervention, and that it rests, therefore, upon that obligation of natural law, by which all men are bound, in so far as they are endowed with reason, and which does not owe its original introduction to any convention of men. It follows from this, furthermore, that it is of no advantage to fortify this universal peace by agreements or treaties; for by a treaty of this nature no addition is made to the obligation of the natural law, that is, the convention does not add anything to which men were not already bound by the very law of nature, nor does it make the obligation more binding. For we suppose that both parties remain so fully in their natural equality that they are obligated to keep their agreement by no further bond than their reverence for God, and their fear of the evil which might come to each man from a violation of his agreement; although for one not to observe what he has expressly promised seems to add something to his improbity and baseness. The same freedom of action is allowed the injured party against a violator of a law of nature, whether an agreement had been entered into or not. And so civilized men have avoided entering into an agreement, the articles and conditions of which have no content other than the promise not directly to violate something which had already been expressly stipulated by nature. Such an action implies little reverence for God, as if His command did not lay upon us a strict enough necessity, and so

we must needs agree to it of ourselves, or as if His obligation depended upon our choice.

Every pact, therefore, must concern something which a man was otherwise unable to require of me by the mere law of nature, or which I was under no perfect obligation beforehand to render to him by the same law, but which I was now fully obligated to perform after my declaration and consent had been secured by him. Thus, when a man has offered his services to another in some form or other, he does not expressly and directly state, as articles of his agreement, that he will not act in bad faith toward him, or that he will not despoil him by thievery. And it would, on the same ground, be a shameful agreement where a man would bind himself for another's sake only to the promise that he would not violate the universal peace against him, that is, that he would not observe in his dealings with him the rights which are habitually exercised toward mere beasts. But if such barbarous depredations were the custom among some nations, a universal agreement, whereby all would agree to maintain the law of nature, would be necessary to restore peace. This is the case when two peoples, who have hitherto been at war, 121 lay down their arms: if they have not agreed on certain special guaranties, nothing is restored but this common peace. But there are even examples of states having been brought to such a pass that they were forced to purchase, not merely by covenants, but even with tribute, this universal peace and freedom from injuries from those who openly lived by plunder. Claudian, *On the Consulship of Manlius*¹ [*Stilicho*, I. 210-11]: 'Those dread tribes whose wont it was ever to set their price on peace and let us purchase repose by shameful tribute.' (P.)

But if nations which heretofore have had no relations with each other by way of assistance or injury, whether in peace or war, enter into treaties wherein there is no agreement upon particular objects, such treaties are said to be entered into for the sake of sanctioning friendship, which, indeed, is supposed to knit a firmer bond than does the above-mentioned natural peace; although they may be only a kind of solemn promise to observe in the future their mutual duty. They are, therefore, like relatives, who at their first recognition of kinship or first meeting, customarily go to great lengths in expressing their mutual affection.

12. But it must be confessed that this natural peace is but a weak and untrustworthy thing, and therefore that it is, without other safeguards, but a poor custodian of man's safety. So true is this that Ovid's verse well applies here, *Tristia*, Bk. V, el. ii [71]: 'Yet peace there is at times, confidence in peace never.' (W.) The reason for that is the evil genius of men, their unbridled lust to increase their power, and their cupidity which menaces what belongs to others. Thus Sallust tells us,

¹ [For *Manlius* read *Stilichonis*.—*Tr.*]

in his *Jugurtha* [vi]: Micipsa 'dreaded the natural disposition of mankind, which is greedy for power and eager to gratify its heart's desire, as well as that opportunity, which through the hope of gain leads astray even men of moderate ambition'. (R.)

The powerful forces of these passions have so enslaved the minds of men that not even the most gentle teaching of Christ, ever inculcating peace, humanity, gentleness, kindness, willingness to forgive injuries, humility, and scorn of wealth and earthly power, is able among Christians to do away with the most wicked treacheries, wars, and oppression of others. And so the words of Plutarch, *Pyrrhus* [xii], apply also to some Christian rulers:

[. . .] To whose rapacities neither sea nor mountain nor endless desert set a limit, nor do the boundaries which separate Europe and Asia put a stop to them. It is impossible to say how they can remain content with what they have and do one another no wrong when they are in close touch. Nay, they are perpetually at war because plots and jealousies are parts of their nature, and they treat the two words, war and peace, like current coins, using whichever happens to be for their advantage, and not as reason dictates. (P.)

And the description of Velleius Paterculus, Bk. I, chap. xii, is true not merely of Romans and Carthaginians: 'There subsisted between these two nations, either war, or preparations for war, or unsettled peace.' (W.) And so, as it is the duty of an honest man to be content with his own, and not to injure others or seek to secure their possessions, so it is the part of a cautious man, and one who cherishes his safety, to such a degree only to believe all men are his friends as to realize that they may nevertheless at any moment become his enemies, and to maintain peace with them on the understanding that it may soon break out into war. Cf. Sophocles, *Ajax*, 688 ff. And so one should think long on the words of Dionysius of Halicarnassus, Bk. VI [lxxxvii]: 'For as long as ill men had the power they would never want the will.' (S.) Therefore Euripides says, *Helena* [1617-18]:

Nought is of more avail
For mortals' need than wise mistrustfulness. (W.)

And a wise man should be 'neither like a lamb in gentleness, nor in violence like a wild beast'.¹ Add Hobbes, *De Cive*, chap. xiii, §§ 7-8. The praise granted by Tacitus, *Germany* [xxxv], to the Chaucians merits emulation:

122 A people the noblest of the Germans, who choose to maintain their greatness by justice rather than violence. Without ambition, without ungoverned desires, quiet and retired, they provoke no wars, they are guilty of no rapine or plunder; and it is a principal proof of their power and bravery that the superiority they possess has not been acquired by unjust means. Yet all have arms in readiness; and, if necessary, an army is soon raised: for they abound in men and horses, and maintain their military reputation even in inaction. (O.)

¹ [Epictetus, III. xxiii. 4, with slight variations.—Tr.]

On the other hand, the same author says of the Cheruskans [xxxvi]:

They, for want of an enemy, long cherished a too lasting and enfeebling peace: a state more flattering than secure, since the repose enjoyed amidst ambitious and powerful neighbours is treacherous; and when an appeal is made to the sword, moderation and probity are terms appropriated by the victors. Thus the Cherusci, who formerly bore the titles of just and upright, are now charged with cowardice and folly. (O.)

That is to say, as in Dio Chrysostom, *Orations*, i [27]: 'Those who are best prepared for war are most likely to have peace.' (M.)

CHAPTER III

ON THE LAW OF NATURE IN GENERAL

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| <ol style="list-style-type: none"> 1. Connexion with the preceding. 2-3. The law of nature is not common to man and beasts. 4. The end of the natural law is not necessary before there is a law. 5-6. Is the natural law common to God and men? 7-9. The natural law is not dependent on the agreement of nations. 10-11. Is advantage the foundation of law? 12. Can the natural law be clearly seen from the end of the Creation? 13. On the dictate of right reason. 14. The true basis for the law of nature is found in the condition of man. | <ol style="list-style-type: none"> 15. The fundamental law of nature. 16-18. A discussion of the position of Hobbes. 19. The former basis for the law of nature is sufficient. 20. The obligation of the law of nature comes from God. 21. On the sanction of natural law. 22. Some things are improperly read back into natural law. 23. Is there a law of nations, distinct from that of nature? 24. The divisions of the natural law. |
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Now that we have seen that the condition of man does not permit him to live without law, and to direct his actions by uncertain impulse and without respect to any rule, our next task is to inquire into the common standard of human action, according to which every man, as a rational animal, should order his conduct. It has become the custom to designate this standard as the rule [*ius*] or law of nature, which may also be called universal, inasmuch as all mankind is bound to observe it, and perpetual, inasmuch as it is not, like positive laws, subject to change. We must observe with care what this law is, how it may be known, what is its chief characteristic, what should be referred to it, and what to positive law; for unless this substructure is firmly laid, everything that is based upon it must certainly fall of its own weight. See the excellent remarks of Plato, *Cratylus* [p. 436 D]: 'This is the reason why every man should expend his chief thought and attention on the consideration of his first principles: Are they or are they not rightly laid down? and when he has sifted them all the rest will follow.' (J.) This we must observe most carefully in the present discussion, the more truth there is in the words of Lactantius [*Divine Institutes*], Bk. III, chap. vii:

123 Since it is more dangerous to commit a fault in arranging the condition of life, and in forming the character, greater diligence must be used, that we may know how we ought to live. [. . .] But in this subject there is no room for difference of opinion, none for error. All must entertain the same sentiments, and philosophy itself must give instructions, as it were with one mouth; because if any error shall be committed, life is altogether overthrown.

No less admirable are the words of Diogenes of Apollonia, in

Diogenes Laertius, Bk. IX [sect. 57]: 'It appears to me that he who begins any treatise ought to lay down principles about which there can be no dispute, and that his exposition of them ought to be simple and dignified.' (Y.)

2. The Roman Jurisconsults used to define the law of nature as 'what nature taught all animals', not, therefore, what is peculiar to man alone, but 'what other animals as well are supposed to know'. And so, on this hypothesis, whatever brutes and men are understood to be attracted to in common, or in common to avoid, belongs to the law of nature, and consequently a law is postulated which is common both to men and brutes. This opinion probably arose from that theory, proclaimed by certain ancients, regarding the soul of the universe, of which soul all others are but *ἀποσπασμάτια*, or particles, which are in themselves of the same nature, but operate differently, according as they take their lodging in different bodies, and are assigned different organs through which to function. A theory related to this was that of *μετεμψύχωσις* [metempsychosis], according to which men and brutes differ only in bodily forms, but have similar souls, which pass from one animal to another. See Vergil, *Aeneid*, Bk. VI, lines 724 ff.; Ovid, *Metamorphoses*, Bk. XV, lines 75 ff. But learned men in general reject the idea that such a law is common to man and beasts, since, indeed, it cannot be thought that a being which has no power of reason, should have any right. Hesiod, *Works and Days*, Bk. I [276 ff.]: 'For the son of Cronos has ordained this law for men, that fishes and beasts and winged fowls should devour one another, for right is not in them; but to mankind he gave right.' (E.-W.)

Now although many actions of men and beasts are very much alike, by the performance of which a man is said to have satisfied the law, as a matter of fact there is a great difference between them, since among beasts they come from the simple inclination of their nature, while man performs them from a sense, as it were, of obligation, a sense which brutes do not have. So writers must be supposed to be using figures of speech, when they attribute to some brutes, mere animate creatures, justice, bravery, pity, gratitude, or chastity, because something resembling these virtues can be seen in certain actions of brutes. See Selden, *De Jure Naturali et Gentium*, Bk. I, chap. v. For things which appear on their face similar are by no means the same, if they proceed from a different internal principle. Now Grotius, *Prolegomena, On the Law of War and Peace*, Bk. I [On the Truth of the Christian Religion, § 7], maintains that some acts of lower animals, such as ants and bees, are in a special way ordered by measure of reason, or some internal intelligent principle, and that some of them show a real regard for their proper interests in the case of their offspring and kind.

² [For *peritia* read *perita*.—Tr.]

But this can be allowed only in the sense that their nature has been adapted to certain actions by God their Creator, not that any external principle guides them, as a pilot directs a ship. Nor is it difficult to understand why an equal intelligence is by no means found in other things, if one accepts the view of recent writers, that any design to be found among lower animals is due to the form and arrangement of their material substance and its movement. Especially since you may discover even among men some who display a most quick wit in certain acts, but a most sluggish one in others, no more complicated or difficult, the reason for which can come only from the special disposal of their
 124 parts, especially of the brain and emotions. Cf. Plutarch, *Septem Sapientum Convivium* [xxi], p. 163 E, ed. Wechel. Those, however, who like to give the designation of 'a law of nature in lower animals' to the endowment of brutes whereby they perform specific actions, needlessly misuse the term 'law'. But there is no lower animal which performs all the duties expected of man, and there is no duty of man the opposite of which many animals do not perform; although in general the popular feeling is greatly aroused against some crime, if it be shown that even the lower animals avoid such deeds. Thus Plato, *Laws*, Bk. VIII [p. 840 D E], says that, in legislating against unnatural vice among men, one may quite properly cite the nature of the lower animals, among which is found no trace of such a foul practice. Theseus in Seneca, *Hippolytus*, lines 913[-14]:

The very beasts
 Shun love incestuous, and keep the laws
 Of nature with instinctive chastity. (M.)

Add Oppian, *On the Chase*, Bk. I, lines 239 ff.; while what the same writer gives in his *On Fishing*, Bk. I, lines 702 ff., may be applied to parents that are ἀστοργοί [unaffectionate].

3. Some persons, indeed, more, I presume, to display their ingenuity than in all seriousness, have endeavoured to show the existence of a community of law between men and the lower animals, gathering reasons from every possible source, which, however, scholars have long since answered. Those which they draw from the Sacred Scriptures need be touched on but lightly. The words in *Genesis*, ix. 5¹: 'Your blood will I require at the hand of every living thing', some take to mean that it is the will of God to avenge the death of a man whether it be caused not merely by another's hand or weapon, but also by the attack of some wild beast. They would assert that, in the days before the deluge, impious men kept wild beasts, whom they used to punish those who would not obey their orders. Others infer from this passage that God would also, with the aid of wild beasts, exact a penalty

¹ [Slightly modified.—Tr.]

for homicide. Others maintain that 'every living thing' applies only to man, as if God meant to say that no man could kill another with impunity.

In *Leviticus*, xviii. 23, and xx. 15-16, it is commanded that even the beasts, which men or women had used for their lust, shall be stoned to death, no distinction of age being observed between an old and a young animal. But the Jews felt that such a distinction should be observed among persons of either sex, so that if a boy was not over nine years of age and a girl not over three, they did not inflict death upon them by virtue of this law, nor upon the animal either, whatever its age, since they do not admit that intercourse before this age was forbidden in the law. For when the animal is stoned, this was not because it had committed any wrong, but partly in order that it might not by its presence incite any other person to a similar breach, and partly that its survival might not keep fresh the shameful remembrance of the person who had been punished. Gratian, *Decretum*, II. xv. 1. 4: 'We must believe that the beasts were ordered slain, because, contaminated with such a sin, they keep fresh the shameful memory of the deed.' But Philo Judaeus, *On Special Laws* [III. viii], gives the further reason: 'To prevent their bringing forth or begetting anything intolerable, as would naturally be the result of such pollutions. Moreover, those who have even a slight care for what is becoming, would never use such animals as these for any purpose of life.' (Y.) Thus God, in *Deuteronomy*, xiii. 15-16, commands that the animals of idolatrous peoples should be killed, not because the animals were capable of idolatry, but to show the awfulness of that sin. It is, furthermore, to be observed that when a Gentile living among the Jews had intercourse with a beast only the man suffered death, while nothing was done to the beast. Add Selden, *De Jure Naturali et Gentium*, Bk. I, chap. iv; Mornacius on *Digest*, IX. iii. 7.

In *Exodus*, xxi. 28, a goring ox was to be stoned, not because he had committed sin, but partly that he might not do a similar hurt to others in the future, and partly that the owner might be punished by his loss, since he had taken but poor care of him. For this latter reason, also, they were not to eat the flesh of the ox. The owner was punished in this way by the loss of his animal, when his fault was only slight, or when he was not aware of the viciousness of the ox; but if the owner knew the animal's failing, he forfeited his own life. In this connexion, 12 however, the Jews note that the ox was slaughtered only when he had killed a Jew, and not a Gentile, and, indeed, it was not unusual among certain other peoples as well to destroy the instrument of some evil deed or misfortune. Thus it is clear from the orations of Demosthenes against Aristocrates, and of Aeschines against Ctesiphon, that by the laws of the Athenians, if a rock, a piece of wood, a knife,

or the like, had been the instrument of some one's death, it was brought before a court in the Prytaneum, as if it were going to suffer punishment. The people of Thasos once decreed that the statue of Theagenes, which had fallen down and killed some one, should be dragged out and cast into the sea. See Dio Chrysostom, *Rhodiaca*, p. 340, ed. Morelli. St. Ambrose in his *Hexameron*, Bk. V, chap. iii, says that the mating of asses and mares, the offspring of which is mules, is forbidden, not that the animals commit any sin thereby, but because in *Leviticus*, xix. 19, man was forbidden to secure any such hybrid. See Selden, *loc. cit.*; Ant. Matthaeus, *De Criminibus Prolegomena*, chap. ii, § 1; and other authors. The account given by Thuanus, Bk. VI, of the Burgundians instituting a process against mice, is only a kind of jest.

We might say in defence of the Roman Jurisconsults that they used the term 'natural law', *Digest*, I. i. 1, § 3, improperly of course, of the ordering by God of such things as serve to preserve nature herself, that is, to preserve species and individual animals. A reason for this is that in the particular section of their law they discuss only the conjunction of sexes, the procreation and education of offspring, and self-defence. Many others have in almost the same way used the term improperly, like Ivo Parisinus in his treatise *De Jure Naturali a Deo Rebus Creatis Constituto*, and Descartes in his *Principia Philosophiae*. Plutarch has written to the point on this matter, *On the Love of Offspring* [iii, 495 BC]:

For, as in wild plants, such as wild vines, figs, and olives, Nature has implanted the principles of cultivated fruit, though crude and imperfect; so she has endowed beasts with a love of their young, though imperfect and not attaining to justice, nor proceeding further than utility. But in man, whom she produced a rational and political being, inclining him to justice, law, religion, building of cities, and friendship, she hath placed the seed of those things that are generous, fair, and fruitful—that is, the love of their children, following the first principles which entered into the very constitution of their bodies. (G.)

4. Some writers constitute as the object of natural law such acts as contain in themselves a moral necessity or baseness, which are, therefore, in their own nature either required or unlawful, and hence necessarily understood to be commanded or forbidden by God. And in this respect, they say, natural law is distinguished not only from human law, but from the divine voluntary or positive law, which does not command or forbid things which are of their own proper nature obligatory or unlawful, but makes them by its forbidding unlawful, or by its command obligatory. But things forbidden by natural law are not improper because God forbade them, but God forbade them because they were of themselves improper; while in the same way things commanded by the same law are not proper or necessary because they are commanded by God, but they were commanded because they are of themselves proper. See Grotius, Bk. I, chap. i, § 10.

Now in addition to the fact that even if this definition be accepted it will still be very uncertain just what acts are of themselves unlawful, how they shall be clearly distinguished from other acts, and what is the principal reason, why they are so; it has already been shown, in Book I, chapter ii, § 6, that no acts are of themselves obligatory or unlawful, until they have been made so by law. Nor is it necessary that any one be perplexed by such a question as the following: 'If the entire morality of human actions depends upon law, might not God have been able to decree a law of nature so that He should have commanded just the 126 opposite of what now prevails; so that, for example, among the duties which men owe one another would be murder, theft, fornication, bearing false-witness, and among the things forbidden them would be gratitude, keeping one's agreements, repayment of loans, and the like?'

Although it seems idle and childish to inquire what God *might* have done when what He actually did is quite clear, nevertheless, if it suits one's fancy to dispel such vagaries, one can easily make the reply that the question raised above implies a manifest contradiction. For although God was under no constraint whatsoever to create man (and certainly they have a feeble conception of God's power who think that His glory would have been in any way diminished, if He had never created the inhabitants of this earth; see *Job*, xxxviii. 7), yet, when once He had decreed to create him a rational and social animal, it was impossible for the natural law not to agree with his constitution, and that not by an absolute, but by a hypothetical necessity. For if man had been bound to the opposite duties, no social animal but some kind of wild and fearful creature would have been produced. Yet, despite all this, it is still true, that before there was any law, every kind of action was indifferent; for by His decision to create man, that is, an animal whose every act should not be indifferent, God also by the same act constituted for him a law. But it does not follow from our assertion that all acts of themselves were indifferent before the announcement of a law, that, had God so wished, He could have commanded that He be worshipped by blasphemy or contempt, as Vazquez asserts, *Controuersiarum Illustrum*, Bk. I, chap. xxviii, n. 9 ff., since the rites of Hercules of Lindus, as described, among other writers, by Lactantius, Bk. I, chap. xxi, are the lies of senseless men. For a rational creature, that is, one whom God has endowed with the faculty of recognizing the real nature of things, can conceive God in no other way than as one possessed not only of a certain infinite superiority, but also of the highest authority over him; otherwise he would conceive only an idol, or anything rather than God. But this would plainly imply that one conceives the same being as both most eminent and also abject; that one commands, and yet I can rightfully flaunt him; that I do, as a witness of my appreciation of the eminence of His divine nature and

power, something which directly and of itself denotes the very opposite. When, indeed, it is said that God cannot sanction such things by law, this no more implies a detraction from His omnipotence than to say that He cannot die, or lie, or make undone what has already been done.

A further warning is here due. If the definition of natural law is built upon that foundation of the necessary good repute or baseness of some actions, it cannot avoid being obscure, and revolving, as it were, in a circle, as is perfectly clear to any one who weighs the definition of Grotius. And Richard Cumberland, *De Legibus Naturae*, chap. v, § 9, properly maintains that, in the definition of natural law, 'good' must be understood as natural good and not moral good, since, indeed, it would be absurd to define a thing in terms which presuppose that the thing defined is already known.

5. Those who search for the prototype of natural law in God himself fall into two classes. The one finds its prime origin in the divine will, and since this is in the highest sense free, they conclude that the law of nature can be changed by God, nay, its very opposite can be enjoined, just as is the case with positive laws. The other maintains that it is based on the essential holiness and justice of God, so that the law of nature expresses these attributes like a kind of *ἐκτύπωμα* [copy]; and from this proceeds also the immutability of natural law, because the justice and holiness of God reject all alterations and change.

127 We must remark on the first of these opinions that it was, indeed, within the power of the divine will to produce, or not to produce, an animal such as the law of nature would agree with. But after man had once been created by God, an animal which could not be preserved alive unless he observed the natural law, it is no longer possible to believe that He will annul or change the law of nature so long as He makes no change in the nature of man, and so long as actions enjoined by the natural law make, by natural consequence, for a social order, in which the race of man finds a temporary happiness, while, by a like necessity, actions contrary to the natural law destroy it; that is, so long as kindness, humanity, fidelity, gratitude, and the like, will have the power to win over the minds of men, while perfidy, injury, and ingratitude will irritate them. And so, on the assumption that the world of nature and man remain constant, the law of nature, even though it was formed in the beginning at the pleasure of God, remains fixed and unmoved; very different from such laws as are so connected with the divine will, that they do not seem to be so necessary a *desideratum* for the condition of men in general. Furthermore, by this statement God is made the author of natural law, a fact which no sane man can question, although it still remains uncertain *how* the divine will can be discovered, and on what evidence we can be certain that God wished to include this thing or that under the natural law.

The same inconvenience attends likewise the second statement. Surely no one will be so impious as to dare to assert that the natural law contains anything repugnant in itself to the holiness and justice of God—the sense in which the line of Euripides is to be understood, *Hecuba*, line 800: ‘For by the Law we know Gods are.’¹ (W.) And yet it will be difficult to show that the natural law so expresses the holiness and justice of God, that the way God acts towards his creatures, and especially towards man, is also the way men should act towards their fellow men, on the command of the natural law. Add Richard Cumberland, *De Legibus Naturae*, Prolegomena, § 6, and chap. v, § 13. For it is not clear how a right which is to have power among persons equal by nature can be drawn from that most supreme right which the Creator exercises towards His creation; that is, how a law, which imposes a mutual obligation upon men, can be a counterpart of the divine power, which can be restrained by no law and no obligation.

The argument brought from Sacred Scripture to the effect that man was made in the image of God has no bearing on this point, for even those who confess that this image has been lost recognize that the appreciation of natural law has remained in man. Among men we usually call that one holy who avoids the more grave offences and is alive to his duty. But who would conceive the holiness of God by such a criterion? Among men he is considered just whose intent is to harm no one, and to give each man his due. But God has the right to destroy what He created, even though it entail suffering. Neither can it be said that God owes something to any man, so that, if it is denied, He can be said to have done him an injury. If God has promised mortals anything, He keeps His pledge, yet not because they have secured any right against Him from His promise, but because it would be unworthy of the divine greatness and goodness for man to trust His pledge in vain. For when a man does not fulfil his engagement, it is because he either lacks the power to do so, or from fickleness or evil design he afterwards renounces an agreement made in good faith, or else, at the time he made the promise he did not know the circumstances which would attend the time of its performance. All these causes imply some imperfection, and so God *cannot* but keep His promises, man *should* not but keep his. Furthermore, a promise of man becomes a thing owed; the promises of God are fulfilled simply by His grace. It is beyond our grasp to understand what rules the vindictive justice of God observes. It is at least certain that it does not display complete 128 resemblance to the findings of a court of law. The words of Aristotle on this point are not inappropriate, *Nicomachean Ethics*, Bk. X, chap. viii:

What kinds of actions do we properly attribute to the gods? Are they just actions? But it would make the gods ridiculous to suppose that they form contracts, restore deposits,

¹ [The words ‘For by the law’ are inadvertently omitted.—Tr.]

and so on. Are they then courageous actions? Do the gods endure dangers and alarms for the sake of honour? Or liberal actions? But to whom should they give money? It would be absurd to suppose that they have a currency or anything of the kind. Again, what will be the nature of their temperate actions? Surely to praise the gods for temperance is to degrade them; they are exempt from low desires. We may go through the whole category of virtues, and it will appear that whatever relates to moral action is petty and unworthy of the gods. (W.)

Catullus [*Carmina*, lxviii, *To Mallius*, 142]:

Yet it is not fit that men should be compared with gods. (C.)

Now by reason of the fact that a common right, as it appears, should not be admitted for God and men, an easy reply is possible to the illustration from which some wish to conclude that God dispensed with the law of nature, as when He commanded Abraham to offer up his son, and the Israelites to take vessels of gold and silver from the Egyptians. To God, indeed, as the supreme master of all things, there belongs a far superior right over His creatures than to man over man, by nature his equal. And so, properly speaking, the law of nature is not dispensed with when man, acting merely as the instrument of God, by His express command exercises the right of God upon men. Cf. Grotius, Bk. I, chap. i, § 10. No one, I believe, will be so simple as to hold that from some change in the object, or variation in the circumstances, the law too has suffered some change. For when a creditor has cancelled a loan to his debtor, the case is no longer covered by the law that a loan must be repaid, since the loan as such is no more. But in the former example, when the property of a person who has put it in trust has been confiscated, neither the law nor its object is changed. For the wording of the law is: 'One who receives a deposit must return it to him who deposited it, or to whatever person has succeeded to his right over it.' And so this law does not cover a thief, because the thing deposited is not his, nor a banished man, because the public treasury has taken over his property rights.

6. No more do the arguments of the author of *De Principiis Justitiae et Decoris* [Velthuisen], p. 254, seem to show that we set up a twofold 'natural law, divine and human, which, in the present world order, coincide'. For since every right or law implies an obligation, which presupposes some intrinsic and superior authority, it appears absurd that such an obligation could be laid upon God. In the same way there is no force in the statement that 'God is obligated by Himself or by His own essence'. Nor may you deduce from *Romans*, i. 32, that there is such a law in God, for since the Gentiles were able by the use of reason to understand the law of nature, the next thing for them to have recognized was that God, as a lawgiver, would not allow any violation of that law. And so, upon the violation of the law of nature, God acquired a right—if such a form of statement be proper—to exact

a punishment; or, in other words, upon the commission of a sin, God properly carries His own threat into execution. But who may conclude from this that God is subject to any right, that is, to law?

But the following is also ambiguous: 'The supreme right of God over His creatures is made known to the natural reason by those principles which form among men the foundation of natural law and equity.' If this means that, in many things, God proceeds with men in the same manner as He wishes mortals also to conduct themselves, no one may take offence. See *Luke*, vi. 35. Thus God through the natural law has commanded men to keep their promises, just as He also will steadfastly keep His promises to them. *Romans*, iii. 4; *Hebrews*, vi. 17-18. He forbids that the innocent shall be condemned by human judges, and He himself will do likewise. *2 Chronicles*, xix. 7; *Romans*, ii. 2. But if the writer means that God has no more right over His creatures than He has given men over each other, we need more convincing arguments, if we are to believe that a supreme master has no more right over his own servant than has the latter over a fellow servant, whom nature has made his equal; or, to use the language of Grotius, that 'the right of directors and the right of equals' [*ius rectorium et aequatorium*] exactly correspond. 129

But another remark, which the same writer makes, on p. 52, deserves criticism: 'God should of necessity consider natural laws to be just, the order in this universe being established and constituted as it now appears to the eyes of every man; and He must recognize as unjust and improper every deviation from them.' These lordly words, 'God should of necessity,' are without doubt inapplicable to the majesty of the omnipotent lawgiver; and with Him there can be discovered no necessity other than that which derives from the divine pleasure. Nor does the reason which he subjoins satisfactorily uphold his thesis: 'Because all things which we can picture in our minds always have a *σχέσις* or relation, arising from the intrinsic nature of the thing, which cannot by sound judgement be separated from the thing'; since things do not have such a nature and accompanying relation of themselves, but they have them at the will of the Creator, and the decision of His will cannot be properly called a law. Thus the reason why, among men, a favour obligates one to gratitude, and why a violation of agreements, savagery, pride, and contumely can never be lawful, is because God has appointed for man a sociable nature, and so long as this is untainted, what is agreeable to it is reputable, and what does not agree with it is unlawful and base. But this does not imply any right common to God and men, or any endowment or *σχέσις* [relation] of things which is not based upon the divine will.

7. Those who base the law of nature on the general agreement of all men or nations, or at least of the majority of nations, and of civilized

mankind, do so on the authority of Aristotle, *Nicomachean Ethics*, Bk. V, chap. x, where he defines 'natural justice' as 'that which has the same authority everywhere, and is independent of opinion'. (W.) He also says, *Rhetoric*, Bk. I, chap. xiii: 'For there is a certain natural and universal right and wrong, which all men divine, even if they have no intercourse or covenant with each other.' (J.) Cicero, *Tusculan Disputations*, Bk. I [xiii-xiv]: 'In every case the consent of all nations is to be looked on as a law of nature. And the consent of all is the voice of nature.' (Y.) Now such a way of proving the law of nature is not only an *a posteriori* argument which does not show at all why the law of nature was so constituted, but also in very truth a slippery statement, involving numberless obscurities. It seems to Hobbes, *De Cive*, chap. ii, § 1, improper to appeal to the consensus of all mankind, because then, if a man really used his reason, it would be impossible for him to sin against the law of nature, since, when that individual, being as he is a part of mankind, strikes his own course, the agreement of mankind is thereby impaired; and because it is improper to deduce the laws of nature from the agreement of those who break them more often than they observe them. For, as Isocrates says, *To Philip* [35]: 'We are all so constituted by nature as to go wrong more often than right.' (F.)

130 Nor is it any happier to appeal to the agreement of *all nations*; for who knows the language of all peoples both ancient and modern, not to mention their customs and institutions? Nor will the case be any better, if we say that agreement on the part of the more civilized peoples will suffice, and that no account need be taken of barbarians. For what people, endowed with enough judgement to preserve its existence, will be willing to acknowledge that it is barbarous? or what nation will claim so much for itself as to demand that all other nations be measured by its customs, and to adjudge that one barbarous which departs from them? In former days the Greeks, in their pride, looked down upon all other peoples as barbarians, and the Romans succeeded to their arrogance; and to-day in Europe some of us claim for ourselves to be superior to others in the development of our culture, while, on the other hand, there are peoples who rank themselves far above us. The Chinese have long held that the Europeans have only one eye, and that all other peoples are condemned to blindness. Add Charron, *De la Sagesse*, Bk. II, chap. viii, and Bk. I, chap. xxxix, where he includes among foolish notions the habit of condemning some custom, and rejecting it as barbarous and base, for the simple reason that it does not agree with our own general customs and ideas. *Idem*, Bk. II, chap. ii, n. 7.

There are some, also, who rail at the learning on the acquisition of which we expend so much labour as if it were a support for our dullness; since the talents of certain other peoples, without the acquisition

of learning, are conspicuous for a natural excellence, and a good mind needs but little education. Nor is learning always accompanied with good habits. Plato, *Epistles*, X [p. 358 c]: 'Steadfastness and loyalty and sincerity, that, say I, is the genuine philosophy.' (P.) Some nations, furthermore, find their greatest delight in a laborious display of idle or superfluous things, and despise those who lead a more simple life; and yet frequently the latter surpass the former in the innocence of their behaviour. Cf. the remarks of Justin, Bk. II, chap. ii, on the Scythians:

And it appears extremely wonderful that nature should grant that to them, which the Greeks cannot obtain by long instruction from their wise men, and the precepts of their philosophers; and that cultivated morals should have the disadvantage in a comparison with those of unpolished barbarians.¹ So much better effect has the ignorance of vice in the one people than the knowledge of virtue in the other. (W.)

Valerius Maximus, Bk. I, chap. i, § 2 *ext.* There are also several passages in Sextus Empiricus, *Pyrrhoneiae*, Bk. II, chap. v, which can be adduced on this topic.

A further argument for the contention that there is little value of itself in this agreement of all peoples lies in the evidence that the majority of men are foolish rather than wise, and few have based their opinions on an investigation of the real nature of things, the majority in blind assent, and without using their own judgement and observation, following others who have preceded them.

Finally, it also happens that, although a fairly clear idea can be obtained as to what most peoples agree upon, at least touching the general principles of the law of nature, and although we can judge the general opinion of nations with which we are unacquainted by the disposals of those which we know, because of their general similarity, yet from all this it is safer to gather what they have felt was to be observed among their own citizens rather than in relation² to other peoples, towards whom many men have a general hatred and whom they have always held it proper to treat as enemies. Add Michel Montaigne, *Essais*, Bk. I, chap. xxx.

8. Now, although the customs of many peoples can be used more effectively to show what is permissible by the law of nature rather than what is prescribed, yet the inconsistencies and differences in the institutions of celebrated peoples show that it is not always safe to draw conclusions even about the former. So true is this that the remark of Socrates in Plato, *Alcibiades*, No. I [p. 110 E], may be well applied in this connexion: 'I cannot say that I have a high opinion of your teachers, when you betake yourself to the many.' (J.*) The same thought is in Plutarch, *Themistocles* [xxvii]: 'Men's³ customs differ; different people honour 131 different practices.' (P.); and Tacitus, *Histories*, Bk. III [xxxiii]:

¹ [For *barbaric* read *barbarici*.—Tr.]

³ [For *mortalibu* read *mortalibus*.—Tr.]

² [For *quit* read *quid*.—Tr.]

'In an army differing in language and manners, composed of Roman citizens, allies, and foreign auxiliaries, all the diversities of passions were exhibited. Each had his separate notions of right and wrong; nor was anything unlawful.' (O.) The following may serve as examples¹ of this difference. Aristotle, *Nicomachean Ethics*, Bk. VII, chap. vi, tells how: 'Some savage tribes near the Black Sea lend their children to one another to feast upon.' (W.); a little farther on he calls these peoples 'irrational, brutal, living a life of mere sensation'. Eusebius, *De Praeparatione Evangelica*, Bk. I, chap. iii, in recounting the disgraceful customs which were corrected by the Gospel, mentions among other things the illicit intercourse with mothers and daughters among the Persians, which is noted also by Diogenes Laertius in his Prologue [I. 6], on the authority of Sotion, and the eating of human flesh and the slaughter of children, as religious rites, among the Scythians; how the Massagetae and Derbices killed their aged and banqueted off them; how the Tibareni threw their old people down from the cliffs; how the Hyrcani cast out their dead to be devoured by birds, and the Caspii theirs to be devoured by dogs. With these customs belong foul vigils beset with adulteries and debauchery in honour of the gods, and the use of human victims. The same writer gives the following facts on the authority of Bardesanus the Syrian, Bk. VI, chap. viii [X, 275 D ff.]:

Among the Geli,² it is legal for women to lie with any one they choose, and especially strangers, and they are not accused for so doing by their husbands, nor called adulteresses. The same custom used to prevail among the Bactrians. On the other hand the Arabs kill not only all adulteresses, but punish even those who are merely suspected of the sin. In Parthia and Armenia the murderer of a wife, son, daughter, or unmarried brother or sister is not even brought to trial, for the law so provides among them. Among the Atrii a thief who has stolen even a penny's worth is stoned to death. In Bactria a petty thief is spat upon. With the Greeks even wise men who have boy loves are not reproved. Many of the Britons have but one wife for the whole group; in Parthia, on the other hand, a number of women have a common husband.³

Sextus Empiricus, *Pyrhoneiae*, Bk. III, chap. xxiv [199 ff.], collects a great medley of conflicting institutions to show how there is no definite line between what is base and good. But he falls into serious error at the very beginning of his discussion, when he says: 'Now among us it is disgraceful, nay, rather, criminal, for men to indulge in homosexual relations, but among the Germans, as they say, it is not disgraceful, but a common habit.' For the Greeks were so addicted to that vice that Plato, in his *Laws*, VIII, feels the necessity of giving reasons to show how it can be prevented by legislation. Nepos, *Epaminondas*, chap. iv, apparently shows that the Boeotians were not free from that failing, unless it be that it died out among the later

¹ [For *spec minis* read *speciminis*.—Tr.]

² [Not the *Getuli*, as Pufendorf has it.—Tr.]

³ [Highly summarized from the original.—Tr.]

Thebans, as the following observation seems to imply: 'Nay, among the Thebans at one time this is said not to have been regarded as disreputable.'¹

But the remarks which he subjoins upon the Germans are so crude a falsehood that it is strange how any one, who had even the slightest knowledge of those peoples, could harbour such ideas. He adds: The Cynic philosophers, and Zeno of Citium, Cleanthes, and Chrysippus regarded ἀρρενομιξία [sodomy] as a matter of indifference. Certain tribes of India thought it nothing wrong to disport with their wives in public. It was held quite proper by many peoples of Egypt for their women to play the prostitute, and some of their daughters secured a dowry before their marriage by a life of shame, and then married. The Stoics said that it was not unreasonable to consort with a harlot, or to make one's living from the profits of prostitution. The Persians married their mothers, and the Egyptians their sisters, of which practice Zeno of Citium said the first was not unreasonable. 132 (Add *Idem*, chap. xxv, where the words ascribed to Zeno cannot² be surpassed in effrontery.) Chrysippus allowed a father to secure offspring from his daughter, a mother from her son, and a brother from his sister. Plato allowed a community of wives. It was an established custom among many barbarian peoples to eat human flesh, a custom approved even by the Stoics. Among many races adultery was regarded as an indifferent thing. The Scythians offered up strangers to Diana, and killed their elders when they had passed the age of sixty. A law of Solon's allowed any Athenian to put his son to death. Among the Romans, gladiators who had killed a man were attended with special honours. The Spartans punished thieves, not as such, but because they had been apprehended. If the Amazons bore any male children, they maimed them so that they would not be able to perform any deed worthy of a strong man. He then adds a great deal on the different opinions held concerning the gods, on the diversity of ritual, on customs of burial, and on death. Add Diogenes Laertius, on Pyrrho, Bk. IX [23-4]. Cicero, *Tusculan Disputations*, Bk. V [xxvii]: 'The minds of the Egyptians being tainted with pernicious opinion, they are ready to bear any torture, rather than hurt an ibis, a snake, a cat, a dog, or a crocodile; and should any one inadvertently have hurt any of these animals, he will submit to any punishment.' (Y.) Busbecq, *Letters*, III, recounts that thievery was honoured by the Colchians; and Francisco Alvarez says that the Abyssinians have a custom whereby thieves give part of their loot to the king, and keep without any disgrace the rest for themselves. The following instructive passage from Philo Judaeus, *De Temulentia*,³ pp. 208-9 [xlvi-xlviii], belongs here:

And then, too, do not those facts which are diffused over nearly the whole world, and

¹ [The quotation is from Sextus Empiricus, *loc. cit.*, 199.—Tr.]

² [For *inhi*l read *nihil*.—Tr.]

³ [Often called *De Ebrietate*.—Tr.]

which have caused both to Greeks and to barbarians such erroneous judgements, exhort us not to be too ready in giving our credence to what is not seen? And what are these facts? Surely they are the instructions which we have received from our childhood, and our national customs and ancient laws, of which it is admitted that there is not a single one which is of equal force among all peoples; but it is notorious that they vary according to the different countries, and nations, and cities, aye, and even still more, in every village and private house, and even with respect to men and women, and infant children, in almost every point. At all events, what are accounted disgraceful actions amongst us, are by others looked upon as honourable; what we think becoming, others call unseemly [...]. Yet I am not surprised if a confused and mixed multitude, being the inglorious slave of customs and laws, however introduced and established, accustomed from its very cradle to obey them as if they were master and tyrants, having their souls beaten and buffeted, as it were, and utterly unable to conceive any happy or magnanimous thoughts, believes at once every tradition which is presented to it, and leaving its mind without any proper training, assents to and denies propositions without examination and without deliberation. But I am surprised if even the multitude of those who are called philosophers, pretending that they are really seeking for certainty and accuracy in things, being divided into ranks and companies, come to discordant, and often even to diametrically opposite decisions, [...] about almost everything, whether great or small. (Y.*)

Add Michel Montaigne, *Essais*, Bk. I, chap. xxii, and Charron, *De la Sagesse*, Bk. II, chap. viii, §§ 4, 7.

9. But the idea of deducing the law of nature from the customs of peoples is attended with yet another difficulty: There is no nation which is governed entirely by the law of nature; but each has laws, whether codified or not, which have been added to it, and are used when its citizens have any business with one another. Furthermore, the relations between nations are very often defined according to a civil law which is common to both, or by the law of nature, which has been clothed, as it were, with many positive additions. Hence it is not so easy to decide what such nations consider a natural law, and what a positive and civil one. And does not custom when long established assume the specious appearance of natural law? Agathias, Bk. II [x. 23]: 'It is manifest that whatever law has obtained for a long course of time among any people, this they certainly regard as most excellent and equitable, and if anything contrary is done, they feel that it should be rejected, is ridiculous, and incredible.'

The famous passage in Herodotus, Bk. II [38], illustrates this thought of Agathias:

133 Darius called into his presence certain Greeks of his empire and asked them how much they would take to eat their parents when they had died—a custom of certain inhabitants of India. They replied that they could not be induced to do so at any price. He then asked some Indians what they would take to burn their parents upon death, as the Greeks did, but not to eat them afterwards. They exclaimed aloud and bade him forbear such language. (R.*)

Furthermore, to have been brought up from infancy on some one idea is so powerful an influence that, even though the idea be fallacious, the thought of questioning it scarcely ever occurs to a man, certainly

if he has no more wit than the common run of humanity. Aristotle, *Problems*, xviii, quaest. 6; 'In whatever men choose to start with and grow accustomed to, they can no longer judge what is better, for the mind has become corrupted through evil prepossessions.' Cicero, *Academics*, Bk. IV [II. iii]:

In the first place, some have been bound hand and foot, before they were able to judge what was best; and, secondly, before their age or their understanding had come to maturity, they have either followed the opinion of some friend, or been charmed by the eloquence of some one who was the first arguer whom they had ever heard, and so have been led to form a judgement on what they did not understand, and now they cling to whatever school they were, as it were, dashed against in a tempest, like sailors clinging to a rock. (Y.)

And a little farther on: 'But, I know not how it is, most people prefer being in error, and defending with the utmost pugnacity that opinion which they have taken a fancy to, to inquiring without any obstinacy what is said with the greatest consistency.' (Y.) Add Michel Montaigne, *Essais*, Bk. I, chap. xxii; Philo Judaeus, *On Abraham* [xxxiv]: 'A habit of long standing is for the most part as strong as nature.' And the greater part of mankind is included in the judgement of Sextus Empiricus, *Pyrrhoneiae*, Bk. III, chap. xxiv [235]: 'He follows the ordinary practices of life without ever a thought'; as well as in the lines of Euripides, *The Bacchanals* [201 ff.]:

Traditions of our fathers, old as time,
We hold: no reasoning shall cast them down,—
No, though of subtlest wit our wisdom spring. (W.)

The words of the Apostle, 1 *Corinthians*, xi. 14, also apply here, as also in a less degree the statement of Plato, *Laws*, VII [p. 749 D E], to the effect that our less ready use of the left hand than the right is due to practice, since nature is equally disposed to both. In the same way many peoples attach no little distinction to the possession of a beard, see Arrian, *Epictetus*, Bk. I, chap. xvi [10-14], while most of the Americans [American Indians] consider it beastlike to raise one. See Rochefort, *Descriptio Antillarum*, Pt. II, chap. viii, § 6 and chap. ix. And yet let us by no means attribute such strength to custom that it be held capable of so distorting and weakening the judgement as to make it incapable of apprehending the truth concerning natural laws. Add Selden, *De Jure Naturali et Gentium*, Bk. I, chap. vi.

10. Now these differences between the laws and customs of different peoples have undoubtedly given some men excuse for alleging that there is no such thing as natural law, and that all law has arisen from the convenience of individual states, and cannot be measured in any other way. So Horace, *Satires*, Bk. I, sat. iii [98 and 111 ff.]:

Utility, the mother, or next to it, of justice and right [. . .]. If you examine the dates of the world's history you will have to confess that the source of justice was the fear of injustice. Nature can draw no line between the unjust and the just, in the way that she does between what is advantageous and the reverse. (W.)*

Ovid, *Heroides*, Bk. I, ep. iv [131 ff.]: 'Such old-fashioned regard for virtue was rustic even in Saturn's reign, and doomed to die in the age to come. Jove fixed that virtue was to come in whatever brought us pleasure.' (S.) Lucan, Bk. VIII [488 ff.]:

As different as are the stars from the earth, as the flames from the sea, so is the profitable from the right. The entire power of sceptres perishes if it begins to weigh what is just; and regard for what is honourable overthrows citadels. It is the liberty to commit crimes which protects a hated sway. (R.)

Very crude language is also used about the origin of justice and injustice, by Aristippus in Diogenes Laertius, Bk. II [93], and by Pyrrho, Bk. IX, § 61. Carneades had disputed at length on this point, and Lactantius abbreviated his arguments in the following words, *Divine Institutes*, Bk. V, chap. xvi:

134 That men enacted laws for themselves, with a view to their own advantage, differing indeed according to their characters, and in the case of the same persons often changed according to the times; but that there was no natural law: that all, both men and other animals, were borne by the guidance of nature to their own advantage; therefore that there was no justice, or if any did exist, it was the greatest folly, because it injured itself by promoting the interests of others. [...] That all the nations which flourished with dominion, even the Romans themselves, who were masters of the whole world, if they wish to be just, that is, to restore the possessions of others, must return to cottages. (C.)¹

Add Grotius, *On the Law of War and Peace*, Prolegomena to Book I.

In meeting such arguments it will be convenient to begin with the following passage of Cicero, *On Duties*, Bk. II [iii]: 'In connexion with this term "expediency" custom has so declined and gradually deviated from the right path that, separating virtue from expediency, it has determined that some things may be virtuous that are not expedient, and some expedient which are not virtuous; than which doctrine nothing more pernicious can be introduced into human life.' (E.) He further remarks, *Ibidem*, Bk. III [iii]: 'Socrates used to execrate those who had first separated in theory those things cohering in nature.' (E.) Certainly such men have imposed upon the less informed by employing the ambiguous word 'utility', which has a double use, as it is considered from different points of view. One kind is what appears to be useful to the depraved judgement of disordered affections, which centre upon advantages that are for the most part immediate and fleeting, and are little concerned with the future. The other kind is judged to be useful by sound reason which not only examines what lies before its very feet, but also weighs the future consequences. It then regards that as really profitable, which will be so under all circumstances and for all time (Marcus Antoninus [Aurelius], Bk. VII, § 74: 'To act by the law of Nature is its own benefit.' (H.)). On no account is the enjoyment of a temporary advantage which will entail a long series of misfortunes

¹ [From Cicero, *The Republic* where it constitutes III. xii. 22.—Tr.]

considered desirable; just as it is a highly dangerous pleasure for men burning with fever to drink cold water, only to suffer soon thereafter the sharpest distress for doing so.

Actions in conformity with the law of nature have, indeed, this characteristic, that not only are they reputable, that is, they tend to maintain and increase a man's standing, reputation, and position, but they also are useful, that is, they procure some advantage and reward for a man, and contribute to his happiness. This quality is so far from unbecoming to a high character, that even in Holy Writ 'godliness' is said to be 'profitable unto all things', on the ground that it has the promise of the life that now is and of that which is to come [1 *Timothy*, iv. 8]. But actions repugnant to the law of nature are, indeed, always base, although they may at times apparently return some advantage, and more often some pleasure, which latter, however, never endures for long, and is followed by a throng of much greater ills. See *Proverbs*, xx. 17; v. 3-4; ix. 17-18; xxi. 6. A remark of Cicero's bears on the same point, *On Duties*, Bk. I [iv]:

But the greatest distinction between a man and a brute lies in this, that the latter is impelled only by instinct, and applies itself solely to that object which is present and before it, with very little sensibility to what is past or to come; but man, because endowed with reason, by which he discerns consequences, looks into the causes of things and their progress, and being acquainted, as it were, with precedents, he compares their analogies, and adapts and connects the present with what is to come. It is easy for him to foresee the future direction of all his life, and therefore he prepares what is necessary for passing through it.¹ (E.)

Therefore, so far is it from being true that even the laws of states were instituted with an eye to this false and momentary utility, that their special end was to prevent citizens of those states from weighing their actions by that idea of utility. For if one wished to test everything by his individual profit alone, without considering other men, all other men would be allowed to pursue the same course, and there could result nothing but the greatest confusion and a kind of war of all men against all others. Nothing could be of less advantage, nothing more unsuitable for man than such a condition, since, on the other hand, it is clear that he, who, by observing the law of nature, studies to put others under obligation to himself, can hold a far more certain hope that some advantage will come to him from others, than he who trusts in his own strength, and decides to do to others whatever suits his pleasure. Add Richard Cumberland, *De Legibus Naturae*, chap. ii, § 29, n. 2. 135

Nor, indeed, is it possible for mortals to imagine any utility which cannot have a universal value, since nature has given no man the privilege² to use some right against others which they may not in turn exercise against him. Hence it is idle for you to believe that it is profit-

¹ [For *adeamque* read *ad eamque*.—Tr.]

² [For *previlegii* read *privilegii*.—Tr.]

able for you to take by stealth or force the product of the labour of others, since they are able to resist as well as to enjoy the same privilege against you, or that it is to your advantage to break your given promise, since your own example can be turned against you. *Proverbs*, i. 13 ff. Isocrates, *Aeropagiticus* [34]:

The poor sustained more injury than the rich by the act of those who did not faithfully observe their agreements; for the latter, if they were to give up lending money, would only lose a small portion of their income, while the former, if they should be without any to assist them, would be reduced to the greatest distress. (F.)

The same writer, in his *On Peace* [26], lays down as the basis of his counsel that his fellow-citizens convince themselves that 'Peace is more useful and more profitable than meddlesomeness, justice than injustice, and the care of one's own than hankering after what belongs to others'. (F.) This principle he elaborates admirably in the course of his work.

Nor is it possible for a man to set such store by his own strength as to believe that the like cannot be done by others in retaliation upon him. All strength, indeed, comes from union with other men whom you may by no means hold together by your own strength alone. Therefore, if everything may be measured by that false standard of utility, the safety of every man, however powerful he be, would be uncertain so long as any one thinks it to be to his advantage for him to die; and whoever pursues such a course, by his example shows others the way to undertake the same course of action against him. And so not justice but injustice is supreme folly, which is of no general or lasting advantage even though a man's evil conduct may seem to him to succeed for a time, and which is certain to overthrow the general security of man, which is maintained by fellowship. And this applies not alone to men as individuals, but to entire states as well, no one of which has been hitherto so well equipped with resources, or so secure that it can do without the friendship of others, and cannot be injured, at least by an alliance of its enemies. Quintilian, *Declamations*, cclv: 'No bad precedent is any good; even though at the very moment it pleases us in a way,¹ still it does us all the greater harm in the end.' Demosthenes, *Olynthiacs*, II [10]: 'Impossible is it to acquire a solid power by injustice and perjury² and falsehood.' (K.)

The remarks of Epicurus on justice, as given by Gassendi, *Syntagma Philosophiæ Epicuri*, Pt. III, chap. xxiv-xxv, agree with what has just been said:

Justice not only never injures any one, but it gives some benefit, firstly, of its own power and nature, since it calms the mind, and, secondly, by the hope that a nature not depraved will have what it desires. If injustice makes its home in any man's mind, the mind cannot help but be disturbed by its very presence, and even if it undertakes something secretly, it

¹ [For *quadam* read *quodam* [*modo*].—Tr.]

² [For *per juria* read *perjuria*.—Tr.]

can never be sure that it will always remain concealed. And since justice has been devised for the common good, it follows that that is right or just, whatever its nature be, which has for its object what is good for groups and individuals who are members of society. And since every one, under the guidance of nature, desires what is good for himself, what is right or just is according to nature and is therefore called natural. And this natural law is nothing else than the stamp by which utility is recognized, or that advantage which is proposed on the basis of a common accord, which consists in men neither doing nor suffering injury in their relations with one another, and, in consequence, living in security. Now since this is good and profitable, every man seeks it under the leadership of nature.

But what he afterwards says about the different kinds of advantage among different peoples, and hence of the variation of justice, can be applied only to the civil law and not to the natural. Diodorus Siculus says briefly, Bk. XXV, Eclog. 1: 'Epicurus [. . .] in his book called *Golden Maxims*, says that the righteous life is void of all trouble and disturbances; but the unrighteous life is full of trouble and sorrow.' (B.*) Lucretius Bk. V [1151 ff.]: 'For violence and injury enclose in their net all that do such things, and generally return upon him who began, nor is it easy to pass a quiet and peaceful life for him whose deeds violate the bonds of the common peace.' (R.) Furthermore, any one can realize how contradictory it is to common sense to weigh all actions by utility as opposed to justice. Compare the apposite words of Protagoras, otherwise a trifling Sophist, in Plato, *Protagoras* [p. 323 A B]:

In other cases, as you are aware, if a man says that he is a good flute-player, or skilful in any other art in which he has no skill, people either laugh at him or are angry with him, and his relations think that he is mad and go and admonish him; but the opposite is true when dishonesty is in question, for even if they know that he is dishonest, yet, if the man comes publicly forward and tells the truth about his dishonesty, in this case they deem that to be madness. They say that men ought to profess honesty whether they are honest or not, and that a man is mad who does not make such a profession. Their notion is that a man must have some degree of honesty; and that if he has none at all he ought not to be in the world. (J.*)

Quintilian, *Institutes of Oratory*, Bk. III, chap. viii [44]: 'Nor is there any one so wicked that he would like to appear wicked.' Nay, there is no man who does not speak better than he either thinks or does.

But by the results of so perverted a doctrine the divine providence effectively unmasks the exponents of the same, as we may show by choosing one or two instances from an infinite number of examples. The famous Lysander, 'being a very crafty fellow, frequently using subtle tricks and notable deceits, placing all justice and honour in profit and advantage, would confess, indeed, that truth was better than a lie, but the worth and dignity of either was to be defined by their usefulness to our affairs'; . . . who said: "'Boys must be cheated with knuckle-bones, and men with oaths,'" (G.*) as Plutarch, *Apophthegms* [p. 229 A B], and Polyænus, *Strategemata*, Bk. I [xlv], describe him. But did Lysander establish his fortune on a firmer foundation than if he had ordered all his course by truth and honesty? See Cornelius Nepos,

Lysander. In the same way Agesilaus, who was constantly maintaining in all his utterances that 'justice is the fountain-head of all virtues, since clearly valour is worthless if justice be not on one's side', defended the occupation of the Cadmea by Phoebidas with the following specious argument: 'One must see whether the deed offers any advantage; for it is proper to venture whatever is of advantage to Lacedaemon, even if no one has ordered it.' [Plutarch, *Agesilaus*, xxiii. 4.] But was not that very act the cause for the Spartans losing the hegemony of Greece?

11. With the foundations thus laid, the arguments which are offered have an easy solution. It is foolish to conclude that, 'since states have instituted different laws on the ground of profit,' it follows that there is no natural and eternal law. All civil laws, indeed, presuppose or incorporate the general principles at least of natural law, whereby the safety of the human race is maintained; and these latter are by no means done away with by the former, which are merely added to them as the distinct advantage of each state has required. We admit that penal 'laws', or penalsanctions, 'have been devised out of a fear of injustice', doubtless after the mere requirements of natural law were found insufficient to restrain the wickedness of men. We acknowledge, indeed, the denial of Horace that nature can distinguish what is unjust, if restricted to that nature which man shares with animals, whereby animals by their senses know what things are good for their body and what harmful, without any knowledge of right or wrong. But we deny the application of his statement to rational nature. The argument of Carneades that, 'if the Romans wish to be just, that is, if they would restore what belongs to others, they would have to return to their primitive huts,' and that therefore justice is folly, has some force in the eyes of the mob, but
 137 carries no real weight with those who examine it carefully. For since others can avail themselves of the same right against us, that we use against them, there is surely no advantage in taking by force what belongs to others, and thereby inviting them to prey¹ upon our possessions.

And in defining profits one's attention should not be confined to what seems to benefit one man or another temporarily, to the detriment of others, but to what is advantageous for everybody and for all time. So let us imagine that some man has accumulated great wealth by robbery. He thinks it folly to restore what he has gained unjustly, and thereby of his own accord to reduce himself to his former straitened circumstances. But when in later years his Prince has detected his thefts, confiscated his wealth, and consigned the feloniously crafty man to the gallows or to prison, do we believe that he ordered his ways more wisely than the man who preferred to be content with a modest fortune, honestly acquired? Thus I question whether it would not

¹ [For *repienda* read *rapienda*.—Tr.]

have been better for Rome to abide by her modest and justly acquired resources, than, after plundering the world, to have turned the sword upon her own vitals, and to have offered her enfeebled body to the Goths and Vandals for them to rend in pieces.

Nor is there any need of a painstaking response to the other arguments of Carneades which Lactantius, *loc. cit.*, records. For if any one thinks the seller of a house is wise if he hides the fact that it is infected with pestilence, so that he may sell it at a higher price, then certainly the purchaser will be wise if he pays counterfeit in place of honest money for it, or if, after he has discovered the fraud, punishes the seller in the severest manner. Finally, we shall discuss in another connexion whether, in a shipwreck, a stronger may snatch a plank from a weaker, or a sound man in flight drag a wounded soldier from his horse so as to save his own life rather than the other man's. It will be enough to remark at this point that what is more readily excused than approved, under necessity or with a mind confused at the prospect of some impending danger, should by no means be laid down as a general rule of action. Add the author of *De Principiis Justi et Decori*, p. 114 ff. [Velthuysen].

12. The same author of *De Principiis Justi et Decori* has adopted the following method in investigating the law of nature. He presupposes at the outset that there is a God and that He has established the world in wisdom, a statement which no sane man will dispute. He adds: 'God has willed that He exercise the virtues of justice and truth in the control of the world.' *Psalms*, xcvi, the last verse [13]. But while the divine truth and justice can hardly with propriety be conceived in the manner of virtue, it is, furthermore, quite clear that that which is ascribed to the justice of God is very different from that which should be observed in the relations of men, for the former denotes the manner in which the most high and good Creator governs the intelligent creatures of His universe, while the latter belongs among those who are by nature equal and subject to the same master. That such divine justice should be measured by the same standard as human justice is by no means established by the fact that, in the Sacred Scriptures, we are often pointed to the example of God, *Luke*, vi. 36; *Matthew*, v. 44-5; xviii. 33, since in these passages the argument proceeds from the lesser to the greater.¹ From these preliminary statements he concludes: 'In creating² the world God set before Himself an end; and His means have in themselves the ability to attain an end; and finally: Man will not go unpunished if he deviates from that plan, which God wills that man should observe in attaining the end which He has set before Himself and man; and whoever orders his life and habits according to the plan

¹ [One would have expected, *a maiori ad minus*, 'from the greater to the lesser.'—Tr.]

² [For *increando* read *creando*.—Tr.]

prescribed by God, should be rewarded, since the justice of God implies nothing other than a proper distribution of penalties and rewards.'

As to these remarks I question whether it can be said in any useful sense that *God set before Himself and man a common end*, or that the order constituted for man, that is, the observance of the law of nature, produces the end of creation as set down by God. Nor can one easily accept the remarks which immediately follow: 'The natural necessity, 138 which is in God, lays upon men the necessity of cultivating virtues and avoiding vices.' But even if we should wholly grant all this, and then in working out a law of nature lay some such groundwork as the following: 'Everything so constituted by nature as to obstruct the purpose designed by God at the creation of the world is forbidden by the law of nature; but whatever have such a nature that this same end cannot be obtained without them, are all enjoined by the law of nature'; still it is impossible to understand clearly and distinctly what integral relation each of the precepts of the law of nature bears to that purpose, since the purpose itself has not yet been defined with sufficient clearness. So, for example, a long deductive process would be required for me to know that the purpose of the creation of the world cannot be attained without honouring one's parents, or that robbery is repugnant to the same end. Nay, the man who confines himself to general terms of this kind without appealing to more concrete and distinct principles arrives nowhere. Therefore a man still leaves the basis of natural law in obscurity if he knows how to do nothing else than reiterate that, 'Since the world was ordered in wisdom, and since courses of action have been assigned man in this universe, this order should of necessity show man what is each person's duty in every step of life.'

13. Most men agree on the one point that the law of nature should be deduced from the reason of man himself, and should flow from that source, provided it be not perverted. Dio Chrysostom, *De Servis*, x [28, p. 110 c]: 'Since you have a mind, you may know of yourself what you should do and how.' For the same reason the Holy Writ declares it to be written in the hearts of men. But we hold it manifest that, even if the divine revelation throws the greatest and clearest light upon the knowledge of the law of nature, it can still be investigated and definitely proved, even without such aid, by the power of reason as it has been given man by his Creator and still persists. Yet we do not, for all that, feel obliged to maintain that the general principles of the law of nature come into and are imprinted upon the minds of men at their birth as distinct and clear rules which can be formulated by man without further investigation or thought as soon as he acquires the power of speech. For any one will readily recognize that this is a mere fancy if he undertakes to examine with some interest and care the different steps of children as they gradually advance from the

ignorance of infancy. Nor should it be considered unimportant that the Sacred Scriptures regularly describe infancy as a state of ignorance of right and wrong, and manhood as one of knowledge of the same. See *Jonah*, iv. 11; *Deuteronomy*, i. 39; *Isaiah*, vii. 14-16.

Richard Cumberland, in his *De Legibus Naturae*, Prolegomena, §§ 5, 7-8, clearly shows that, even if such ideas are denied, the knowledge of the law of nature has in fact been stamped upon the minds of men by God as the first source of their being, whereby any one can also know that it is His wish and command for men to live in accordance with that law. The phrase in *Romans*, ii. 15, so pressed by most writers, is a figure of speech, and means nothing other than that this knowledge is clear, is fixed deep in the heart, and each man is sure in his own conscience of the source from which it was impressed upon his heart. In the same way the words of *Jeremiah*, xvii. 1, that sins 'are graven upon the tables of their hearts' only mean that they are real sins, not that they were known from birth. Add *Luke*, ii. 51; *Proverbs*, vii. 3. Likewise the ease with which children and the uneducated distinguish right from wrong comes from experience, since from their earliest days, and as soon as they show some use of reason, they have seen good deeds approved and rewarded and evil ones reprov'd and punished. They daily exercise such virtues and order every detail of their life by this pattern, and in this way their minds become so moulded that it occurs 139 to very few of them to question whether things could be done in any other way. Indeed, if any one should undertake to examine this matter in detail, he will discover how difficult it is to give any clear explanation for many things which the common throng does at once, and without a sign of hesitation. For instance, the author of *De Principiis Justitiae et Decori* [Velthuysen] asserts [p. 81]: 'If any one is caught stealing, the whole multitude are of one mind and body in striving to apprehend the thief, while if some one in a fit of anger has committed murder, every one hopes for his escape, and no one of his own accord lends assistance for his apprehension.' The common man does not know the reason for this, which is: 'Every one runs greater danger from a thief, who will take anyone's property, than from a murderer who is only angered against the one by whom he has been injured.' Therefore the law of nature may be called the dictate of a right reason only in the sense that the mind of man has the faculty of being able clearly to understand, from the observation of his condition, that he must of necessity order his life by that law, and at the same time to search out the principle whereby its commands can be convincingly and clearly demonstrated. Cf. Richard Cumberland, *De Legibus Naturae*, chap. iv, § 3.

It is no objection to our theory that most men do not know or understand the method whereby the commands of the law of nature are demonstrated, and that the majority of them usually learn this law

and observe it as a matter of training or by following the general example of society; for we also daily see workmen do many things by imitation, or with tools whose method of use they cannot demonstrate; and yet such operations can nevertheless be called mathematical and based upon good reason. From this it is clear how the fitness of the reason to work out the law of nature may be measured, and on what basis it can be decided whether some command proceeds from a sound or a depraved reason.

Now the dictates of sound reason are true principles that are in accordance with the properly observed and examined nature of things, and are deduced by logical sequence from prime and true principles. On the other hand, it is a dictate of depraved reason when one either proposes false principles, or by *ἀσυλλογιστία* [improper reasoning] formulates false conclusions. For to say that the law or nature is imprinted upon us by the nature of things implies¹ that it is true, since nature only puts forth what truly exists; and is the cause of that which contains nothing untrue, since, indeed, falsehood springs only from the error of men, who separate ideas which are related by nature, or else combine those which are separated by nature. Add Richard Cumberland, chap. v, § 1. If this is observed there need be no further fear that any one can palm off for the law of nature the vagaries of his diseased brain or the disordered craving of his mind; for his appeal to reason will be vain if he is unable to prove his assertions from principles which are legitimate and agreeable with the nature of things, inasmuch as truth and accuracy consist in the agreement of concepts and terms with the things which they are supposed to set forth. And if a man be so dull of wit as not to know how to weave the threads of an argument, he is very bold if he demands that any attention be paid to the conclusions of his fancy in so far as they deviate from the accepted beliefs of men. But it is clear to those who understand the true nature of proofs that principles should be not only necessarily true and fundamental, but also in a peculiar and intimate way be related to the subject of discussion, and so clear that the mind, on perceiving that the reason for making a statement is drawn from those principles, will rest satisfied and look for no further proof. This law for eliciting the true dictates of sound reason has been sinned against not only by those whose foundation of

140 the law of nature we have thus far discussed, but also by those who believe that they have set up a sufficient basis for the law of nature when they say: 'Natural good repute consists in the harmony of reason with desire; and the measure of this good repute is the excellence and dignity of human nature; while its end is that most noble one whereby we appear to have been appointed by nature to possess this universe.' For even if I should argue ever so emphatically that a certain action

¹ [For *insinuntur* read *insinuatur*.—Tr.]

accords with the excellence and dignity of man, and therefore is reputable, and consequently to be performed, I would still not have attained a clear and distinct system in which my mind could rest with all confidence; but it remains none the less uncertain of what that excellence consists, and why it agrees with the nature of man. Thus, if one says to a priest, 'It is not becoming of you to frequent road-houses and places of prostitution,' of course he voices what is true, but he does not give the ultimate reason which leaves no room for further doubt.¹ Cf. Rachel, *Prolegomena to Cicero, On Duties*, §§ 38 ff.

Although it is not the right of merely any one whomsoever to draw out from its first principle, by proper deductions, the law of nature, yet evidence sufficient to enable us to assert that it can be understood by all men who are capable of reasoning may be found in the fact that even men of merely ordinary intelligence can grasp its demonstration, when presented to them by others, and recognize clearly its truth when they have compared their own natural condition with it. As for the common throng, who usually get their acquaintance with the law of nature from general information and common usage, the authority of their superiors, who oversee its observance in states should, in the first place, be enough to make them certain regarding it; secondly, the fact that there are no plausible reasons which can disturb or destroy its truth; and lastly, the fact that its concrete value may be observed daily. On such grounds the law of nature is considered common knowledge, so that no adult or sane person can oppose to it an insuperable ignorance.

To show how easy it is to know what the law of nature commands, Hobbes, in his *De Cive*, chap. iii, § 26, and *Leviathan*, chap. xv, recommends the following rule: 'When any one questions whether what he plans to do to another will be done in accordance with the law of nature or not, let him imagine himself in the other man's place.' For, in this way, when self-love and passions, which strongly bore down one scale of the balance, are transferred to the other scale, it will be easy to see which way the balance turns. This same rule is approved by our Saviour, *Matthew*, vii. 12. Moschus, *Idyllia*, v: 'If you would be loved where you be loving, then love them that love you.' (E.) Add Selden, *De Jure Naturali et Gentium*, Bk. VII, chap. xii. When Aristotle, in Diogenes Laertius [V. 21], was asked how we should conduct ourselves toward our friends, he replied: 'As we should wish them to treat us.' *Digest*, II. ii. 1 and 4. Seneca, *On Anger*, Bk. III [xii]: 'Let us put ourselves in the place of him with whom we are angry: at present an overweening conceit of our own fortune makes us prone to anger, and we are quite willing to do to others what we cannot endure should be done to ourselves.' (S.) It was a saying of Confucius, as given by Martinus, *Historia Sinica*, Bk. IV, chap. xxv: 'Do not to another what you

¹ [For *postquam* . . . *expressi* read *post quam* . . . *expressit*. [Tr.]

would not yourself experience.' The Inca Manco Capac, the founder of the empire of Peru, as narrated by Garcilasso [de la Vega] *Comentarios Reales*, Bk. I, chap. xxi, laid down the same rule for his citizens, whom he wished to raise to a higher level of culture.

Sharrock, *De Officiis secundum Jus Naturae*, chap. ii, n. 11, however, does not feel that this rule is universal, since under it a judge who was going to pass sentence upon some highway robbers would have to acquit them, as he most certainly, if put in their place, would wish his own life to be spared; I would have to lend a poor petitioner as much as he wished, since I would wish the same if I were in want; I would have to clean his shoes for my servant, since I regularly ask of him to do the same for me. But the rule will remain consistent, if it be borne in mind that not simply one but both scales are to be considered; that is, I must con-
 141 sider not only what suits me, but also what obligation or duty rests upon the other, and what I can demand of him without damaging our mutual obligation. We confess, however, that this rule cannot be held to be a basic axiom of the law of nature, since it is a corollary of the law that we should regard ourselves as on the same level with other men, and therefore can be ¹ proved *a priori*.

14. There seems to us no more fitting and direct way to learn the law of nature than through careful consideration of the nature, condition, and desires of man himself, although in such a consideration other things should necessarily be observed which lie outside man himself, and especially such things as work for his advantage or disadvantage. For whether this law was laid upon man in order to increase his happiness or to restrain his evil disposition, which may be his own destruction, it will be learned in no easier way than by observing when man needs assistance and when he needs restraint.

In the first place man has this in common with all beings which are conscious of their own existence, that he has the greatest love for himself, tries to protect himself by every possible means, and tries to secure what he thinks will benefit him, and to avoid what may in his opinion injure him. Cicero, *On Ends*, Bk. III [v]: 'As soon as an animal is born he is instinctively induced and incited to preserve himself and his existing condition, and to feel attachment to those things which have a tendency to preserve that condition; and to feel an abhorrence of dissolution, and of those circumstances which appear to be pregnant with dissolution.' (Y.) Valerius Flaccus, *Argonautica*, Bk. V [643]: 'There is love, and all things protect their own.' Add Diogenes Laertius on Zeno, Bk. VII [85]; Marcus Antoninus [Aurelius], Bk. XI, § 8; Epictetus, *Manual*, chap. xxxviii. 2. And this love of each one for

¹ [Barbeyrac translates: '& qu'ainsi l'on ne peut la démontrer *a priori*', but without comment. In our opinion, however, if we understand aright the course of the argument, the text as rendered above is sound.—Tr.]

himself is always so strong that any inclination towards any other man yields to it. It is true that there are instances when some men seem to cherish others more highly than themselves, to rejoice more in their success, and to grieve more in their misfortunes than in their own, as Descartes says, *Les Passions*, chap. lxxxii:

The love which a good parent bears towards his children is so pure that he wishes to get nothing from them, nor to have them in any different manner than he now does, or to be more closely united to them than at the present moment. He regards them as his other self and strives for their advantage as if it were his own; or rather with greater interest, since he feels that he and they form one whole, of which he is not the better part, and he prefers their advantages to his own, not fearing even to sacrifice his own life so as to save them.

See 2 *Samuel*, xviii. 33; Euripides, *Alcestis*, lines 653-705.

But passing over the fact that this love is not always constant, parents often wish to have the misfortunes of their children transferred to themselves, because they feel that they can bear them better than can their children, or because the youth of the latter makes them more worthy to live. Furthermore, when parents are so greatly affected by the successes of their children, it is principally because they think that it constitutes credit for them to have brought them into the world. See *Luke*, xi. 27; Vergil, *Aeneid*, Bk. I [606]: 'What glorious parents gave birth to so noble a child?' (F.) On the other hand, Epaminondas used to say that of all the successes which he experienced, the one which pleased him most was that he defeated the Lacedaemonians at Leuctra while his parents were still alive. Plutarch, *Apophthegms* [*Epaminondas*, x, p. 193 A]. But it is well known that many others have calmly faced death for those whom they have loved greatly, or to whom they have strongly attached themselves. To such they feel themselves joined and united as lesser parts of the whole, and hence they prefer to die that so they may preserve the greater part. Cf. Descartes, *op. cit.*, chap. lxxxiii, and the account of the soldiers in Caesar, *Gallie War*, Bk. III [xxii]; Procopius, *Persian War*, Bk. I, chap. iii [6]:

Among the Ephthalitae Huns the wealthy citizens are in the habit of attaching to themselves friends to the number of twenty or more, as the case may be, and these become permanently their banquet-companions, and have a share in all their property, enjoying some kind of a common right in this matter. Then, when the man who has gathered such a company together comes to die, it is the custom that all these men be borne alive into the tomb with him. (D.)

Francis Carron, *Descriptio Japoniae*, chap. vii, writes that such human sacrifices are the present custom among the Japanese. On the customs of the Ethiopians, see Diodorus Siculus, Bk. III, chap. vii. The truth is that such peoples hold the boasting of friendship and love, and the glory derived from it, above all other things, and feel that they are well purchased even at the cost of life itself. Some people, furthermore, take their life to avoid misfortune, feeling that it will henceforth be loathsome to them, now that the one is gone in whom they centered all

their hope. Without doubt, in whatever a man does for another, he never forgets himself, and the general feeling of men is well expressed in the words of Satan in *Job*, ii. 4.

In addition to this self-love and desire to preserve himself by any and all means there is observable in the character of man the greatest weakness and native helplessness, so that if one could conceive of man as deprived of every assistance that comes to him in this world from other men he would think that life had been given him as a punishment. It is also evident that no greater help and comfort, after that granted man by God, comes to him than that from his fellow-creatures. For although the power of individual men to preserve themselves is so slight that they need the assistance of many things and men if they are to live well and comfortably, because their own strength and time would fail to give men very many most useful and most necessary things did not several persons unite their efforts; yet, on the other hand, individual men can contribute many things to the use of others, of which they do not feel the need, and which would therefore be of no use to themselves if they were not bestowed upon other men. Seneca, *On Anger*, Bk. I, chap. v: 'Man was born for mutual assistance.' Marcus Antoninus [Aurelius], Bk. II, chap. i: 'For we have come into being for co-operation, as have the feet, the hands, the eyelids, the rows of upper and lower teeth.' (H.) Yet men can, and often do, inflict just as much injury and harm on one another, either because of their base desires, or because they are forced to defend themselves against the injuries of others. Such acts constantly meet our eyes, and have been described more fully above in chapter i of Book II. Add Cumberland, *De Legibus Naturae*, chap. i, §§ 14 and 18.

It should be observed, in this connexion, that in investigating the condition of man we have assigned the first place to self-love, not because one should under all circumstances prefer only himself before all others or measure everything by his own advantage, distinguishing this from the interests of others, and setting it forth as his highest goal, but because man is so framed that he thinks of his own advantage before the welfare of others for the reason that it is his nature to think of his own life before the life of others. Another reason is that it is no one's business so much as my own to look out for myself. For although we hold before ourselves as our goal the common good, still, since I am also a part of society for the preservation of which some care is due, surely there is no one on whom the clear and special care of myself can more fittingly fall than upon my own self.

15. After the preceding remarks it is easy to find the basis of natural law. It is quite clear that man is an animal extremely desirous of his own preservation, in himself exposed to want, unable to exist without the help of his fellow-creatures, fitted in a remarkable way to

contribute to the common good, and yet at all times malicious, petulant, and easily irritated, as well as quick and powerful to do injury, For such an animal to live and enjoy the good things that in this world attend his condition, it is necessary that he be sociable, that is, be willing to join himself with others like him, and conduct himself towards them in such a way that, far from having any cause to do him harm, they may feel that there is reason to preserve and increase his good fortune. Cicero, *On Laws*, Bk. I [v. 10]: 'You will appreciate the fact, if you investigate the nature of human associations and society, that law has not been established by opinion but by nature.' (Y.) Iamblichus, 143 *Protrepticon*, chap. xx [123 A]: 'That men should live together and at the same time contrary to law would be utterly impossible. For in that case they would suffer more than if each man lived altogether by himself.' And so it will be a fundamental law of nature, that 'Every man, so far as in him lies, should cultivate and preserve toward others a sociable attitude, which is peaceful and agreeable at all times to the nature and end¹ of the human race'. For by a sociable attitude we do not understand here the particular meaning of a tendency to form special societies, which can be formed even for an evil purpose and in an evil manner, such as a banding together of highway robbers, as if it were enough for them to band together with any end whatsoever in view. But by a sociable attitude we mean an attitude of each man towards every other man, by which each is understood to be bound to the other by kindness, peace, and love, and therefore by a mutual² obligation. And so it would be absolutely false to assert that the sociable attitude which we propose makes no distinction between a good and a bad society.

We said that every man should cultivate, and by his life promote, a sociable attitude 'so far as in him lies'. Because, inasmuch as it is not in our power to make all others conduct themselves towards us as they should, we have, therefore, done our duty, if we have omitted nothing within our power which might move them to be in their turn sociable towards us. A corollary of this is that, since whoever obligates a man to an end obligates him as well to the means without which the end cannot be obtained, 'all things which necessarily work to that sociable attitude are understood to be commanded by natural law, and all that disturb or destroy it to be forbidden.' It is patent that this way of eliciting the law of nature is not only the most clear, but the majority of scholars recognize that it is also the most fitting and proper. There is no need of piling up a mass of testimony. The words of Seneca may serve as an example of all others, *On Benefits*, Bk. IV, chap. xviii:

To what do we trust for safety if not in mutual good offices one to another? It is by the interchange of benefits alone that we gain some measure of protection for our lives,

¹ [For *scope* read *scopo*.—Tr.]

² [For *mutaque* read *mutuaque*.—Tr.]

and of safety against sudden disasters. Taken singly, what should we be? a prey and quarry for wild beasts, a luscious and easy banquet. [. . .] Man is covered by a soft skin, [. . .] weak and naked by himself he is made strong by union. [God] has bestowed upon him two gifts, reason and union, which raise him from weakness to the highest power. And so he, who if taken alone would be inferior to every other creature, possesses supreme dominion. Union has given him sovereignty over all animals [. . .]; it is union which has checked the inroads of disease, provided support for our old age, and given us relief from pain. [. . .] Take away union, and you will rend asunder the association by which the human race preserves its existence. (S.) For man saves man, and city, city; one hand washes the other, and one finger the other; all our security rests in comrades.¹

Pliny, *Natural History*, Bk. IX, chap. xlvi. Add Marcus Antoninus [Aurelius], Bk. IV, § 4, and Bk. V, § 16, where he calls 'society the good of the logical creature', and Bk. V, § 29, and *passim*, where he denominates man as 'by nature a social creature'. Add *Idem*, Bk. VII, § 55. Libanius, *Declamations*, xix [xiii. 30]: 'Nature has appointed man to be a helper to his fellow man and a partner in his life.'

Though other reasons also may be added, they are less important, or are arguments for man's social nature. Such, for example, is the fact that nothing is sadder for man than continued solitude. So Cicero, *On Ends*, Bk. III [xx]: 'No one would like to pass his life in solitude, not even if surrounded with an infinite abundance of pleasures.' Therefore, 'it is easily perceived that we are born for communion and fellowship with man, and for natural association.' (Y.) Or that the tongue would in that case serve no end, that most noble instrument, by which man
144 alone of all animals can express his thoughts in articulate sound (see Quintilian, *Institutes of Oratory*, Bk. II, chap. xvi). Or that every good man takes the greatest delight in distinguishing himself among his fellows by worthy deeds. Thus what Cicero has to say should surely be considered only among the secondary reasons of sociableness, *On Duties*, Bk. I [xliv. 158]:

But if we could be furnished, as they say, as by a kind of magic wand, with everything that relates to food and raiment, then every man of excellent genius, laying aside all other occupations, would apply himself to knowledge and learning. The fact is not so; for he would fly from solitude and look out for a companion in his pursuits; and would desire sometimes to teach and sometimes to learn, sometimes to listen and sometimes to speak. (E.)

In another place he speaks to the same effect, *On Duties*, Bk. III [v. 25]:

To undergo the greatest labours and inquietudes for the sake, if it were possible, of preserving or assisting all nations—imitating that Hercules whom the report of men, mindful of his benefits, has placed in the council of the gods—is more in accordance with nature than to live in solitude, not only without any inquietudes, but even amid the greatest pleasures, abounding in all manner of wealth, though you should also excel in beauty and strength. Wherefore every man of the best and most noble disposition much prefers that life to this. (E.)

The following remarks of the same writer, in his *Laelius* [viii],

¹ [This last sentence, a Greek quotation, is not in Seneca at this point, but derives from Menander, *Monastichoi*, 29, and (with a slight variation) 543.

apply more properly to friendship in particular than to our general sociable attitude: 'Friendship and society have sprung rather from nature than from a sense of want, and more from an attachment of the mind than from a calculation how much advantage they would afford.' (E.)

The law of nature, as stated by Richard Cumberland, *De Legibus Naturae*, chap. i, § 4, regarding zeal for the common welfare and the greatest possible exhibition of good will towards others does not differ from our fundamental law. For in saying that man is a social animal we do not intimate that he should hold his own advantage, distinct from that of others, as his good, but the advantage of others as well, nor that any one should seek his own advancement to the oppression or neglect of others, nor that a man should hope for happiness if he disregards and injures others.

From the social nature of man, and from the fact that he was born not for himself alone, but for the human race, Bacon of Verulam in his *Advancement of Learning*, Bk. VII, chap. i, has drawn some excellent corollaries, for example: That the active life is to be preferred to the contemplative; that the happiness of man is to be sought in virtue, not in pleasure; that we should not withdraw from active life or separate ourselves from contact with others because of unforeseen events; finally, that we should not retire from public life because of timidity or disinclination to conciliate men. In the same connexion he also observes that no system of philosophy, religion, law, or belief has in any age so increased the public good and repressed individual self-seeking as the Christian faith.

16. Let us now consider whether what Hobbes advances in his *De Cive*, chap. i, § 2, is opposed to what we have said. Certainly his position has been represented by some learned men in a very unfavourable light, as if he maintained that 'nature has ordained discord and not society between men'; from which in their minds it follows that 'every kind of human society is contrary to the purpose of nature'. Cf. Conring, *De Civili Prudentia*, chap. xiv, towards the end. This is as if I should say that no man is by nature born with the power of speech; therefore all speech which is acquired is contrary to the purpose of nature; or that all men on first seeing the light are by nature very small; therefore it is contrary to nature when they grow up; or that men are by nature subject to disease; therefore it is contrary to nature when they avert or throw off diseases by dieting and medicine.

Now at first sight the theory of Hobbes appears paradoxical enough, especially if one does not carefully note the ambiguity of the word nature. That no one may be led to make the same mistake it should, first of all, be observed that self-love and a sociable attitude should by no means be opposed to each other, but rather that their tendencies

should be restrained in such a way that the latter be not checked or destroyed by the former. (Arrian, *Epictetus*, Bk. I, chap. xix [xiv]: 'It can no longer be regarded as unsocial for a man to do everything for his own sake.'¹) When unrestrained licence has broken up that control, and each man decides to seek his own advantage to the hurt of others, all manner of confusion arises, whereby the race of man is divided into warring groups. To avoid such a state of affairs the care of one's own safety commands that the laws of a sociable attitude be observed, since without the latter the former cannot be secure. As for the demonstration whereby Hobbes very adroitly deduces the laws of nature from the desire for self-preservation we should observe at the outset that such a method of proof shows, indeed, most clearly how conducive it is to the safety of men for them to lead their life in accordance with such dictates of reason. But the conclusion should not be drawn, without more ado, that man has a right to use such dictates as means for his preservation, and that therefore he is also bound to observe them as by some law; if those dictates of reason are to have the effect of laws they must certainly be drawn from some other principle.

In the next place great care should also be taken to prevent any one from concluding that when he feels he has made his own safety perfectly sure he need take no thought of others, or that he may do despite at his pleasure to anybody that contributes nothing to my safety, or has not the strength to work it harm. For we called man a sociable creature because men are so constituted as to render mutual help more than any other creature, just as no creature can suffer more injury² from man than can man himself. Nay, man's eminence and perfection stand out all the more as they contribute to the advantage of others, and deeds of such a nature are considered most noble and indicative of the greatest wisdom, while on the other hand any worthless fellow and a fool can bother and injure others. Furthermore, if it be proper to consider a man's own advantage his one end of life, then when several persons decide that their greatest advantage is concerned with the same thing it will follow either that the ends of several people, involving a contradiction, are said to agree at the said time with right reason, which is absurd; or, since no one can claim that his end should be preferred to that of another, it will have to be admitted that man should not propose his own advantage as his end unless he also takes into consideration the advantage of others. Nay, should a man neglect all his fellow men, and endeavour to adjust all things to his own advantage, he will have his pains for nothing, since it is impossible for all things and persons to be disposed according to the desires of individual men who seek contrary ends, and so he will invite others to prey upon him. Furthermore, if only that is good for man which serves his own

¹ [Deleting the erroneous period after *ylverai*.—Tr.]

² [For *commodi* read *incommodi*.—Tr.]

advantage alone, it follows that it is evil for others, since it cannot serve their advantage. Hence the same thing will be sought by one person and opposed by all others—a situation which can only give rise to conflicts among men. For a fuller discussion see Richard Cumberland, *De Legibus Naturae*, chap. v. Bacon wisely observes, *Essays*, chap. xxiii: 'It is a poor centre of a man's actions himself.'¹

Finally, even though some man may be unable to work me any benefit or harm and has in himself nothing for me to fear or desire, yet it is nature's will that even such a one be considered my kinsman and equal, and this reason alone, were there no others, lays upon the race of men the cultivation of a friendly society. And if there were any nation addicted to internal peace and justice, and so powerful that it could be formidable to all others, for which reason they would not be restrained from injuring others by the fear that their deeds might return upon their own heads; yet, were this nation to prey at its will upon weaker peoples, harry, plunder, kill, and drag others into slavery, just as they felt it to be to their profit, we would say that they had plainly broken the law of nature. And yet this people, as we imagine them, might preserve themselves, even if they observed no right towards others. Cicero, *On Ends*, Bk. III [xix]: 'Nor is a betrayer of his country more to be blamed than one who deserts the general advantage or the general safety on account of his own private advantage or safety.' (Y.) In the same way no one would commend the life of brigands, because among themselves they maintain some elementary justice and observe laws, because also their leader divides their booty equally, and because that one of their number who openly or secretly robs one of his fellow thieves thereby leaves for himself no place even in their own undertakings. See Cicero, *On Ends*, Bk. II [xi]. And this point needs stressing all the more, the more evident it is that a very strong man is led to break the law of nature on the grounds that he is sufficient for himself, his own safety is abundantly provided for, and there is no reason why he should conduct himself in a peaceable and friendly manner towards others. 146

In conclusion, as the care for one's own safety does not exclude the care for a sociable attitude, so also the former can continue unimpaired along with the latter, as is clear from the words of our Saviour when He commands us to love our neighbour as ourselves. Chrysippus says in Cicero, *On Duties*, Bk. III [x]:

He who runs a race ought to make exertions, and struggle as much as he can to be victor; but he ought by no means to trip up or push with his hand the person with whom he is contesting. Thus in life it is not unjust that each should seek for himself what may pertain to his advantage—it is not just that he should take from another. (E.)

Nay, reason also plainly declares that he who regards his safety and

¹ [For Bacon's 'himself' Pufendorf substitutes 'his own advantage'.—Tr.]

life cannot renounce the care of others. For since our safety and happiness depend in large part on the goodwill and assistance of others, and the nature of men is such that they desire for their good deeds some like return, and when this is not forthcoming make an end of their benefactions, no sane person can propose to protect himself on the theory that he renounce respect for all others. But, on the contrary, the more he loves himself the more he will endeavour by kindly deed to get others to love him. For no one can hope with any reason that men will want, of their own accord, to make any effort to increase the happiness of those whom they know to be malevolent, perfidious, ungrateful, and inhuman; surely one must rather believe that other men will watch their opportunity to repress and destroy such persons.

17. Again, it does not follow that individual men, on entering some society or association with particular men look for some special advantage which will come to them; and hence that the nature of man is not determined for society, and I am not expected to live on social terms with one from whom I expect for myself no special profit. For this much is surely clear that, when certain men gather into a particular kind of organization, it is because of some congeniality, peculiar to themselves, of mind or other qualities, or because they think they can secure some special end better among these associates than among others. Moreover, granting that as a rule it is agreeable to no man to live outside some form of society, also among those who are united by no other bond than a common humanity, this general sociable attitude and peace should be fostered, which consists in the avoidance of unjust injuries, and in the mutual advancement and division of advantages and profits,¹ so far as more binding obligations leave it possible.

147 18. All this makes perfectly clear the reply to be made to the following objection: 'If a man loved another man naturally, that is, as a man, there would be no reason why every man should not love every other man equally, as being equally a man, or why he should associate himself more closely with those in whose society more than in that of others he is accorded honour or profit.' In this statement general sociable attitude is confused with particular and more limited societies, and general love with that which arises from particular causes, for, as a matter of fact, no reason is required for this general love other than that a person is a man. Nature, indeed, for the reasons cited above, has in fact ordained a certain general friendship between all men, of which no one is to be deprived, unless some monstrous iniquities have made him unworthy. But, although by the wisdom of the Creator the natural law has been so adapted to the nature of man, that its observance is always connected with the profit and advantage of men, and therefore also this general love tends to man's greatest good; yet, in

¹ [For *commodo* read *commoda*.—Tr.]

giving a reason for this fact, one does not refer to the advantage accruing therefrom, but to the common nature of all men. For instance, if a reason must be given why a man should not injure another, you do not say, because it is to his advantage, although it may, indeed, be most advantageous, but because the other person also is a man, that is, an animal related by nature, whom it is a crime to injure. Lucian, *Amores*, [xxvii]:

We are not like brute beasts in loving a solitary life, but, as we are united in a kind of friendly community, our blessings are more sweet, our burdens are lighter, when they are shared with one another, and we are the happier when we have communicated our pleasures.

Dio Chrysostom, *Orations*, xii, says that Zeus has been called 'the patron of friends' and 'the patron of companions', because 'he gathers all men into groups and wills that they be friends to one another, and no one the opponent or enemy to another; likewise "the patron of strangers"', because one should not be indifferent even to strangers, and should consider no man an alien'.

Now, indeed, there are not a few circumstances above and beyond this general friendship which make a person cherish one man with greater affection than another. For instance, because there is a greater congeniality of mind between them along certain lines of conduct; because one is more fitted or inclined than another to work to your advantage; or because they have close relations of birth or residence. But the reason why a man more gladly associates himself with those in whose society he is accorded more honour or profit than another, lies in the fact that no man can avoid setting his heart upon his own advancement, so far as he recognizes it correctly. But such a setting of one's heart is by no means repugnant to the social nature of man, provided it does not disturb the harmony of society. For nature has not commanded us to be sociable, to the extent that we neglect to take care of ourselves. Rather the sociable attitude is cultivated by men in order that by the mutual exchange among many of assistance and property, we may be enabled to take care of our own concerns to greater advantage. And even though a man, when he joins himself to any special society, holds before his eyes, first of all, his own advantage, and after that the advantage of comrades since his own cannot be secured without that of all, yet this does not prevent his being obligated so to cultivate his own advantage, that the good of the society be not injured, or harm offered its different members; or at times to hold his own advantage in abeyance and work for the welfare of the society.

And it has nothing to do with the case when the assertion is made that the origin of large and lasting societies, that is, of states, lay not in the mutual good-will of men, but in their mutual fear, the latter word 148 being taken as the prospect of future evil or precaution against it. For,

passing over the fact that we are now concerned not with the origin of civil society, but with the general sociable attitude, it is furthermore entirely in keeping with the state of man's nature that, while single men or small groups should lay themselves open to the injuries of those who look for their own advantage without the slightest regard for others, many should unite, and so defend themselves against the infliction of such injuries. For is it not required for a society to be said to be in harmony with nature that it have been formed upon the basis of mutual good-will alone. And yet this motive is not entirely absent in the formation of states, since, indeed, at least the majority of those who lay the foundations of states are united by a feeling of mutual good-will, even though afterwards others, whose compelling motive is fear, are led to join with them. But on fear as the bond of states, as well as on the dispute, whether man is by nature a ζῷον πολιτικόν [political animal], we shall dwell more at length when we have to discuss the origin of states.

19. This method of deducing the natural law, we feel, is not only genuine and clear, but also so sufficient and adequate that there is no precept of the natural law affecting other men, the basis of which is not ultimately to be sought therein. Yet, as we shall show later, if these dictates of reason are to have the force of laws, it is necessary to presuppose the existence of God and His providence, whereby all things are governed, and primarily mankind. For we cannot agree with Grotius, when he says in his *Prolegomena* that natural laws 'will have some place, even if we should grant—what can only be done with the greatest impiety—that there is no God, or that He does not concern Himself with the affairs of men'. For if some man should devise such an impious and idiotic theory, and imagine that mankind had sprung from itself, then the dictates of reason could in no possible way have the force of law, since law necessarily supposes a superior. Cicero observes quite properly, *On the Nature of the Gods*, Bk. I [ii]: 'I do not even know if we cast off piety towards the gods, but that faith, and all the associations of human life, and that most excellent of all virtues, justice, may perish with it.' (Y.) Libanius, *Declamations*, iii [v. 79]: 'Good faith does not go hand in hand with disrespect for the gods.' Although, of course, its rules might conceivably be followed out of regard for profit, like the medicines which are prescribed by physicians in order to maintain one's vigour. The sentiments of Grotius seem to be gathered from a passage of Marcus Antoninus [Aurelius], Bk. VI, § 44:

If the gods take counsel about nothing at all—an impious belief—why may I not take counsel for myself? It is still in my power to consider my own interest. And that is to every man's interest which is agreeable to his own constitution and nature. But my nature is rational and civic; my city and country, as Antoninus,¹ is Rome; as a man, the world. The

¹ [For *Antonius* read *Antoninus*.—Tr.]

things, then, that are of advantage to these communities, these, and no other, are good for me. (H.)

Now the view of a certain scholar, that upon our principle the virtue of fortitude cannot be proved unless a basis is laid for it in the immortality of the soul, since otherwise no reward could fall to the lot of the man who sacrifices his life for a worthy cause, his view, I say, offers little difficulty. Although it is impious to deny or to cast doubt upon such a belief, still it is possible to show that even without it a soldier can be commanded to do battle to the death for his country. For, not to mention the fact, that it has not been clearly proved, that every proper action must necessarily be sacrificed for some, as it were, external reward, it is certainly agreed that it lies within the power of the supreme authority to arm citizens, and to proclaim upon pain of death that no one flee from his appointed place. Now of two evils a man cannot avoid choosing the lesser. But it is a lesser evil to fight with peril to one's life, and even to one's last breath, than to face certain death. Therefore a soldier would be the greatest fool and coward who would not prefer falling at the hand of the enemy with some expectation of revenge, to offering his throat to the executioner, with the disgrace attendant upon such a death. The saying of Iamblichus, *Protrepticon* [xiii, p. 76 A], applies here: 'When brave men meet death it is from fear of greater¹ evils.' But it would appear to be sufficient that one fight boldly and with all his strength, whatever be his motive; nor is it always necessary for the preservation of states and society among men that all be endued with a steadiness of mind imperturbable in the face of death, which certainly cannot be predicated of every man's spirit. Nay, the use of fortitude is seen not only in bravely facing death, when that is necessary, but chiefly in vigorously repelling the danger of death. For it frequently happens that perils are the only means of avoiding perils, and 'Death o'ertakes not less the runaway, nor spares the limbs and coward backs of faint-hearted youths'. (B.) [Horace, *Odes*, III. ii. 15 f.]

Nor does it follow that, unless the immortality of the soul be presupposed, the *summum bonum* of man must be found in sensual pleasure. For passing over the fact that in the system of natural law, as set forth above, the immortality of the soul is not denied, but only not taken into consideration, that sensual pleasure, which is popularly considered the *summum bonum* of Epicurus, does not work towards the conservation, sociable attitude, peace, and tranquillity of mankind, but is on the contrary opposed to it. Very different from this system of natural law is the heart and scope of the Christian religion, and therefore the Apostle is entirely right in saying that Christians would be of all men most miserable if in this life only they had hope in Christ [1 *Corinthians*, xv. 15, 19].

¹ [For *plurimum* read *plurium*; but *maiorum* would have been a better translation.—Tr.]

20. But if these dictates of reason are to have the force of law, there is need of a higher principle; for although their advantage is most manifest, still it alone could never lay so firm a restraint upon the spirits of men that they could not forsake such dictates if they should find satisfaction in disregarding this advantage, or believe that they could better consult their own advantage in some other way. Nor can a man's will be so thoroughly restrained by his mere intentions that he cannot go opposite to it whenever he so pleases. And even if many men endowed with natural liberty should agree to keep those dictates, these will, none the less, abide only so long as the agreement of those men continues in force. Nor would the obligation cease only when all who had agreed to it should decide to give it up—as is now the custom, whenever pacts are renounced by mutual disagreement—but even while the compact stands there would be no power to enforce it since, as the case supposes, the aforesaid dictate of reason which maintains agreements has not yet taken on the force of law; and so each person concerned will be able to withdraw from such an agreement whenever he wishes, no matter though the other members disagree with him.

Finally, the mere authority of men does not seem able to endow these dictates with the power of obligation. For since such authority can arise only by means of pacts, and pacts secure their force through law, it does not appear how any human authority could arise endowed with power to assert the force of obligation, unless the dictates of reason had beforehand the strength of law. Even if you should imagine that human government depends on the mere consent of men, and by this consent the observance of the dictates of reason is enjoined with the force of laws, they still would have no greater force than do positive laws, which in origin and duration depend upon the will of the legislator. Cf. Selden, *De Jure Naturali et Gentium*, Bk. I, chap. vii.

150 It must, therefore, under all circumstances be maintained that the obligation of natural law is of God, the creator and final governor of mankind, who by His authority has bound men, His creatures, to observe it. And this assertion can be proved by the light of reason. Inasmuch as it has long since been established by men of discernment, and no God-fearing man disputes it, we now assume that God is the maker and controller of this universe. Since He so formed the nature of the world and man that the latter cannot exist without leading a social life, and for this reason gave him a mind capable of grasping the ideas that lead to this end, and since He suggests these ideas to men's minds by the course of natural events as they come from Him as the first cause, and represent clearly their necessary relationship and truth, it is surely to be recognized that He also willed for man to regulate his actions by that native endowment which God Himself appears to have

given him in a special way above the beasts. And since this end cannot be attained in any other way than by the observance of natural law, it is understood that man has been obligated also by the Creator to observe this law, as a means not elaborated by the wish of men, and changeable at their pleasure, but as expressly ordained by the Creator Himself to secure this end. For whoever has the authority to enjoin some end upon another is also understood to have obligated such a person to use the means without which that end cannot be secured. See Marcus Antoninus [Aurelius], Bk. IX, § 1.

That a social life has been enjoined upon men by the authority of God is clear from the following considerations: Because the human race is of such a nature, that it cannot exist in safety if this belief be not firmly established; because, therefore, the will of the first cause has brought it about that, in natural consequence, the happiness of the human race is secured through acts commended by the natural law, and its misery is created by such as are forbidden; but especially because in no other creature than man is there to be found any religious sense or fear of God. To be added to these considerations is the sensitive conscience in the hearts of upright men, which convinces them that, in sinning against the law of nature, they are offending Him who has sovereignty over the minds of men, and is to be feared even when there is no impending fear of other men. This is illustrated by the passage of Tacitus, *Annals*, Bk. VI [vi], about Tiberius:

So terribly had his own crimes and excesses recoiled in punishment on his head! How true the saying of the great ancient sage [Socrates] that, if the souls of tyrants could be laid bare, the marks of blows and tortures might there be seen; since just as the body is scored by stripes, so is the mind by cruelty, by lust and wicked purposes. (R.)

Cicero, *On Ends*, Bk. I [xvi]:

But if any men appear to themselves to be sufficiently fenced around and protected from the consciousness of men, still they dread the knowledge of the gods, and think that those very anxieties by which their minds are eaten up night and day are inflicted upon them by the immortal gods for the sake of punishment. (Y.)

Seneca, in Lactantius, Bk. VI, chap. xxiv: 'Foolish men! what does it profit you not to have a witness, if you have the witness of your own conscience?' (C.) Albricus,¹ *De Deorum Imaginibus*, 22: 'Malice never wears a frank expression.' Add Juvenal, *Satires*, XIII [193]. On the advantages of a good conscience, Martial, Bk. X, ep. xxiii: 'A good man lengthens his term of existence; to be able to enjoy our part of life is to live twice.' Add Philostratus, *Life of Apollonius of Tyana*, Bk. VII, chap. xvii.

Now the laws of nature would have had full power to obligate men, even if God had never proclaimed them again in his revealed word, for man was bound to obey his Creator, whatever the way in which He

¹ [Or rather 'Albericus'.—Tr.]

might reveal His will to him. Nor was a special revelation absolutely necessary, in order that a rational creature might recognize that he was subject to the command of the final judge of things. No one, indeed, would deny that even those to whom the Sacred Scriptures were not known have sinned against the law of nature—a statement which could not be made, if it acquired the force of law only through its pronouncement in the Scriptures.

For this reason we cannot approve the following statement of Hobbes, *De Cive*, chap. iii, towards the end: 'Since those which we call the laws of nature [. . .] are nothing else but certain conclusions, understood by reason, of things to be done or omitted; but a law, to speak properly, is the speech of him who by right commands somewhat to others to be done or omitted, therefore they are not, in propriety of speech, laws, as they proceed from nature, but only as they are delivered by God in Holy Scriptures.' For we do not feel that it belongs to the essence of law that it be spoken, or that it be made known to subjects by words formed into a speech; but it is enough if the will of the superior be arrived at and understood in any way whatsoever, whether by the inner dictate of the mind, from the condition of our nature, or the character of the business to be undertaken. He himself acknowledges this, *ibid.*, chap. xv, § 3: 'The laws of God are disclosed in three ways: first, by the unspoken dictates of right reason,' and so forth.

But the laws of nature discovered by rational processes can only be conceived in the form of propositions, and in this respect they are properly called propositions. But just as it makes no difference, in the case of civil laws, whether they are made public in writing or by verbal proclamation, so the divine law will have equal force whether it be made known by God Himself in visible form, and speaking with a voice like that of man, or through very holy men, moved by a special divine impulse; or whether, finally, it be discovered through the natural reason by a study of the condition of man. For the reason, properly speaking, is not the law of nature itself, but only the means by the proper use of which it is recognized. Besides, the method of promulgating a law has no bearing upon its real nature. Now it may be a clearer, and possibly more convenient, method of revealing one's will to another, if a man impresses it upon the senses of another by propositions expressed in words; and yet a thing is held to be sufficiently revealed, when an opportunity is afforded, and even thrust upon a person, for considering and pondering it by the proper faculty. And so man, who has been given by the kindness of his Creator the faculty to understand both his own and others' actions, and to judge of their harmony with human nature, cannot but have occasion to judge of the agreeableness of those actions, positing the existence of other men. Add Richard Cumberland, *De Legibus Naturae*, chap. i, § 11; chap. v, § 1.

Although in order to make a law obligatory it is necessary for it to be known to the subjects, while it is not in the power of every one to deduce the natural law from the dictate of reason, and to recognize its necessary relation to the nature of man, yet this is no reason either for natural law ceasing to obligate all men, or for it being impossible to regard it as known by the light of reason. For a public and simple knowledge is sufficient to make a law obligatory, and no elaborated demonstration and deduction of it is required for such a purpose. And although it be probable that the important principles of natural law were given to the first men by God, to be passed on to others afterwards by instruction and custom, yet the knowledge of that law can none the less be called natural, inasmuch as its necessary truth can be gathered by mental processes or the use of natural reason. And because the propositions which define natural law are suggested to the minds of men by a contemplation of the nature of things, they are referred back to the author of nature, even to God. Add Richard Cumberland, *De Legibus Naturae*, chap. i, § 10.

The most enlightened of scholars refer the origin of natural law to God. Plutarch, *On Listening to Lectures* [i, p. 37 D]: 'It is one and the same thing to follow God and to obey reason.' An excellent passage from Cicero, *On the Commonwealth*, Bk. III [xxii. 16], is given in Lactantius, Bk. VI, chap. viii.

This is indeed a true law, right reason, agreeing with nature, diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding; which, however, neither commands nor forbids the good in vain, nor affects the wicked by commanding or forbidding. It is not allowable to alter the provisions of this¹ law, nor is it permitted us to modify it, nor can it be entirely abrogated. Nor, truly, can we be released from this law, either by the senate or the people; nor is another person to be sought to explain or interpret it. Nor will there be one law at Rome and another at Athens; one law at the present time, and another hereafter; but the same law, everlasting and unchangeable, will bind all nations at all times; and there will be one common Master and Ruler of all, even God, the framer, arbitrator, and proposer of this law; and he who shall not obey this will flee from himself, and, despising the nature of man, will suffer the greatest punishments through this very thing, even though he shall have escaped the other punishments which are supposed to exist. (C.)

Sophocles, *Oedipus the King* [865 f.]:

Those laws ordained on high
Whose birthplace is the bright ethereal sky.
No mortal birth they own,
Olympus their progenitor alone. (S.)

Selden, *De Jure Naturali et Gentium*, Bk. I, chap. viii, shows that even though the Gentiles recognized that the principles of natural law were now and then violated and overturned, as it were, by the depraved manner of men, still they were persuaded that τὸ αὐτοδίκαιον, or what

¹ [For *Huc* read *Huic*.—Tr.]

is really just by the command of the gods, remains the same at all times, and always maintains the same force of obligation. This belief was the source of the prevailing belief of the Gentiles on the tortures of the wicked in the lower regions, which awaited those who were guilty of gross sins against the law of nature; for since they believed that the gods demanded satisfaction for a violation of the natural law, they must have believed that they were the authors of that law. Likewise, all the best of the Gentiles, on the other hand, were persuaded that the virtue displayed by good men was not without the favour of Heaven. Iamblichus, *Protrepticon*, chap. xiii [p. 83 A]: 'This one thing must be thought true, that no evil befalls a good man either in life or in death, and his¹ fortunes are not disregarded by the immortal gods.' Euripides, *Ion* [1621 ff.]:

For the good at last shall overcome, at last attain their right;
But the evil, by their nature's law, on good shall never light. (W.)

Selden proceeds to show that among the early Christians the general opinion prevailed that even in the interval between the creation and the handing down of the Decalogue, the natural and universal laws were given man by God, which were later inserted in the body of the Mosaic law. This caused Chrysostom to make the excellent remark, *Orations*, xii, *To the People of Antioch*: God added no reason to His laws on the honouring of parents, murder, adultery, and theft, because they were already well known as portions of the natural law; but since the law on the Sabbath was positive, He took care to add a reason. Add also *ibid.*, Bk. I, chap. ix; Bk. VII, chaps. ix-x. In conclusion, the wisest legislators have recognized that all laws secure their greatest stability from religion, and so have regularly given the first place in their codes to the worship of God. See the introduction to the laws of Zaleucus, as given by Diodorus Siculus, Bk. XII, chap. xxi.

21. It is also worth while to treat more carefully the sanction of natural law. In this connexion, beside what has been set forth above on the sanction of law in general, we open our discussion by observing that the good and evil which fall to the lot of man can be divided into three classes. Now, among good things, some proceed from the free gift of the Creator, or from the voluntary benevolence of other men, or are acquired by the labour of man, which he has undertaken without compulsion and of his own free will. This class is plainly not due to the observance of laws. A second class of good things proceeds by a natural consequence from an action required by the laws, because the Creator
53 has assigned to every act agreeable with His laws its regular and natural effect, which tends to the advantage of man. These good things Richard Cumberland calls 'natural rewards'. The third and last

¹ [The correct reading is *τούτων*. The sentence is really a quotation from Plato, *Apology*, p. 41 c d.—*Tr.*]

class of good things follows certain actions, because of the will of the legislator or the agreement of men; of these the former are rewards *κατ' ἐξοχήν* [par excellence], or arbitrary rewards, the latter are wages.

In the same way some evils follow from the particular nature and condition of man—no notice being taken of how this condition first came about—or they involve no guilt on the part of him on whom they fall. These you may call in a sound sense *evils of fate*, the word fate not being opposed to the disposal of God, but to the special guilt of him who suffers from that evil. Others follow upon sins by a natural consequence and connexion; and these are sometimes called natural punishments. The last class arises from sins upon the special determination and disposal of a legislator, not from a line of natural effects; and in this case the quality, degree, place, and time of the evil depend upon the will of the legislator. These last are what we call punishments, in the proper sense of the word, or, in a looser sense of the word, arbitrary punishments.

With this much by way of introduction we declare that, although the most Good and Great Creator might, by virtue of His power, have demanded of us an obedience that would certainly have been without any merit for us, it pleased His goodness so to constitute the nature of the world and of men that certain good things follow by a natural connexion the observance of natural laws and certain evils their violation. And the observance of natural laws is attended by an easy and good conscience, joined with a good assurance, a well-ordered and calm mind, the preservation of the body from many not fatal evils and unnumbered advantages which can be secured by the mutual good-will and attentions of other men. Thus Seneca, *On Anger*, Bk. II, chap. xiii, calls 'a great reward the steady calm of a happy mind';¹ and again:

The road to happiness is easy. [. . .] What is more restful than a mind at peace, and what more toilsome than anger? What is more at leisure than clemency, what fuller of business than cruelty? Modesty keeps holiday while vice is overwhelmed with work. In fine the culture of any of the virtues is easy, while vices require a great expense. (S.)

Add *ibid.*, Bk. II, chap. xxx, and the last chapter; Bk. III, chap. v and xxvi. The same is illustrated by the story of Prodicus about Hercules at the two ways, in Xenophon, *Memorabilia of Socrates*, Bk. II [i. 21 ff.]. *Proverbs*, ii. 4; viii. 18; x. 9; xi. 3, 5, 10, 18, 19, 25; xviii. 20; *Sirach*, vi. 5; vii. 37, 39; xxxi. 28.

On the other hand there comes by natural connexion from a violation of the same law uneasiness of conscience, distress and degeneracy of mind, a wasting away of the body, and countless evils which can arise from the provoked violence of other men and the withdrawal of their aid. Marcus Antoninus [Aurelius], Bk. IX, § 4: 'The unjust man is unjust to himself, for he makes himself bad.' (H.) Cicero says of a ruined man: 'His own habits will take their revenge upon

¹ [These words do not occur in the text of Seneca at this point.—Tr.]

him,' [*Letters to Atticus*, IX. xii] *Proverbs*, v. 9-11; vi. 33-5; xii. 13; xiv. 14, 22, 32, 34; xvii. 13; xix. 29; xx. 1; xxii. 5; xxiii. 20, 28 ff.; *Sirach*, xix. 3; xxxi. 22 ff., 39, 40.

Now although these rewards and evils are said by some to come with only little certainty from good and evil actions, since many are returned for their benefactions only hatred, envy, and other ills, while, on the other hand, others enjoy without punishment the fruits of their evil deeds, and so it cannot be assumed, without chance of error, that for our good deeds we shall be returned in kind by other men (although the fruit produced within ourselves is never subject to interruption); still it is sure that, from good and just actions, we can reasonably hope for advantages with a degree of certainty that would not be justified if one were to expect to get them from the opposed vices. *Proverbs*, xi. 31. And even if these good deeds do not secure everything, which by the nature of things they were fitted to secure, there is still an evident probability that not a few benefits will follow, or at all events more than can be expected from evil actions. And so on this score we are
 154 consulting far better for our safety, and can conceive a much more likely hope that others will contribute something to our advantage than if we should have no respect for other men, and should refer all things to our own advantage; and especially is this true if we should decide to practice violence and deceit on others and to seek our gain through their loss. On this argument, therefore, the value of the reward that must follow a good action when all things are properly weighed exceeds the gain that will accrue from an illegal action.

It should be carefully noted at this point, when the effect of good and evil actions is being discussed, that no consideration is being given to those advantages and evils which we referred above to the first class, and which cannot be either acquired or avoided by our foresight and endeavour. For such can and do fall equally on good as well as on wicked men. Thus a scoundrel may receive from nature a healthy and strong body, a good man one that is weak and subject to disease. In the same way death carries off the good as well as the evil. But the only things concerned here are those that can be foreseen by the human reason, and therefore depend to some extent upon our actions.

Now although some of the advantages which it is our endeavour to gain from other men by observing the law of nature depend upon the good-will and honour of others, and are, therefore, clearly not within our control, yet because it is probable that they also have the same end as we, there is good reason at least to expect the effects which depend upon others, although they cannot be determined beforehand with the same accuracy. And hardly any person has had experience with men so incensed at him that he does not recognize he owes much to the good-will of others. Certainly the evils which have come of men

have never been able to encompass the destruction of the human race; and this is a proof that good actions have attained their effect more often than they have fallen short of it. Thus, even if, by an unforeseen concurrence of external causes, many benefits from other men pour as though of their own accord upon a man who neglects the law of nature, yet because such effects in this case are only, as concerns him, contingent, and certainly come but rarely, it is clear that reason does not prescribe acts of such a kind, nor does law command any such thing. Reason, indeed, teaches quite clearly that it will lead with far greater probability to our happiness for us to act with an end in view, and through the best means at our disposal, than if we take no foresight and commit ourselves entirely to the uncertain play of chance. But all this is perfectly obvious, and is most fully set forth by Richard Cumberland, *De Legibus Naturae*.

There remains, therefore, the question whether in addition to these natural effects of evil actions, and those which spring from the sanction of civil laws, there are still others framed by the will of God, to be exercised, as it were, by his sovereign hand; or whether natural laws are sanctioned by God with a further arbitrary penalty; especially since it is observed that the natural effects of evil actions are sometimes interrupted and the crimes of some men turn in part to their profit. On this point the Sacred Scriptures give clear testimony. But affirmation of this point is also furnished by the very ancient belief, found among most peoples, of the divine Nemesis and the punishments of the lower world. Illustrations of this appear in *Jonah*, i. 7, and *Acts*, xxviii. 4, where there was, indeed, no natural connexion between the sin of Jonah and the storm on the sea, and between the murder and the bite of the viper, and so the sailors of Palestine and the people of Malta assumed that crimes were being punished from heaven by the sovereign hand, as it were. Add Grotius, *On the Truth of the Christian Religion*, Bk. I, §§ 19–22; Bk. II, § 9. And in truth, since it is certainly the will 155 of God for those laws to be observed by men, and it appears that their natural effects are in part, at least, evaded by some, it is highly probable that God will punish their wickedness in some other way; especially since the remorse of conscience, and the loss of security, that is the lot of wicked men, do not always seem to equal the greatness of their offences. Add Cumberland, *De Legibus Naturae*, chap. v, § 25. But since such *a priori* reasoning does not seem to carry full proof, but only a high probability, and since such an arbitrary penalty presupposes a positive determination of the divine will, which can scarcely be apprehended without a definite revelation of God, and since an induction or proof from experience is as yet imperfect, we cannot avoid having to confess, that for those who follow the mere light of reason this question is still involved in obscurity.

22. Regarding the material of natural law, Grotius, Bk. I, chap. i, § 10, observes that many things are commonly ascribed to natural law not properly, but *reductively*, in that natural law does not oppose them; just as not only the things which are owed by justice are called just, but also such as are not repugnant to justice, although you might more properly call them permitted. But you might apply this distinction more conveniently to those institutions which have been introduced on the persuasion of a will for peace and quiet, in accordance with a certain state of mankind, and to acts which are undertaken and accomplished in accordance with these institutions. For you may hear questions like the following discussed among lawyers; for example, whether the ownership of things, the acquisition of title by long use [*usucapio*], the drawing up of a will, buying and selling, fall under natural law. Such questions cannot be directly answered, unless you separate those things, which the law of nature disposes of by direct command or denial from those which a desire for sociable relations has persuaded men to institute, or the permission to undertake which has come directly from these institutions, so that they are said to belong reductively to the law of nature. Thus the ownership of things does not come directly from nature, nor can any express and determinate command be alleged for its introduction, yet it is said to spring from natural law, since the condition and peace of the multiplied human race could no longer tolerate their primitive community. In the same way there is no definitive command of natural law for the existence of usucapion, yet after distinct ownership of things came to be established, the peace of mankind favoured it, so that the ownership of property might not always be in question. Nature also commands no man to make a testament, to buy, or to sell, but, in the course of nature, it follows from antecedent ownership that a man on his death-bed may dispose of his property, or, again, that any one may by agreement sell his possessions or acquire those of another.

Grotius, in the same passage, further notes that things are sometimes improperly ascribed to natural law which reason declares are noble and better than their opposites, although they are not really owed. To this class belong many acts of such liberality as is unusual and surpasses the general average, acts of mercy and compassion, and occasions when a man yields his right under no constraint. Illustrations of such are given by the Apostle in *1 Corinthians*, x. 23; vi. 12; vii. 38. So Ulpian writes in *Digest*, IV. vii. 4. 1.

However, the Praetor does not find fault with the behaviour of the man who shows this anxiety to be rid of property, where his object is to avoid being exposed to constant litigation about it—indeed such a [...] resolution, proceeding as it does from the party's hatred for actions at law, is not a thing to be censured. (M.)

Socrates refused to call into court a base fellow who had done him

an injury, considering it no more than if an ass had kicked him. So Cato, 'when he was struck in the face, did not fly into a rage, did not take vengeance, did not even pardon the injury, but denied that it had been done.' 'He thought it was better not to admit it than to avenge it.' [Seneca, *On Anger*, Bk. II, chap. xxxii; *On the Steadfastness of the Wise Man*, chap. xiv.]

23. There is, finally, one more question to be considered here, namely, whether there be a peculiar and positive law of nations, distinct from natural law; for on this point scholars are not entirely agreed. It is held by many that the law of nature and the law of nations are one and the same thing, differing only in their external denomination. Hence Hobbes, *De Cive*, chap. xiv, §§ 4, 5, divides natural law 'into the natural law of men and the natural law of states, which is commonly called the law of nations. The injunctions of both', he adds, 'are the same; but because states, upon being constituted, take on the personal properties of men, the law, which we call natural when speaking of the duty of individual men, on being applied to whole states and nations or peoples, is called the law of nations.' To this statement we also fully subscribe. Nor do we feel that there is any other voluntary or positive law of nations which has the force of a law, properly so called, such as binds nations as if it proceeded from a superior. Add Boecler on Grotius, Bk. I, chap. i, § 14; Bk. II, chap. iv, § 9. And so we do not, as a matter of fact, disagree with those who like to define the law of nature as that which is in conformity with rational nature, and the law of nations as that which proceeds from considerations of our requirements which are helped most of all by sociable attitude; for we deny the existence of any law of nations arising from a superior. And whatever is deducible from the requirements of human nature we refer to the natural law, since we are unwilling to deduce it from a conformity with rational nature, inasmuch as by such a procedure reason is set up as its own rule, and any demonstration of natural laws undertaken in this way is merely arguing in a circle. 156

Most of the matters which the Roman Jurisconsults and others refer to the law of nations, such as ways of acquiring things, contracts, and the like, belong either to the law of nature or to the civil law of different nations, which law amongst most nations agrees in such matters as do not otherwise depend on the universal reason that is common to all mankind. But no distinct branch of law can properly be constituted from these, since, indeed, those laws are common to nations, not because of any mutual agreement or obligation, but they agree accidentally, due to the individual pleasure of legislators in different states. Therefore, these laws can be and many times are changed by some people without consulting others. Nor is the view of Felden, on Grotius, Bk. II, chap. ii, § 20; Bk. II, chap. viii, § 1, to be lightly dis-

missed when he says that for the Roman Jurisconsults the law of nations is the right to actions and business belonging to aliens in the Roman state, while the civil law is that of citizens only, excluding aliens. So the making of wills and marriage was said to fall under the civil law, but contracts under the law of nations, because only citizens could enjoy the former, but also aliens at Rome the latter.

Among many writers there is also gathered under the term law of nations certain customs which amongst most nations, at least those that lay claim for themselves to some repute in more refined and human deeds, are observed by a certain tacit agreement, especially in warfare. For after it was considered a matter of great pride among the more advanced nations to secure glory in warfare, that is, to show in combat a man's superiority to other men, because he had the boldness and the skill to slay many men, and so unnecessary and unjust wars were frequently rushed into; therefore, in order to prevent great warriors from unduly exposing their skill to envy when they exercised the full licence of a just war, it seemed best to many peoples to restrain the excesses of wars by a form of humanity and magnanimity. This was the origin of customs about the exemption of certain things and persons from the violence of war, about the manner of injuring enemies, of treating captives, and the like. I question whether the custom was worth the profession of soldiers, which Machiavelli in his *Princeps*, chap. xii, says was introduced by Albericus Comensis e Flaminia,¹ and followed in Italy, in former centuries, in combats between mercenary cavalry, whereby 'their generals strove with all their power to remove all fear and exertion from themselves and their soldiers, taking care that
157 there should be no casualties, but that only captives might be taken on each side, and released these without ransom. No storm missiles were shot at night against cities which they were besieging, nor did the garrisons of the city shoot into their tents.² Furthermore, their camps were not surrounded by any wall or trench, nor used in winter. All this was a part of their military discipline and of institutions of their own making.' Strabo, Bk. X, tells of a similar agreement between the citizens of Eretria and Chalcis, whereby they would not use missile weapons. You may also class with such practices the customs of the Hindus, as described by Arrian, *Indica* [xi], whereby in time of civil war farmers were kept free from all harm.

Now although such customs seem to have an obligation arising from some sort of tacit agreement, still, if a man who is waging a legitimate war neglects them, and declares that he will not be bound by them, providing a course opposed to them is possible by the law of

¹ ['Alberigo da Conio, Romagnuolo,' in Machiavelli; or, in the ordinary form, 'Alberico da Barbiano, Count of Cunio in Romagna.' Pufendorf's 'Comensis' is probably due to the erroneous printing 'da Como' in the editions prior to 1848.—*Tr.*]

² [For *intentionaria* read *sententia*.—*Tr.*]

nature, he may be accused of no fault other than a kind of ungentlemanliness, in that he has not adapted himself to the number of those by whom war is considered one of the liberal arts. In the same way, among gladiators, he is accused of lack of skill who wounds another contrary to the rules of the art. Therefore, whoever wages just wars can neglect these observances, and conduct them by the mere law of nature, unless he prefers to observe them for some advantage to himself, in that he may find his enemy less cruel to him and his troops. But he who proceeds to violent and unjust wars follows, it may be, such observances carefully, so as to play the scoundrel with some appearance of right. Since, however, these reasons are not general, they cannot constitute any universal law and such as binds all people. Especially since it appears that any one can free himself from such obligations as rest only upon a tacit agreement, if he expressly declares that he is not willing to be bound by them, and that he will not complain should others also not observe them towards him. And so we see that many such observances have become obsolete in the course of time, or else an opposite custom has overpowered them. And there is no reason for any one to make complaints, as if this doctrine destroyed the safeguards of the security, interest, and safety of nations, since these surely lie not in such customs, but in the observance of the law of nature, which is much more sacred. If this latter be intact, mankind has no need whatsoever of the former. Furthermore, if any custom is based upon the natural law, without doubt far more is done to give it dignity than if its origin is based upon the simple agreement of nations.

Among the most important divisions of the voluntary law of nations Grotius numbers the law of embassies. On this point we feel that envoys, by the mere law of nature, are inviolable, provided they play the part of envoys and not of spies, even among enemies, so long as they form no hostile designs against him to whom they have been sent; although perchance, in the ordinary manner, they seek through negotiations the advantage of their master rather than that of another. For since such persons are necessary, in order to negotiate, preserve, and strengthen by treaties and agreements that peace which the law of nature itself commands men to embrace by all honourable means, surely it is agreed that the same law has provided for the security of the individuals without whom the end ordained by it cannot be secured. Add Marselaer, *Legatus*, Bk. II, chap. xiii. To this right there is added the one, that in those matters with which the duty of ambassadors is concerned they are free from the jurisdiction and control of him to whom they are dispatched, for, were this not so, they would have no power to serve the interest of their master with fitting zeal, if on this point they had to render an account to any other than their master. But the other privileges commonly allowed ambassadors, and especially those who reside at some

court, more to seek out the secrets of another state than for the sake of
 158 peace, depend entirely upon the indulgence of the prince to whom they
 are sent, and so they can be denied them, if it seems advisable, without
 violation of any law, provided the prince is willing to see his own envoys
 treated in the same way.

Also the right of burial, which Grotius appears to make likewise
 a special chapter of the law of nations, can be referred to the
 obligations of humanity. Add Antonius Matthæus, *De Criminibus*,
Prolegomena, chap. iii, § 5.

Nor are his other instances of such importance that they should
 form a special field of law, since they can very easily find place in the
 system of natural law. But it seems to us quite incongruous for some to
 refer to the law of nations special agreements of two or more peoples,
 usually defined by leagues and agreements of peace. For although the
 natural law about the keeping of faith orders that such agreements be
 maintained, they still do not properly fall under the term of laws.
 Furthermore they are practically infinite in number and for the most
 part temporary. They no more form a part of law than do agreements
 between individual citizens belong to the body of their civil law; but
 they are rather the subjects which history claims for her own. Add also
 Selden, *Mare Clausum*, Bk. I, chap. ii. On unwritten law or custom see
 especially Boecler on Grotius, Bk. II, chap. iv, § 5.

24. In our opinion that division of natural law seems to be the best,
 wherein it is considered how, on the command of natural law, a man
 should conduct himself, in the first place, toward *himself*, and, in the
 second place, toward *other men*. The commands of natural law, as they
 concern other men, can be further divided into absolute and hypo-
 thetical. The former are those which obligate all men, in whatever
 state they be, and without regard for any institution formed or intro-
 duced by men. The latter presuppose some state or institution
 formed or accepted by men. This has been stated by Grotius, *loc. cit.*,
 as follows: 'The natural law is concerned not only with things which
 exist apart from relation to the will of man, but also with many things
 which attend an act of his will.' Hence, although the will of man has
 set up the ownership of things as it now stands, yet now that it is
 established, the natural law itself declares that it is illegal to take
 another's property, if he be unwilling. See *Digest*, XLVII. ii. 1, § 3;
 L. xvi. 42. Now there are many things which are arbitrary as touching¹
 the exercise of the act, or, in other words, it lies within the judgement
 of men, whether or not they care to undertake a certain action; but,
 when the action has been undertaken, a moral necessity or obligation
 from some precept of the law of nature follows it, or else its mode and
 circumstances are determined thereby. For example, although the law of

¹ [For *quo ad* read *quoad*.—Tr.]

nature does not command me to buy from another, yet, granted that I buy of my own choice, the same law commands me not to seek my gain at the loss of another, nor to defraud him in some bargain. Thus there are a great number of precepts of natural law which have no reason or any ground for existing, unless there are posited the separate possession of property and civil authority.

But this does not mean that all positive laws are also part of the natural law, because by our own consent we put ourselves under the direction of another whose commands the law of nature bids us to obey. It is, indeed, certain, that violators of civil laws mediately sin against the very law of nature by reason of such an agreement. Yet there is this great distinction abiding between hypothetical natural laws and positive civil laws, namely, that the reason for the former is sought from the condition of mankind as a whole, while the reason for the latter is taken from what appears to be of advantage for some certain state, or from the mere will of the legislator. And so positive civil laws are not hypothetical precepts of the natural law, but they borrow their power to obligate in a court of law, from a hypothetical precept.

Now we feel that the three most important of those institutions upon which hypothetical precepts rest are speech, the possession of things and their price, and human sovereignty; and hereafter our discussion will be based on such a division.

ON THE DUTIES OF MAN TOWARDS HIMSELF IN THE CULTIVATION OF
HIS MIND AS WELL AS IN THE CARE OF HIS BODY AND OF HIS LIFE

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| <ol style="list-style-type: none"> 1. Self-development is necessary for man. 2. With what it is concerned. 3. The mind must first be instructed in religion. 4. Non-religious ideas must be eradicated. 5. A knowledge of one's self is necessary. 6. A man should know his mind and his duty. 7. And the limits of his strength. 8. He should not strive beyond his strength. 9. How far one should strive for fame. 10. How far for riches, | <ol style="list-style-type: none"> 11. And for pleasures. 12. The passions are to be governed by reason. 13. On literary study. 14. On the care of the body. 15. On the use of life. 16. Whether there be any obligation to preserve one's life. 17. How far one's life should be spent in the service of others, 18. Or be exposed to danger for another. 19. Whether suicide be lawful. |
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ALTHOUGH man has this in common with other animals, that he is interested in his self-preservation, and is naturally glad to be in as good condition as possible, yet this interest should be far more refined and of a higher type than that which beasts observe, not merely because he has received far more endowments than they, which permit a high and productive culture, but also because the duties to which he is bound cannot be fittingly observed unless he quickens his native endowment by education, and renders it fitted for worthy conduct. Another reason is because the labour which a man undertakes in developing himself does not end in himself, but spreads abroad its fruit to the widest benefit to all mankind, and the more outstanding a person is for his own advantage the more noble and worthy a citizen he is considered of this world. Therefore, as man studies to fulfil the laws of that sociableness, for which his Creator intended him, he should properly give his first attention to himself, since he will fulfil his duties towards others more satisfactorily as he exercises himself with greater care for his own perfecting. And from him who is of no use and a sluggard in his own concerns others can expect no advantage.

But this regard for oneself is as difficult as it is necessary, not only because men come into the world entirely ignorant of all things, and their still immature minds can easily be filled with evil thoughts which you may afterwards remove only with difficulty, but also because man's innate evil desires draw him, now with greater and now with less violence, away from the dictates of right reason, and unless they are restrained, they produce throughout his entire life a flood of evil actions.

This always holds true, for the old complaint in Euripides is of no avail, *Suppliants* [1080 ff.]:

Ah me, why is not this to men vouchsafed,
Twice to see youth, and twice withal old age?
Now in our homes, if aught shall fall out ill,
By wisdom's second thoughts this we amend.
Our life we may not. Might we but be young
And old twice o'er, if any man should err,
We would amend us in that second life. (W.)

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Now since man consists of two parts, soul and body, of which the former is the source and inspiration of a man's own actions, and the latter serves as their instrument, the care and cultivation of the former lays proper claim to our first consideration.

2. The cultivation of the mind, which all men are constrained to undertake, and which is necessary to the complete fulfilment of the duty of man, consists primarily in the following: That his conclusions on matters which concern his duty be rightly reached, that his judgement and opinion of matters which commonly arouse his appetite be properly formed, and that the impulses of his mind be regulated and governed by the rule of right reason.

3. Now among the opinions which all men should make a part of themselves, the first is that which concerns God as the Creator and Governor of this universe: That there exists in fact a supreme Being from whom all other things derive their origin and the principle of their motion, not as from some inanimate power, as, for instance, the weight moves a clock, but from what is endowed with intelligence and liberty; and that this Being exercises His control over the entire universe, over mankind, and even over individual men; whose eye nothing escapes; by whom in His sovereign right through the natural law certain duties are laid upon men, the observance of which is approved by Him and their violation and neglect frowned upon; and that He will for this reason demand from every one a reckoning without favour and without regard of persons.

Now as the first duty of man, which we have treated more fully elsewhere [*De Officio Hominis et Civis*, I. iv], and have not felt it necessary to repeat in this connexion, is concerned with this belief, so it is the source of that calmness which suffuses from within the minds of men, and is furthermore the guarantee of all uprightness which should be shown towards other men, and without which no one can be said to have done a good deed with proper intent, nor can others be convinced of any one's good purpose. Boethius, *The Consolation of Philosophy* [V. vi]: 'There is a great necessity of doing well imposed upon you, since you live in the sight of your Judge, who beholdeth all things.' (R.) Grotius, *Commentary on the Book of Wisdom*, chap. xii, § 1:

Although people speak grandly of how good repute should be cultivated for its own sake, yet so great is the force upon the mind of the things we see, that without a belief in a divine providence that visits the deeds of men with retribution, and without laws as well to direct men in the right way, men cannot avoid wandering into devious and evil ways. For as the reason of men is inconstant when the passions are aroused and appealed to by alluring behaviour, it easily finds an excuse for its evil designs, and refuses to heed its own calling, until it becomes deaf to all appeals. Those men, therefore, are considered foolish who have no careful regard for the belief in God and His providence, but allow every man his own opinion on this point, the most pernicious thing to be found, not only, I maintain, to good morals, but to the state as well.

Now although it does not appear from the decrees of the Christian religion that God can be so appeased by men with any kind of worship, that He is willing to favour them with His grace and grant them eternal happiness, which effect only follows that worship which He himself has in a special way ordained for the human race, yet a serious belief of any nature in the Divine Being and His providence, under whatsoever particular form or manner of worship, has the effect of rendering men more observant of their duty. Lucian, *De [Pro] Imaginibus* [xvii]: 'Those who worship the Deity most sincerely are very apt to be most upright in their dealings also with men.' The proof of this is the fact that there have existed in the past, and are now to be
 161 found, men addicted to a religion which is harmful to the welfare of their souls, such as the Mohammedan, or pagan, who, because of their belief in a divine providence, show an active concern for decency and duty so that, so far at least as their outward acts are concerned, they do not seem to fall behind the majority of Christians. There are, indeed, some who after long travels claim to have observed that the Christian religion has not affected the particular inclinations of peoples towards certain vices, and that the truth of this religion cannot be discovered from the outward manners and acts of its professors. But the reason for this I judge to lie in the fact, that most men embrace the Christian religion from no personal conviction so much as from the custom and usage of the state in which they were born, and so for the most of them it lies rather on their lips than in their mind, while but few take it to their heart to improve their character according to its direction. For I have no doubt that they could restrain at least the external acts of their, as it were, national vices, if they seriously endeavoured to conduct themselves in a manner worthy of their profession.

4. As, therefore, this belief and whatever else reason or a particular revelation teach regarding the worship of God, should be implanted before all else in a properly educated mind, so all ideas contrary to it should be carefully excluded. By such we understand not merely Atheism and Epicureanism, but not a few other beliefs as well, which are destructive to true religion, good morals, and human society, and

which it is to the highest interest of the human race thoroughly to root out. Among these is that doctrine of the Stoic Fate, or of the unchangeable sequence of all things and actions, even those of men, whereby men are made the mere instruments of their actions, which it is not in their power to change at their will, however much they may wish to try. For if this opinion stands, it is not apparent why a man's actions can be imputed to him rather than the motions of a clock be imputed to its wheels; or what use religion has, or justice, laws, and penalties. Seneca, *Oedipus* [1019]:

What thou deplorest is the fault of fate.

A fated crime can leave no stain of sin. (M.)

Add *ibid.*, lines 980 ff., Homer, *Iliad*, Bk. XIX[86-7]: 'But it is not I who am the cause, but Zeus and Destiny and Erinys that walketh in darkness.' (L.) This tenet was rather evaded than maintained by Zeno, in Diogenes Laertius, Bk. VII [23]: 'He was once scourging a slave whom he had detected in theft; and when he said to him, "It was fated that I should steal"; he rejoined, "Yes, and that you should be beaten."' (Y.) The words of Marcus Antoninus [Aurelius] are more to the point, Bk. II, chap. xi: 'And the Gods have put it wholly in man's power not to fall into evils that are truly such.' (H.)

A belief similar to this is that the sequence of cause and effect, or that kind of chain of things constituted by the Creator, has so unchangeable a law governing it that God has not reserved for Himself any liberty regarding it, even in particular instances. In this way miracles and special aid from God, as well as effects from prayers, repentance, and reformation, are apparently done away with.

To the same frame of mind belongs also that very ancient as well as general belief that the relation of the stars lays some unavoidable necessity upon human actions and events, or that the hour of birth governs the whole course of one's life. Manilius, among others, poses as an advocate of this in the following lines, Bk. IV [79 ff.]:

One mad in love to Troy will carry war,

Or swim the flood and view the torch from far;

The other is determined to the bar.

A son his father, father kills the son;

On mutual wounds two brothers headlong run.

Those combats prove the force of ruling powers,

For they are too unnatural to be ours. (C.)

And this false view is still held throughout a large part of the 162 Orient, where nothing of any importance is undertaken without first consulting astrologers, 'That they may read', as the phrase runs, 'what has been written in heaven.' An amusing story along this line is told by Bernier, in his account of life in the Mogul Empire, about a gardener of Abbas, king of the Persians, who dug up some trees that had been

planted by the king, on the advice of an astrologer, at the most auspicious hour. Upon being threatened by the king he turned to the astrologer and said: 'You chose a bad hour, because trees planted at noon are dug up in the evening.' He gives another story of a runaway slave from Goa who, with great assurance, was foretelling many events to the people of the city of Delhi, every now and then looking at a mariner's compass and his book of the *Hours*, as they call it, as if at the most noble instruments. And when some who had known him expressed surprise at his new occupation and equipment, he replied, 'For such beasts such an astrologer.'

But such astrology is in fact nothing other than a specious device of certain cheats to mulct the credulous of their money. In speaking so boldly about the future, they rely more on the credulity of others than on their own skill; and if things fall out as they have foretold, they are held in great esteem, while if they turn out otherwise, their predictions are forgotten. Tacitus, *Histories*, Bk. I [xxii], calls such pseudo-mathematicians 'men dangerous to princes, and a fallacious reliance to aspiring subjects'. (O.) Add Hobbes, *De Homine*, chap. xiv, § 12. Agathias, Bk. I [i]:

I do not believe that the cause of evils is the course of the stars, and destiny, and unreasonable necessities. [. . .] For if fate should prevail in all things, the element of moral choice and of free will would be taken from us, we should have to regard all admonition, art, and instruction as empty and useless, and the hopes of those men who have lived the most upright lives would pass vainly and fruitlessly away. Nay more, in my opinion it is not seemly to regard God as the author of murders and conflicts.

See also Grotius, *On the Truth of the Christian Religion*, Bk. IV, § 11. Moreover, in addition to the other ills which attend this belief, it has the further consequence that those who gape so much at the stars are too little concerned with suiting their actions to the norm of sane reason. True is the saying of Euripides, *Helena* [757]:

Sound wit with prudence is the seer of seers. (W.)

Statius, *Thebaid* [II. 582 ff.]:

Those only, who have forfeited his love,
Explore the counsel of almighty Jove.
Hence falsehood, discontent, and impious rage,
Hence every vice that stains the present age. (L.)

Pernicious also is the belief that God holds a kind of market for the sins of men, and allows them to be redeemed with money and other presents, as well as with some empty mummary or set forms of speech, without any change of life. Likewise the idea that God is pleased with such inventions of men and artificial institutions of life, which do not accord with human and civil society as it is adapted to the command of sane reason and natural law. Here belong most of the institutions of monasticism, found in such numbers not only among certain Christian

sects but also among Mohammedans and pagans. Likewise any superstition which has a low regard for God and His worship, since every sensible man should, on the contrary, be 'God-fearing and yet not given to superstition.' (H.) Marcus Antoninus [Aurelius], Bk. VI, § 30. Add Bacon, *Essays*, chap. xviii.

Evil also is the belief that it is enough for a man merely to show a piety toward God, without any regard for the exercise of probity and one's duties toward men, or that displays of piety, and the careful observance of the formalities of God's worship, can make amends for a life of injustice toward men; and that it is proper, throughout one's entire life, to scrape together money by good or bad devices, provided that a man upon his death-bed leave something for so-called pious causes. Add Charron, *De la Sagesse*, Bk. II, chap. v, § 25 ff.

Perverted also is the belief that a mere man is able not simply to fulfil his own duty towards God, but also to store up for himself some added virtue which he may transfer to others, so that a deficiency from some neglected duty can be, as it were, made good by another's merit.¹ Nor is the belief any better that, because of the satisfaction and merit of Christ, men are any less obligated to cultivate uprightness and purity of conduct, or that trust in Him gives one security in sinning. For when a man is persuaded that his sins are forgiven him through the merit of another, he can scarcely avoid slipping into the loosest licence, unless he is also persuaded that he is under a personal obligation to give every attention to a holy life.

It is no less pernicious than brutal to hold that the Divinity smiles at the adroitness and abandon of certain crimes, and regards some sins as but jests. Thus the old poets spread the nonsense that the gods overlooked the perjuries of lovers and ignored their furtive acts. Tibullus, Bk. III [vi. 49-50]: 'Jupiter laughs at false oaths of lovers, and bids the winds carry them off without fulfilment.' (P.) Their madness went to such bounds that they did not shrink from asserting that such deeds were practised by the gods themselves, and they set up certain gods as patrons of such offences. So Fulgentius quite properly says, *Mythology*, Bk. I [xviii]: 'If there were gods' (Mercury and Laverna) 'who presided over theft, there were no use of having a judge to punish crimes, because the thieves had a deity as author and patron of their guilt.'

Seneca, *Hippolytus* [195 ff.]:

The gods! 'Tis vicious lust
That hath his godhead framed; and, that its end
More fully may be gained, it has assigned
To its unbridled love the specious name,
Divinity! (M.)

¹ [For *mondum* read *meritum*.—Tr.]

Euripides, *Ion* [449 ff.]:

Unjust it were
To call men vile, if we but imitate
The sins of gods: they are vile which teach us this. (W.)

Nor was the reasoning so bad of the Indian who replied to a Spaniard, when he was boasting that he was a Christian and the son of God, the creator of heaven and earth, and that he had come to proclaim His law: 'If your God commands you to invade in this way the lands of others, spoiling, burning, killing, and committing every outrage of which you can conceive, know that we will never believe in that God or accept His law.' Geronimo Benzoni, *History of the New World*, Bk. II, chap. xiii.

It is also wrong to believe that God is pleased with the prayers which a man pours forth, to the effect that other men may suffer an undeserved evil wherein he may find some chance for profit. For instance, if those who dwell along the coast should pray that many shipwrecks occur at that place. Nor should I judge that those supplications are any more holy that are raised when a man wages an unjust war upon another, or when success in such a war smiles upon him.

Base also is the view that it is allowable in religion and the worship of God to break any command of the natural law to another's hurt. Instances of this are when some men believe that they should maintain an active hatred towards those who do not belong to our religion; that religion should be spread¹ by the sword; that faith should not be kept with men of a different belief, and no so-called political friendship or acts of humanity should be shown them; or that every contact with such should be avoided as if they were unclean; that any crimes, treachery, perfidy, treason, rebellion, are lawful, nay, even praiseworthy, if they are done in the interest of religion.

Baneful also is the belief that it makes no difference for real happiness whether a man cultivates virtue, or abandons himself to vice, and that no better state awaits the just than the unjust. Cicero, *On the Nature of the Gods*, Bk. III [xxxv]: 'Surely there is no Divine Providence regulating the world if there is no distinction between the honest and the wicked.' Likewise, that man has nothing better to look forward to than the present enjoyment of the senses, and that souls of men perish together with their bodies. Also, that all law, even that called natural, is but a device of man, and that it cannot be referred
164 to God as its author, nor secure from Him any authority or sanction. Therefore, these and similar opinions are certainly to be eradicated, since they undermine the duty of man towards God and prevent any firm endeavour to conform conduct to sane reason.

5. The next prime concern of a man in his self-development is care-

¹ [For *propogandum* read *propagandum*.—Tr.]

fully to examine and become acquainted with himself and his nature. Antiquity made so much of this inquiry as if it opened the way to true wisdom, that the words 'Know thyself' were set up in gold letters on the temple of Delphi. On this motto Cicero remarks, *Tusculan Disputations*, Bk. I [xxii]:

The precept of Apollo, which advises every one to know himself, I do not apprehend to have been, that we should understand our members, our stature, and form; for we are not merely bodies. When, therefore, he says, 'Know thyself,' he says this, 'Inform yourself of the nature of your soul'; for the body is but a kind of vessel, or receptacle of the soul, and whatever your soul does is your own act. (Y.)

Add what Casaubon has written in his commentary on Persius, *Satires*, iii, line 67.

Now from this knowledge of himself, when properly secured, a man is led on to a knowledge of his condition, and the task the performance of which has been laid upon him in this world in that he observes that he did not come into being from himself, but that he owes his origin to a more sublime cause; that he has been endowed with more noble faculties than he observes in the animal world about him; and, finally, that he was born not for himself, but as a part of mankind, towards whom he is obliged to bear himself in a sociable manner. From these fountains, as it were, there is easily drawn the knowledge of man's duty. See Marcus Antoninus [Aurelius], Bk. X, § 6; Persius, *Satires*, iii [133 f.]:

What heaven would have us be, and where to stand,
In this Great Whole, is fixed by high command. (G.)

It is also a part of this self-knowledge that whoever knows what his strength is, and how far it may reach, knows also how to extend his actions, as well as what further undertakings he should attempt. With this is connected the explanation of that noble utterance of Socrates, in Xenophon, *Memorabilia*, Bk. IV [ii. 24]. Add Bacon, *Essays*, chap. xxxvi. A corollary of this is that one should know the effects of every human action, and what relation and use the things outside of man have for man himself.

6. Now it follows from this knowledge that man will recognize that he is subjected to the sovereignty of God, and that in return for the gifts granted him, he is under obligation both to publish abroad the majesty of God, and to show himself sociable towards other men. And since he has been endowed by God with the light of intelligence, he should certainly conclude that he should not do everything on blind impulse, or without a definite goal, but that whatever he undertakes should be first carefully weighed and planned. It follows, then, that he will propose for himself a goal suited to his nature, and then properly fit his actions as well as other means to that goal. And this in such a way that he will not proceed to the use of means before he has decided upon the end, nor will he set an end for the attainment of

which no means are available. Connected with the foregoing is the thought that, since truth and right are always uniform, one should so shape his judgement that he will always reach similar conclusions on similar matters, and when once he has reached a right decision, that he will always abide by it. Furthermore, that the will and desire do not precede, but follow, a right judgement, and do not resist its decisions. For he who takes this course will act both with wisdom and with constancy and with moderation. Such a man did Lucan, Bk. II [381 ff.], make his Cato: 'To observe moderation, and to adhere to his end; to follow the guidance of nature, and to lay down his life for his country; and not to believe himself born for himself, but for the whole world.' (R.) He who acts otherwise does not move with a steady tread, but is tossed this side and that through this world, and 'is ever at odds with the ordered way of life' [Horace, *Epistles*, I. i. 99]; nor will he ever attain happiness. For as Sophocles says, *Antigone* [1348]:

Of happiness the chiefest part
Is a wise heart. (S.)

- 165 7. If a man knows his strength and his power, he will recognize that it is finite and has set limits beyond which it may not go, and that, therefore, there are a multitude of things in this universe which he can by no possible means control or oppose. Some things, however, are not absolutely beyond the power of man, but can be prevented by the interplay and opposition of other powers. A final class only yields to our power, if it is aided by dexterity. These classes agree with the well-known distinction of the Stoic philosophy, according to which some things are said to be ἐφ' ἡμῶν, or in our power, and others, οὐκ ἐφ' ἡμῶν, [not in our power].

What seems to be most of all under our control is our free will and its power, in so far as it is exerted in eliciting actions proper to a man. For although inclinations towards stubbornness surround the will, such as tend to move it from its balance, yet there is nothing closer than it to a man, or more a part of him, or less open to hindrance from external powers, nothing the motions of which belong to a man, and can be more imputed to him. Hence it should be every man's special care to employ his faculties and strength with all diligence, and in accordance with the command of sane reason; that, at least, he have a firm and continued resolution to do, so far as in him lies, what is appropriate to his end and duty. This last is the measure whereby every man must be weighed, and his intrinsic worth and probity measured. Arrian, *Epictetus*, Bk. I, chap. i: 'What follows? We must make the best of those things that are in our power, and take the rest as nature gives it.' (M.)

8. With regard to the other matters which lie outside us, a man will exert himself about them in so far as they are not beyond our strength, and lead towards an end which is proper for him, and if the

things on which labour is being expended are worthy. Things that are beyond our strength he will not strive after with idle hope and vain effort, and he will deem it folly to pursue with all his might an object which he knows he cannot secure with only the means which he may rightfully expect, unless it is at least certain that the probable hope of attaining his object is of more value than any effect which he may be able to produce at the same time with his own labour. He will commit all things else to the divine providence, and will steel his mind to receive them, so far as possible, with resignation; he will not disturb himself because of misfortunes which have already happened, or may come to pass, through no fault of his; and so he will avoid in advance a large part of the evils which a vain hope, that drives one on to improper undertakings, or grief, or wrath, or fear, are wont to engender. Arrian, *Epictetus*, Bk. II, chap. vii: 'Is anything better than what seems good to God?' (M.) Libanius, *Declamations*, xxi [x, p. 535 c]: 'A good and worthy man is judged by his intent and his moral purpose; and even if the final result does not correspond with the measures which he has taken, he is none the less a worthy man.'

From what has been said it follows that in so far as a man is guided by the mere light of reason he should not in this world create for himself and take as his goal any other happiness than that which comes from the prudent direction of his faculties and from those aids which we know the Divine Providence in His administration of this world will offer us. But a second consideration from the foregoing is that, just as nothing should be committed to blind chance, when there is opportunity for human foresight, so, if we have done all in our power, we cannot be responsible for an event which is otherwise unforeseen 166 by us, and does not depend upon our direction. For as all wise men should lay to heart the remark of Iphicrates, given by Polyænus, *Strategemata*, Bk. III [ix. 17], that 'It is not the part of a general to say "I did not think so"'; so the poet has well said: 'Let him come to naught, I pray, who thinks the deed should be condemned from its result.' (S.) [Ovid, *Heroides*, II. 85 f.]. Yet it is said that this belief is prevalent among the Mohammedans, so that they think success is a sure proof of a just cause and a kind of vote by heaven, by which that cause is approved. But this position is by others more properly classed among the foolish claims of the untutored. For, as Juvenal says, *Satires*, xiii. [104-5]: 'Many commit the same crimes with results widely different. One man receives crucifixion as a reward of his villainy; another, a regal crown.' (E.)

This further thought naturally follows: That just as a wise man should not merely see what lies immediately before his feet, but also foresee what future events will bring forth,¹ and with all his strength

¹ [Terence, *Adelphi*, 386-8, slightly modified.—Tr.]

persist in a decision which he has properly reached, and allow himself to be shaken from it neither by fear nor by the enticements of an immediate pleasure, so it is characteristic of a fool to struggle against the stream, and not rather to accommodate himself to things, in so far as they are unwilling to accommodate themselves to him. Martial [*De Spectaculis*, xxxi. 1]: 'To yield to the stronger is valour's second prize.' (K.)

And finally, inasmuch as human foresight is quite blind when coming events are concerned, and therefore it is not within the power of man to control them, though they often fall out better than our hope—Tryphiodorus¹ [310-11] calls them 'the shadowy mist of things to come'—too great security should not be felt in present conditions nor should future events be anticipated with undue anxiety and worry. But for the same reason insolence in prosperity and despair in adversity should be carefully avoided.

It would be easy to illustrate all of this with numberless sayings from men of learning. It may suffice merely to scatter, as it were, a few flowers from their garlands. Arrian, *Epictetus*, Bk. II, chap. i: 'Be confident in all that lies beyond the will's control, be cautious in all that is dependent on the will.' (M.) Plutarch, *On Superstition* [viii, p. 169 c]: 'God is the hope of virtue, not the pretext of cowardice.'² Juvenal, *Satires*, x [365]: 'No divinity is lacking, if Prudence be present.'³ Horace, *Odes*, Bk. III, ode iv [65]: 'Brute force bereft of wisdom falls to ruin by its own weight. Power which counsel tempered, even the gods make greater.' (B.) Lucretius, Bk. III [1000 ff.]: 'For to seek a power, which is but in name, and is never truly given, and for that to endure for ever grinding toil, this is to thrust up hill with great effort a stone, which after all rolls back from the topmost peak, and headlong makes for the levels of the plain beneath.' (B.) Horace, *Odes*, Bk. II, ode ... Remember, when life's path is steep, to keep an even⁴ mind, and likewise, in prosperity, a spirit restrained from overweening joy.' (B.) *Idem*, Bk. II, ode⁵ x [21]: 'In time of stress show thyself bold and valiant! Yet wisely reef thy sails when they are swollen by too fair a breeze!' (B.) *Idem*, Bk. III, ode xxix [41 ff.]: 'Master of himself and joyful will that man live who day by day can say: "I have lived to-day; to-morrow let the Father fill the heaven with murky clouds, or radiant sunshine!"' (B.) *Idem*, *Satires*, Bk. II, Sat. vii [83 ff.]:

Who then is free? The wise man alone, who is a stern master to himself, whom neither poverty nor death nor bonds affright, who has the courage to say 'no' again and again to desires, to despise the objects of ambition, who is a whole in himself, smoothed and rounded, with the surface on which nothing from outside can find lodgement. (W.)

¹ [For *Thryphiodoro* read *Tryphiodoro*.—Tr.]

² [For *θελλας* read *δαίτας*.—Tr.]

³ [The reading is false. The line really is: 'Thou would'st have no divinity, O Fortune, if we had but wisdom.' (R).—Tr.]

⁴ [For *Aequum* read *Aequum*.—Tr.]

⁵ [For *Odys.* read *Od.*.—Tr.]

Juvenal, *Satires*, xiii [20 ff.]: 'Yet we deem those happy too, who, with daily life for their instructress, have learned to endure with patience the inconveniences of life, and not shake off the yoke.' (E.) *Idem*, *Satires*, x [347 f.]: 'If you will take advice, you will allow the deities themselves to determine what may be expedient for us, and suitable to our condition. For instead of pleasant things, the gods will give us all that is most fitting. Man is dearer to them than to himself.' (E.)

9. The most necessary part of education is that in which a person learns how to set a proper value on the things which especially attract the desire of man. For upon this depends the question of how much one should concern himself about each one of them. Now that which is considered the most eminent among these, and is fitted to attract 167 in a special way men of more noble mould, is a reputation for worth and excellence from which are born honour and fame. Regarding this the mind should be so shaped that it will endeavour in every way to procure a simple¹ esteem, or the reputation of being a good man; and this results as a rule from an observance of the natural law and its duty, while a disregard of it can furnish occasion for many ills to us. And if it be assaulted by the calumnies and lies of base men, care should be taken to have its former brilliance restored. But when it is not within our power to repulse calumnies and false opinions about us, the rectitude of our conscience will be our solace, and the fact that our innocence is established in the sight of God. Add Antoine le Grand, *Institutio Philosophiae*, Pt. VIII, art. x, p. 420.

Now intensive esteem, such as honour and fame, should be sought, in so far as it results from deeds worthy, agreeable with reason, and looking to the good of human society, and as it opens the way to the performance of such. But no matter how much of this comes even from worthy reasons, we must be careful to keep the mind from swelling with pride and insolence. Pliny, *Panegyrics* [lxxi. 4]: 'He who has reached the highest exaltation has but one way in which yet further to increase; and that is for him, in the full confidence of his greatness, voluntarily to yield place to others.' And regard as one of the greatest follies the desire to plume one self on something that is empty and forms no solid argument for our worth. Thus, for instance, Lucian tells us, *Demonax* [xli], how, when Demonax once saw a man puffed up because of the width of the purple stripe which he was wearing, he put his head up to the other's ear and fingering the garment said: 'Look you, a sheep used to wear this before ever you did, and was but a sheep at that.' But when there is no opportunity for us to show our worth, and it is not in our power to offer such, we should not be disturbed, since there is no reason in this for our being criticized. Horace, *Odes*, Bk. III, ode² ii [18 ff.]: 'True worth, that never knows

¹ [See VIII. iv. 2, for an explanation of this term.—Tr.]

² [For *Odyss.* read *Od.*—Tr.]

ignoble defeat, shines with undimmed glory, nor takes up nor lays aside the axes at the fickle mob's behest.' (B.) Claudian, *De cons. Mallii* [*Panegyricus Dictus Manlio Theodoro Consuli*, 1 ff.]:

Virtue is its own reward; alone, with its far-flung splendour, it mocks at Fortune; no honours raise it higher nor does it seek glory from the mob's applause. External wealth cannot arouse its desires, it asks no praise but makes its boast of self-contained riches, and unmoved by all chances it looks down upon the world from a lofty citadel. (P.)

On the other hand, it is clearly foolish and wicked to affect the insignia of honour when its intrinsic fundamentals are lacking, and a mad and abhorrent thing to struggle to secure fame and position by evil designs and deeds repugnant to reason, or to wish to surpass others so that you can insult them and have them as objects for your wantonness. And since it is not always within our power to make¹ our fortune as we will, in so far as it depends on extrinsic causes, a man should so dispose his soul that, when it has done what lay within its strength, it may accept the lot that falls to it, and may look without vexation upon the things which it could not control, as if they were none of its concern. Valerius Maximus, Bk. VII, chap. ii, § 1, ext. Seneca, *Agamemnon* [102 ff.]:

The meanest things in longest fortune live.
Then happy he whose modest soul
In safety seeks a nearer goal;
Fearing to leave the friendly shore,
He rows with unambitious oar,
Content in low security to thrive. (M.)

Idem, Hercules Oetaeus [691 ff.]:

So are great fortunes joined
To mighty ills.
Let others then as fortunate
And great be hailed; I wish no share
Of popular renown. My boat
Is frail and needs must hug the shore.
And let no strong wind force my bark
Far out to sea; for fortune spares
Safe-harboured boats, but seeks the ships
In mid sea, proudly sailing on,
Their topsails in the clouds. (M.)

Add *Idem, Oedipus*, lines 882 ff.

10. A man for his preservation has need of external things, the procurement of which often belongs to the duties of others as well. And
168 so it is a reasonable thing to give attention to securing them, so far as is compatible with one's strength, opportunity, and honesty. Vergil's ant, providing for the need of its old age, *Georgics*, Bk. I [186], is commended

¹ [For *frabricari* read *fabricari*.—Tr.]

also in Holy Writ among the illustrations of innocent industry. *Proverbs*, vi. 6. Euripides, *Electra* [80-1]:

None idle—though his lips aye prate of gods—
Can gather without toil a livelihood. (W.)

But since our needs are not infinite, but extremely moderate, the desire of such things should be limited to the measure and frugality of nature. *Proverbs*, xiii. 7. It is told, in Diogenes Laertius, Bk. II [25], that when Socrates used to see many objects for sale, he would say to himself, 'How many things there are that I have no need of!' Juvenal, *Satires*, v [6]: 'Nothing is more easily satisfied than the cravings of nature.' (E.) *Idem*, *Satires*, xiv [316 ff.]: 'Yet if any one were to consult me what proportion of income is sufficient, I will tell you. Just as much as thirst and hunger and cold require.' (E.) Apuleius, *Apologia* [19]:

I approve of wealth on the same principles that I do a garment, rather when it suits the person, than when it is remarkable for its length. [. . .] Indeed, in all matters which are needed for the requirements of life, everything that steps beyond becoming moderation is superfluous, and is rather a burden to us than useful. Hence it is that immoderate wealth, just like a large and disproportioned rudder, is more apt to sink than to guide, for in such a case people have a useless abundance, a pernicious superfluity. (A.*)

Lucan, Bk. IV [381]: 'Learn with how little we have the power to prolong life, and how much it is that nature demands. Enough for the people is the stream and bread.' (R.) Lucretius, Bk. V [1117]: 'But if a man would steer his life by true reasoning, it is great riches to a man to live thriftily with calm mind.' (B.) Claudian, *Against Rufinus*, I [215-16]: 'A frugal life is best. Nature has given the opportunity of happiness to all, knew they but how to use it.' (P.) Horace, *Odes*, Bk. III, ode xvi [39 ff.]:

By narrowing my desires I shall better enlarge my scanty revenues than were I to make the realm of Alyattes continuous with the Mygdonian plains. To those who seek for much, much is ever lacking; blest is he to whom the god with chary hand has given just enough. (B.)

Idem, *Epistles*, Bk. I, ep. x [32]: 'Under a humble roof you may live a far happier life than kings and kings' friends.' (W.) *Idem*, *Epistles*, Bk. I, ep. xii [4]: 'For he is not poor who has the full use of property.' (W.) Quintilian, *Declamations*, xiii: 'To want nothing more is wealth enough.' Turpilius in Priscian [*De Metris Terentii*, 16]: 'Assuredly, the very least a man was content with, the very happiest was the life which he led.' And so the reins on our desire for possessions should not be held too loose; and much less should we hasten to seek wealth by base means, and to the injury of others. Horace, *Satires*, Bk. I, sat. i [92 ff.]: 'The sum of my answer is, let us end our money-getting somewhere. As what you have increases, let your fears of poverty diminish; begin to bring your toil to a finish when you have gained that which you desired.' (W.) Eumenius [Incerti¹], *Panegyric* [xv]: 'No gifts of for-

¹ [The real author is unknown.—Tr.]

tune can satisfy those whose desires are not limited by reason, and thus happiness glides past them without bringing joy, while ever full of hopes, yet destitute of comforts, they lose the present and look to the future.' Add Charron, *De la Sagesse*, Bk. I, chap. xxi.

Furthermore, what has been secured should not be regarded as anything but helps for our need and means for deserving well of others. On no account should the mind be solely concerned or satisfied with the mere possession and care of property, and the infinite concern of accumulating it. Juvenal, *Satires*, xiv [136-7]: 'It is palpable insanity to live a beggar's life, simply that you may die rich.' (E.) There is excellent commendation of the wise man in Statius, *Silvae*, Bk. II [ii. 150-3]: 'Thy riches are not hoarded and stifled in miserly chests; thy heart is not tortured for loss of greedy gain. Frank and open is thy abundance, moderate thy desires, and no strangers to joy.' (S.) Hippodamus, *De Felicitate* [frag. 1, Mullach]: 'It is not enough to possess the good, but one ought also to enjoy it.' Add Theocritus, *Idylls*, xvi. Horace, *Epodes*, ii [i. 33-4]: 'I will not lay up treasure, either to bury in the ground, like miser Chremes, or to squander like some reckless spend-thrift,' (B.) *Idem*, *Odes*, Bk. IV, ode ix [45 f.]: 'Not him who possesses much would one rightly call the happy man; he more fitly gains that name who knows how to use with wisdom the blessings of the gods.' 169 (B.) *Idem*, *Epistles*, Bk. I, ep. ii [56]: 'The covetous is a beggar always. Try to find a definite limit to your wishing. When a man has enough he should wish for no more.' (W.) *Idem*, *Epistles*, Bk. II, ep. ii [190 ff.]: 'I shall use and take from my modest heap as much as need requires, nor shall I fear what an heir may think of me because he does not find more than I leave him.' (W.) Add Gellius, Bk. X, chap. xvii.

It must also be borne in mind that nature does not cease to produce lavishly what serves the need of man. Arrian, *Epictetus*, Bk. III, chap. xxiv: 'No man is an orphan, but all men have always the Father who cares for them continuously.' (M.) Note also that the things laid up for future use are liable to such a variety of accidents; and the protection of them calls for a concern as great as the labour attending their acquisition. Horace, *Odes*, Bk. III, ode xvi [17]: 'As money grows care follows after.' (B.)

And, finally, remember that at our death everything which has survived us must always be left to an unworthy or smiling heir. Bion, *Idyl.* iii¹ [7]: 'How long shall we go thus miserably toiling and moiling, and how long shall we lavish our life upon getting and making, in the consuming desire for more wealth and yet more? Is it that we all forget that we are mortal?' (E.) As, therefore, no opportunity of honestly securing wealth should be neglected when it offers itself, so the mind should be trained in such a way that, if it so chance, the loss

¹ [For v read iii.—Tr.]

of one's wealth will not entail the collapse of one's courage. Horace, *Odes*, Bk. III, ode xxix [53 ff.]: 'I praise Fortune while she stays; but if she shakes her wings for flight, I renounce her gifts, enwrap me in my virtue, and woo honest Poverty, undowered though she be.' (B.) Add Charron, *De la Sagesse*, Bk. I, chap. xxxix, n. 11, § 9.

On the other hand, touching the disposal of wealth, the mind should be so tempered that it will give out gladly what it is the command of duty to pay, and not lavish it beyond what is necessary and reasonable. Horace, *Epistles*, Bk. II, ep. ii [195-6]: 'For difference there is whether you scatter your substance lavishly or neither grudge any expense nor be anxious to add to your store.' (W.) Juvenal, *Satires*, xi [37-8]: 'Do not long for a mullet,¹ when you have only a gudgeon in your purse. For what end awaits you, as your purse fails and your gluttony increases?' (E.) It is equal folly not to be willing to devote money to the end for which it has been created, and recklessly to pour out what was owed to better use; especially since the former carries with it many a transgression of one's duty, while the latter paves the way to many vices and injuries, such as debt, disgraceful poverty, rapine, deceit, and theft. Catullus [*Poems*, xxvi]: 'My little farm stands exposed not to the blasts of Auster or Favonius nor fierce Boreas or Aphelotes, but to a call of fifteen thousand two hundred sesterces. A wind that brings horror and pestilence!' (C.) Lucan, Bk. I [181-2]: 'Hence devouring usury, and interest greedy for each moment, and credit shaken, and warfare profitable to many.' (R.) Ovid, *Heroides*,² Bk. I, ep. xv [66]: 'The wealth he cast away by evil means once more by evil means he seeks.' (S.) Add Bacon, *Essays*, chaps. xxviii and xxxiv.

11. It is, furthermore, agreeable with reason to avoid unnecessary sorrow and shun it so far as possible, since it works to the destruction of the body; not merely that one may be free from sorrow, but that objects may also be suited and pleasing to the senses. See Charron, *De la Sagesse*, Bk. II, chap. vi, n. 1-2. But the mind should not be trained eagerly to seek a singular and refined gratification of the senses, since this either enervates a man, diminishing the vigour of the body as well as that of the mind, and making it unfitted for serious undertakings; or steals time away from better and necessary tasks; or consumes and wastes the necessary equipment of a man and his substance that should be better spent, or often, when combined with fault, brings in its train peril, loss, disgrace, or remorse. Therefore, as it borders on madness to solicit sorrows that are unnecessary and serve 170 no purpose, so it is reasonable to indulge only in a taste even of lawful and harmless pleasures, rather than to plunge deeply into them. But on no account should duty be neglected or shirked for pleasure's sake.

12. Finally, the mind should take every care that it keep its motions

¹ [For *mulium* read *mulum*.—Tr.]

² [For *Horoid*. read *Heroid*.—Tr.]

and affections in control, since most of them do not only entirely destroy the strength of the body and vigour of the mind, but becloud and distort the judgement of the intellect, and turn it with great force away from the path of duty and reason, so that a coldness of the passions is, as it were, the natural source of prudence and probity among men. Quintilian, *Declamations*, ccxcvi: 'Profound emotions pay no attention to laws.'

It will not be beside the point to note a few things about the different passions. *Joy* is in itself entirely agreeable with nature. But care must be taken to keep it from expressing itself to excess, or for improper reasons, such, for instance, as the misfortunes of another, and from leading to idle matters, vanities, and what is base or unfitting. *Gloominess*, like a disease, wastes away the mind and body. It should, therefore, to the best of one's ability be banished, save in so far as it is held among the duties of humanity to show pity and grief at the misfortune or death of others, or in so far as it is a part of the expression of remorse for evil deeds. *Love* is a passion friendly to the nature of man, but one that must be controlled by reason, that it may be shown toward a worthy object, that it may not turn to the accomplishment of base deeds, or seek fuel for itself in evil ways, that it be not the cause of delay in other duties, nor degenerate into a disease, nor, when concerned with something that may pass away or be lost, set such store upon it that at its loss the mind will be unable to contain itself. Sophocles, *Antigone* [648]: 'Let no woman ever fool away thy wits.' (S.) Euripides, *Hippolytus* [253 ff.]:

Let heart-strings ne'er together cling,
Nor be indissolubly twined
The cords of love, but lightly joined
For knitting close or severing.¹ (W.)

Add Bacon, *Essays*, chap. x.

Hate is a passion as harmful for him who holds it as for those upon whom it falls. When possible, therefore, it should be quenched and restrained, lest under its impulse we do to others what duty forbids. And even if the one for whom we have an aversion entirely deserves it, let us not for that reason make trouble for our own selves.

Envy is indeed a base passion, and one that often leads to evil consequences for others, but always for the one who nurses it; for the envious person is consumed by his own habits, like iron by rust. Ovid, *Metamorphoses*, Bk. II [781 ff.]: 'Unwelcome to her is the sight of men's success, and with the sight she pines away; she gnaws and is gnawed, herself her own punishment.' (M.) Horace, *Epistles*, Bk. I, ep. ii [58-9]: 'The tyrants of Sicily never invented a torture worse than envy.' (W.)

¹ [Pufendorf here adds, as a variant translation for the last two verbs: 'or diminished and increased.'—Tr.]

Hope, although a more gentle passion, should be so controlled that the mind be not diseased through it, and waste not itself away for naught in cherishing vain and uncertain things, or such as are beyond its power, nor become a 'day dream' as Aristotle calls it, Diogenes Laertius, Bk. V [18]. Nor may that befall us which Lucretius describes, Bk. III [1085 ff.]: 'But as long as we have not what we crave, it seems to surpass all else; afterwards, when that is ours, we crave something else, and the same thirst for life besets us ever, open-mouthed.' (B.)

Fear is an enemy of the mind of man, and a wholly useless thing. For the caution, which is supposed to come from it, can be produced also without its aid by prudence, and a wariness that is not over apprehensive or anxious.

Anger is a most violent as well as baneful passion, to be resisted 171 by every means; it blinds and destroys even bravery itself, and that constancy in the face of dangers which it is commonly supposed to support. Xenophon, *Art of Horsemanship* [vi. 13]: 'Anger is a reckless thing, that often makes a man do what he must regret.' (N.) Statius, *Thebaid*, Bk. X [703-5]:

Give not thy heated mind the reins of sway,
Allow some internal, some short delay:
Impetuous haste misguides us oft. (L.)

Horace, *Epistles*, Bk. I, ep. ii [62 ff.]: 'He who will not control his anger will presently wish that undone which irritation and the feelings of the moment have made him do in his hurry, to satisfy his vengeful hatred. Anger is a short madness.' (W.) Add Libanius, *Progymnasmata: Vituperatio Irae* [*Vituperationes*, vii].

Related to anger is the *lust for vengeance*, which is clearly a vice when it exceeds a legitimate and proper defence of oneself and one's own, and the assertion of one's rights against any violators. See Antoine le Grand, *Institutio Philosophiae Cartesianae*, Pt. VIII, chap. xii.

13. Now in these duties lies that cultivation of the mind which all are required to undertake, and for the acquisition of which those who have laid upon them the education of others should be especially concerned. The absence of this cultivation, or an attitude hostile to it, is opposed to the duty of man, or else constitutes no slight obstacle¹ to the proper performance of his duty. And so whoever lacks such an endowment is worthy of reprehension.

There is, furthermore, a special development of the mind consisting in the knowledge of various things, of the arts and the sciences, which is not absolutely necessary for the proper undertaking of a man's duty; and so a person will seek it as his capacity, opportunity, impelling causes, and the advantages to be gained from it, will lead him. Now

¹ [For *remore* read *remorae*.—Tr.]

no one questions that the arts are useful in their service to the necessities and advantages of the life of man. Yet many scruple at literary pursuits, on the ground that they are not only useless but even harmful, and hence it is forbidden in many states to advance beyond the knowledge of reading, writing, and handling numbers. Nay, many are convinced that it makes men unfitted to conduct business affairs. Erasmus, in commenting on a certain learned man, adds this statement, *Epistles*, Bk. XVII, ep. xii: 'He had a foresight in common affairs, which is usually lacking among the more highly educated.' Every one is familiar with the terms that are applied to scholarly men. A good illustration is the well-known passage from Procopius, *The Gothic War*, Bk. I [ii. 12 and 14]: 'Letters are far removed from manliness, and the teaching of old men results for the most part in a cowardly and submissive spirit [. . .]. Theodoric [. . .] used to say to them all that, if the fear of the strap once came over them, they would never have the resolution to despise sword and spear.' (D.) The sentiment of Plato is not very different, *Republic*, Bk. VII [p. 536 E]: 'A freeman ought to be a freeman in the acquisition of knowledge.' (J.) Seneca, *Hippolytus*, [459-60]:

So do our inborn powers a richer fruit
Of praise and glory bear, if liberty,
Unchecked and boundless, feed the noble soul. (M.)

Plato, *Gorgias* [p. 484 D], says of philosophers: 'When they betake themselves to politics or business, they are ridiculous.' (J.*) Arrian, *Epictetus*, Bk. I, chap. xi [39], calls a scholar 'a creature at whom we all laugh'. Add Michel Montaigne, Bk. I, chap. xxiv; Charron, *De la Sagesse*, Bk. I, chap. xxxix *ad fin.*; III. xiv, n. 19 ff.

If we are to have a clear understanding of the matter, and know, therefore, the proper value to put upon letters as well, it makes a great difference if we lay it down in the first place as unquestioned that the mere knowledge of letters is not enough to secure foresight and wisdom, but that a native endowment is an absolute requisite; and if this is lacking you will no more be able to secure wisdom by letters alone than
172 you can secure a rich harvest if you plough the desert sands. It is one thing to have read much, another to understand it and to be prudent. An old poet has said: 'Of how little use is learning, if there be with it no understanding' [Menander, *Monostichoi*, 557]. And Quintilian has put it well, *Institutes of Oratory*, Bk. VI, chap. vi, § 32 [VI. v. 11]: 'It is certain that judgement can do more without learning than learning without judgement.' (W.) Therefore, the fact that a naturally stupid and dull person does not turn out to be prudent and wise by the aid of letters no more detracts from the worth of sound learning than the inability of medicines to restore life to the dead lessens their efficacy. 'To him that hath shall be given.' [Matthew, xxv. 29.] And 'culture

enhances innate power' [Horace, *Odes*, IV. iv. 33], but it is applied in vain when there is nothing innate.

It has been further observed that, by the acquisition of letters, native folly becomes no less incurable and intractable than do native evil and impiety, but rather more so, since letters give folly, as it were, weapons wherewith it defends evil and impiety and makes open use of them. Hobbes, *Leviathan*, chap. iv, observes: 'Without letters men do neither, as a rule, become especially wise, nor (unless a man's mind be impaired by some chance disease or ill constitution of the organs) especially foolish.' Add Bacon, *Essays*, chap. xlviii.

And so not everything which passes under the title of letters is of the same nature and should not be considered of the same value. For we call some learning *useful*, some *elegant* and *curious*, and some, finally, *idle*. Useful learning may be divided into three classes: moral, medical, and mathematical science. For true and sound theology stands on its own worth, unless one may choose to place it in the first class. Moral science is concerned with the cultivation of the mind and the promotion of social life; medical science with the health of the body, and mathematical science, which has manifest utility, with the various arts that contribute very great advantage to the life of man. By elegant and curious learning we understand that learning the usefulness of which is not, indeed, so great that without it the life of man would be less sociable or convenient, but the knowledge of which is worthy of a free man, since it either leads us more deeply into a study of the works of nature, or witnesses to the excellence and ingenuity of the human mind, or preserves the memory of the human race and of its undertakings and accomplishments. And to this class we can refer the acquaintance with several languages, the subtle inquiry into the works of nature, the higher departments of mathematics, all fields of history, criticism, in so far as it preserves intact the best works of men's minds, poetry, oratory, and the like. Such studies are in themselves certainly excellent and worthy of praise, and serve as the spice and adornment of man's development, and according to this measure they should be allowed their due cultivation and value.

Now by idle learning we mean not only that which is concerned with false and erroneous matters, but that which troubles itself with the opinions of smooth-speaking or idle men, whereby the mind is perplexed and prevented from aspiring to the substantial knowledge of things. To this class should be assigned not only many views of ancient philosophers, utterly divergent from the nature of things, but also most of those matters with which the schools resounded in the dark ages just past and which are still bitterly maintained by many to the ignorance of better things, either because they are ashamed to unlearn what they learned with such pains, or because it is to the interest of

the papal monarchy that active minds be busied with trifles. See Hobbes, *Leviathan*, chaps. xlvī-xlvīi. Plutarch, *Alexander* [vii. 5], remarks on the metaphysics of Aristotle: 'For in truth his treatise on metaphysics is of no use for those who would either teach or learn the science.' (P.) Martial, Bk. II, ep. lxxxvi [9-10]: 'It is absurd to make one's amusements difficult; and labour expended on follies is childish.'

- 173 A man has the greater disdain for this idle learning the better acquainted he becomes with sound learning. Finally, the evil of pedantic learning and addled pedagogues is not to be laid at the door of letters. See Charron, *De la Sagesse*, Bk. III, chap. xiv, n. 21 ff. Thus who could make any strides towards wisdom and prudence in such a school as that of the philosopher Uranius, as described by Agathias, Bk. II [29]:

When they hold their meetings every man talks as he pleases upon sublime themes and divine speculations, and although they are forever arguing these questions, they are never convinced by one another, nor do they ever give up a notion which they have once entertained, whatever it may happen to be. But the same men persistently hang on to the same doctrine, and when they come to the end of their argument they are angry, and openly revile one another, using the disgraceful language of dicers. Thus when the contention ends, it is hard to get them to separate; they neither give nor get any advantage, and change from friends into the bitterest enemies.

And the following caustic description hits the director [*Ibid.* 30]: 'He surpassed the rest only in impudence and garrulity [. . .] as 'one who knew nothing¹ among others who knew nothing'. A similar method of disputation is described by Lucian in his *Bis Accusatus*, with which may be compared his dialogue entitled *Charon*.

But who will question that one endowed with good wit will advance more rapidly in his undertakings, after he has been grounded in solid learning, than if equipped with only his natural ability? Plutarch, *On Education of Children* [x, p. 8 A]: 'He that spends his time in contemplation without action is an unprofitable man; and he that lives in action and is destitute of philosophy is a rustical man, and commits many absurdities.' (G.) An ancient poet has said: 'One must acquire learning and after that use judgement' [Philonides in Stobaeus, *Anthology*, III. xxxv. 6a, and Menander, *Monostichoi*, 96]. Sallust, *Jugurtha*, Preface [ii]: 'Therefore, we can but marvel the more at the perversity of those who allow the mind, which is better and greater than anything else in man's nature, to grow dull from neglect and inaction.' (R.) Aelian, *Varia Historia*, Bk. VII, chap. xv: 'When the men of Mytilene commanded the sea, they punished the allies who fell away from them by prohibiting them from teaching their children literature and music, regarding it as the severest of all punishments to live in ignorance of the liberal arts.' Add Cicero, *On Duties*, Bk. I [vi], where he speaks of zeal in the pursuit of truth.

¹ [After Plato, *Gorgias*, p. 506 A.—Tr.]

But those who undertake the study of letters should take care, first of all, to connect this study with some use in their life, and with the cultivation and improvement of their mind, and not make them a barren occupation with which to pass the time. Aristippus, as the account is given by Diogenes Laertius, Bk. II [80], when asked what were the things which well-born youths should learn, replied, 'What they may find of use when they become men.' And it is disgraceful for a person who holds such fine thoughts in his mind to be of no more service than common men. Pacuvius in Gellius, Bk. LIII, chap. viii [XIII. viii]: 'I hate men of philosophic sentiment but lazy in action.' Isocrates, *Praise of Helen* [4 f.]:

The Sophists held it their duty 'to bring up their disciples to a knowledge of practical politics, and to train them to experience in such matters, bearing in mind that it is far better to have a sound opinion upon useful things than an accurate knowledge of things that are useless, and to have a slight superiority in matters of importance, than to be far above others in small things that are of no practical benefit in life.' (F.)

Lucian, *Convivium* [xxxiv]: 'It is no good knowing the liberal arts if one doesn't improve one's way of living too.' (H.*) Among the Egyptians a library used to be called a 'clinic for the soul', Diodorus Siculus, Bk. I, chap. xlix. They are ill educated to whom can be applied the remark of Arrian, *Epictetus*, Bk. IV, chap. v: 'In the lecture-room we are lions, and foxes in the world outside.' (M.)

Their second concern should be that not all their learning turn 174 upon mere authority and a habit of listening, as well as upon the imitation of unknown terms, but that their inquiry go down to the firm foundations of things. Let there be no obstinacy about questions which have not yet been reduced to a clear proof, and let one's former position be gladly changed when better and more certain facts have been presented, because it is quite possible than another's wit may surpass our own, and a following day improve upon the one that has gone before. This, indeed, is the surest proof of a noble mind. Sophocles, *Antigone* [710 f.]:

The wisest man will let himself be swayed
By others' wisdom and relax in time. (S.)

Pliny, *Natural History*, Bk. III, Preface: 'It is far from surprising that a mere mortal cannot be acquainted with everything.' (B. & R.)* *Idem*, Bk. XI, chap. iii [6]: 'For my part, whenever I have considered the subject, I have ever felt persuaded that there is nothing impossible to nature.' (B. & R.) And so we have the remark of Diogenes Laertius, Bk. X [87]: 'It is not a question of laying down, *a priori*, rules for the interpretation of nature; the only guides for us to follow are the appearance themselves.' (Y.) Cicero, *On the Nature of the Gods*, Bk. I [v]: 'The authority of the teacher is often a disadvantage to those who

are willing to learn. For they refuse to use their own judgement, and rely implicitly on him whom they make choice of for a preceptor.' (Y.)

Quintilian, *Institutes of Oratory*, Bk. III, chap. i [6]: 'Their adherents approve whatever path they have pursued, and you will not easily alter prepossessions that have been inculcated¹ into youth, for every one had rather have learned than learn.' (W.) *Ibid.*, Bk. VII, chap. xi [XII. xi. 6]: 'No man would like that art, in which he himself has been great, to fall into decay.' (W.) Horace, *Epistles*, Bk. II, ep. i [83 ff.]: 'Either they think nothing can be right but what has pleased themselves, or else they think it shame to be led by their youngsters, and to confess in their old age that what they learned before their beard grew is poor stuff.' (W.) But certainly, as Plato says, *Republic*, Bk. V [p. 480 A]: 'Men ought not to be angry at the truth.' (J.)* [Quintilian, *Institutes of Oratory*, III. vi. 65]: 'Longer perseverance in study would be superfluous, if we were not at liberty to find out something better than what was advanced before.' (W.)

Their last care should be not to bury themselves so deeply in books that they neglect their other duties and become unfit for the spirit of social life. Lucian, *Convivium* [xxxiv]: 'Education leads men away from right thinking, since they persist in having no regard for anything but books and the thoughts of them.' (H.) For pedantry of mind is not a vice confined to literary pursuits, or to any religious sect, but pervades men of every race, calling, and position.

14. But although the highest and most toilsome training is that which has to do with the mind, yet the care of the body should not for this reason be neglected, since it is the support of the mind, and if it be disordered the mind also can accomplish little of value. We should, therefore, make every possible endeavour to have a healthy mind reside in a healthy body, and to have the latter trained to endure hardships rather than to be wrecked by dissipations and a life of ease. See Diodorus Siculus, Bk. I, chap. xlv. It is said by Lucian, *De Lapsu inter Salutandum*² [xi], that Pyrrhus in his daily sacrifices asked of God nothing other than *ὕγιαλνεν*, good health, since it includes all good. Care should also be taken that the vigour and strength of the body be not jeopardized by intemperance in meat and drink, by unseasonable or unnecessary labour, or in any other way. For this reason gluttony, drunkenness, excessive relations with women, and the like, should be avoided. Juvenal, *Satires*, xi, line 34: 'You should know the measure of your cheek.'³ Add the remarks of Socrates against incontinency, in Xenophon,⁴ *Memorabilia of Socrates*, Bk. I [iii]. It is a pointed observation of Democritus, in Plutarch, *Advice about Keeping Well* [xxiv,

¹ [For *juculatas* read *inculcatas*.—Tr.]

² [More commonly called *Pro Lapsu in Salutando*.—Tr.]

³ [The modern text reads: 'Let a man take his own measure . . .' (R.), the word *buccae* being taken with the preceding sentence.—Tr.]

⁴ [For *Xenophonem* read *Xenophontem*.—Tr.]

p. 135 E]: 'If the body should summon the soul before a court on an action for ill-treatment, the soul would lose the case.' (G.) Although the reply might be made that the mistakes of the mind about sustenance and sensual pleasure and the other things which concern the care of the body arise from the fact that the mind, without any warnings of the reason, yields to the desire and passions of the body, but is never made worse by itself. No less famous is the remark of Theophrastus, in Plutarch, *loc. cit.*: 'The soul pays a dear house-rent to its landlord the body.' (G.) Add Bacon, *Essays*, chap. xxx.

15. Our life has been given us by the Creator as a kind of race-course, where our strength is to be displayed¹ at the dictate of reason, and so it must be measured not by the succession of one breath after another, but by good actions. Therefore, every one must be watchful not to become a 'profitless burden of the earth' [Homer, *Iliad*, XVIII. 104], of no advantage to himself and a care to others; a mere unit of mankind, 'born to consume the fruits of the earth' [Horace, *Epistles*, I. ii. 27], or one whose sole reason for living is in his palate. Cicero, *On the Nature of the Gods*, Bk. II [xvi]: 'Whatever is wholly inactive seems to me not to exist at all.' (Y.) Ovid, *From the Pontus*, Bk. I, ep. vi [I. v. 44]: 'I regard idleness as death.' (W.) Silius Italicus, Bk. III [145]: 'What is the difference between death and a life of obscurity?' Theocritus, *Idylls*, xiv [70]: 'We must fain be up and doing while there's sap in our legs.' (E.) Add Gellius, Bk. XIX, chap. x.

Now since the industry of men generally shows itself either in the quest of what is necessary for preserving life, or in the fulfilment of the duties of social and civil life, which has every kind of variety, and for which not every one is equally fitted, it follows that every one should early in life undertake and choose a course of life which is honest, advantageous, and suited to his capacity. For the most part, the way of one's manner of life is usually set by the impulse of one's bent, some peculiar aptitude of body and mind, the condition of one's birth, the goods which fortune bestows, the authority of parents, sometimes the command of the state, the invitation of opportunity, or mere necessity. Isocrates remarked about the ancient Athenians, *Areopagiticus* [45, p. 255]:

It was impossible to direct all towards the same pursuits, as their positions in life were not the same; but they ordered them to follow occupations in conformity with their means. Those who were less well off than others, they employed in agriculture and mercantile pursuits, knowing that want of means arises from idleness, and vicious habits from want of means; thus, by removing the source of those evils, they thought to keep them from the other offences that follow in its train. Those, on the other hand, who were possessed of sufficient means, they compelled to devote their time to horse-racing, athletic exercises, hunting and philosophy, seeing that as a result of such pursuits some gain distinction, while others are kept from most vices. (F.)

¹ [For *enserendis* read *exserendis*.—Tr.]

Among the Egyptians and Hindus every one was commanded to follow his father's trade, Diodorus Siculus, Bk. I, chap. lxxiv; XII. xli. A reason for this custom is given by Isocrates, *Busiris* [§ 20]. The same thing was practised among the Peruvians in the time of the Incas, the nobles alone, but not the common people, being allowed to acquire the culture of learning, Garcilasso de la Vega, *Comentarios Reales*, Bk. IV. The words of Xenophon, *Training of Cyrus*, Bk. II [i. 21], apply here: 'Those became best in any given thing who gave up paying attention to many things, and devoted themselves to that alone.' (M.) And *Idem*, Bk. VIII [ii. 5]: 'It is impossible for a man who works at many things to do them all well.' (W.) Hence, not only those who exist by knavery live in a state opposed to sane reason, but those as well who, without any necessity, withdraw themselves from the duties common to life, as, among others, many hermits and monks, and a few of the ancient philosophers. Such are also the able-bodied mendicants, who adopt a calling unworthy of the divine Name, and make God a kind of tributary of themselves; their wickedness is all the greater, if they voluntarily distort or mutilate their limbs, so that they may not be of any use in the future, even if they should wish to be. The fact is worth mentioning that, among the Chinese, no able-bodied man is allowed to beg, even though he be blind, the latter class earning their living by
 176 turning mills. Martinius, *Historia Sinica*, Bk. I, chap. xxxiv.

And since time rushes on apace, and death often overtakes men unawares, while none can escape it, one should in his early years make the most of life, nor have too comprehensive a plan of action. Martial, *Epigrams*,¹ Bk. I, ep. xvi [I. xv. 11-12]: 'Tis not, believe me, a wise man's part to say, "I will live". To-morrow's life is too late: live to-day.' Silius Italicus, Bk. III [141-2]: 'The brevity of this changing hour forbids me to put off the day.' Horace, *Epistles*, Bk. I, ep. iv [12 ff.]: 'In a world of hope and care, of fears and angry passions, hold for yourself the belief that each day that dawns is your last: the hour to which you do not look forward will be a pleasant surprise.' (W.) *Idem*, Bk. I, ep. iv [15]: 'Life's brief span forbids our entering on far-reaching hopes.' (B.)

Finally, we should also always keep the balance-sheets of life ready to hand in, and harden our mind early to meet the terrors of death, so that, without complaint and without fear, we may return to the Creator, at His demand, what He gave us to use for a season. Silius Italicus, Bk. IX [376 ff.]: 'Valour is an empty name, unless it be that renown is vouchsafed for him who endures, when the moment of death draws nigh.'² Pliny, *Natural History*, Bk. VII, chap. xl.: 'It is the day after that is the judge of the day before; and after all it is only the last

¹ [For *Epist.* read *Epigr.*—*Tr.*]

² [The text which Pufendorf used was badly interpolated, but without harm, probably, to the general sense.—*Tr.*]

day that is to set its stamp on the whole.' (B. & R.) Arrian, *Epictetus*, Bk. I, chap. i: 'And afterwards when the time comes I will die. And die how? As befits one who gives back what is not his own.' (M.) Add Marcus Antoninus [Aurelius], Bk. XII, last section [36], and Bacon, *Essays*, chap. ii.

16. Now every one knows how much a man loves his own life, and how its preservation lies upon his heart. But there is some question as to whether that natural instinct which he has in common with brutes impels him to this or whether, as a matter of fact, there is the addition of some command of natural law. For since no one can be obligated only to himself, it is not clear what efficacy belongs to that law which terminates only in myself, and the necessity of obeying which I can escape whenever I wish, while its breaking brings an injury on no one. Moreover, it seems superfluous to pass a law on such a matter, since even without it, through the anxious solicitude of self-love, a man would be so impelled to care for and preserve himself, that, not even if he willed it, could he easily do otherwise. Seneca, *On Benefits*, Bk. IV, chap. xvii: 'It is superfluous to force us into the path which we naturally take, just as no one needs to be urged to love himself, since self-love begins to act upon him as soon as he is born.' (S.) Nay, if a man were born only for himself, we confess that it would be fitting that what he would decide for himself should be left entirely to his own judgement. But since all wise men agree that the most Good and Great Creator made man to serve Him, and by improving His good gifts to make His glory greater, and since the social relation, for which man was created, cannot be exercised and preserved to good advantage unless every man improves and preserves himself to the best of his ability—because the safety of all human society is a meaningless phrase if it makes no difference whether individuals are safe or not—it is clear, that when a man neglects his own care, he works an injury, not, indeed, on himself, but on God, his Creator, and on the human race. Cf., however, Antonius Matthaëus, *De Criminibus, Prolegomena*, chap. iii, § 4.

However, such an argument cannot be pushed to the conclusion that the law of nature does not command a man to preserve his own life, inasmuch as instinct already bore heavily enough in that direction; rather, instinct appears to have been, as it were, enlisted as an aid to the dictates of reason, as if the latter by itself alone would not constitute a support adequate to sustain mankind. For surely if account be taken of the troubles which accompany the life of man, troubles that far surpass that brief and mean allotment of pleasures which constantly recur in the same degree, but only with less delight and even with distaste; and how many men there are for whom life is prolonged that they may encounter more misfortunes; who would not, at the first opportunity, take his own life, did not his instinct so forcefully commend it, or were 177

not death accompanied by ideas of such bitterness? Or who would not overcome that instinct, did not the commands of the Almighty Creator stand in his way? The words of Quintilian, *Declamations*, iv, are surely to the point:

Of what satisfaction, O wretched mortals, can it be to retain the soul for so many years or, if nature allows, for endless ages of time in the most unhappy restraint of the body? If you carefully weigh all our joys, all our pleasures, everything in this whole universe that rejoices our sight or serves our use, you will find that the entire life of man is but a single day. They must be utterly poor and abject minds who are not sated with this eternal repetition; so that he who has learned from his converse with the liberal arts, what is the end of blessings, and in what true happiness consists, will never feel that he is going to die by an untimely death, and of those who refer the cause of light to the soul and mind, there is not one but is surfeited of life every day. Do you expect me now to recount how many more things there are in this short space of life which we ought to avoid; to set off our fear and misfortunes against our joys and successes? Nay, let us rather weigh those things for which we weary the gods with our prayers, and on account of which we complain of the shortness of life. What are they but vanity, desire, luxury, and lust? Are we not ashamed for the sake of such things as these to bear weakness, sorrow, and lingering illness? and to prefer to suffer these even though we might escape?

And a little above [iii]: 'The most effective device of nature for the preservation of man is our own unwillingness to die, and the help which she gives us to bear up under such a multitude of misfortunes with patience and equanimity.' And Socrates, in Xenophon, *Memorabilia of Socrates*, Bk. I [iv. 7], 'judged it to be the handiwork of some wise artificer, that he planted in us this passion to beget offspring, this passion in the mother to rear her babe, and in the creature itself, once born, this deep desire of life and fear of death.' (D.*)

Now it is the last of these which makes each man's life safe from other men. For how easy it would be to slay if death were not so bitter! Hence he who despises his own life is master of another's, and the safety of others¹ is my defence. Add Charron, *De la Sagesse*, Bk. II, chap. xi, n. 8.

17. It is a question for more profound investigation as to whether a man has any power over his own life at all, and if so to what extent; whether willingly to expose it to real danger, or to wear it away by small degrees, or, finally, to end it in some violent manner. Certainly many of the ancients used to allow this right to man so freely that they believed a man could offer his life as a pledge for another man and sacrifice it in his own behalf without any purpose of saving another; and, when it grew wearisome, even do away with it before its natural or fated end. In Pliny, *Natural History*, Bk. II, chap.² vii, the ability to kill oneself is called 'the greatest blessing among such great penalties of life'. And yet a man can in no way be freed from the accusation of impiety in that he does not fear to have so low an opinion of the greatest

¹ [For *asiena* read *aliena*.—Tr.]

² [For *b.* read *c.*—Tr.]

gift of God. It will be our task to inquire as to what appears to be most in keeping with the principles of natural law.

Now, in the first place, there is no question but that, since a man may and should use his ability in the service of others, and since some kinds of tasks, or the diligence with which they are pursued, may so affect a man's strength that old age and death will come on sooner than if a man had spent his life in ease, one may quite properly choose a slightly shorter length of life, in order to give other men a more generous use of his ability. For since we live not for ourselves alone, but for God and society, surely, if either the glory of God or the safety of society demands our life, we should spend it gladly for such a use. Statius, *Thebaid*, Bk. X [615]:

Thrice happy who can so adorn his death,
And for so great a meed resign his breath. (L.)

Horace, *Odes*, Bk. III, ode ii [13]: 'Tis sweet and glorious to die for fatherland. Yet Death o'ertakes not less the runaway, nor spares the limbs and coward backs of faint-hearted youths.' (B.) Here 178 belongs the remark of Pompey the Great, who, when there was a famine in Rome, and the officer in charge of the grain supply and his friends were using every means to dissuade him from setting out into a tempest, replied to them: 'It is necessary for me to go, not for me to live.' [Plutarch, *Pompey*, l.] Achilles, in Homer, *Iliad*, Bk. IX, preferred a brief but glorious life to one of no repute, unwilling to be a stay-at-home, and so attain to extreme old age.

18. Moreover, since it is certain that time and again the life of many a person cannot be preserved, unless others expose themselves to the probable peril of their life in his behalf, it is also plain that, at the order of a rightful commander, an obligation can be laid upon a person not to refuse to meet such a peril, unless he is willing to face the most grave penalties. The obligation of soldiers rests upon such a principle, of which more will be said in its proper connexion. It is a noble saying of Socrates, recorded in Plato, *Apology* [p. 28 D]: 'For wherever a man's place is, whether the place which he has chosen, or that in which he has been placed by a commander, there he ought to remain in the hour of danger; he should not think of death or of anything but disgrace.' (J.) But it does not appear to go against either natural reason, or Holy Writ, which commands a man to lay down his life for his brethren, that a person should of his own accord, without such a specific command, expose himself to the probable peril of his life, on behalf of others, unless there is some hope that such a course will work for their safety, and they are worthy of being saved at so high a price. For it would be an act of folly for a person merely to join another in his certain death, when no good results from it, or for a man of worth

to perish in place of some ne'er-do-well. Grotius, *On Jonah*, i. 12: 'If it is right for one man to offer his life that he may preserve many, as Phocion told Demosthenes, such a deed is much more fitting in the case of one who recognizes that he is the cause of others' dangers.'

We feel, therefore, that it is proper for one to offer his person as security for another, especially for an innocent and worthy man, or to give himself up as a hostage that the safety of others may be secured, even though he run the risk of death, if the accused person does not appear or the treaty is not observed. Although, as we shall show hereafter, persons who offer themselves in this way as security, or as hostages, cannot rightfully be executed by another. But we have no hesitation in asserting that sacrifices of this kind, which serve no other purpose than to afford an empty show of confidence and bravery such as we have noted above is still to be observed frequently among the Japanese, are contrary to natural law. For any unreasonable display of courage is idle. We feel, indeed, that the law of nature in no wise commands that, especially when other things are equal, a man should value another's life above his own; the very contrary, in fact, is clearly to be deduced from the common feeling of men, and from witnesses too weighty for any exception who allow that every man is dearest to himself. See 2 *Corinthians*, viii. 13-14; *Digest*, XIX. v. 14; XXXIII. iii. 6; XXXIX. iii. 2, § 9; this is not refuted by *Digest*, XIII. vi. 5, § 4, nor by *Digest*, XXIX. v. 1, § 28. Add the author of *De Principiis Justi et Decoris*¹, pp. 122 ff. [Velthuysen].

19. There remains for discussion the question whether a man, of his own free choice, when he has rejected the pleasure of life, either to avoid great misfortune or to anticipate an ignominious death which is expected at any moment, may hasten his fate by his own hand. To this question applies that classic passage, praised even by Christian writers, in Plato, *Phaedo* [p. 62 B]: 'Man is a prisoner who has
179 no right to open the door of the prison and run away.' (J.) The same thought has been expressed more fully by Lactantius, *Divine Institutes*, Bk. III, chap. xviii:

For as we did not come into this life of our own accord; so, on the other hand, we can only withdraw from this habitation of the body which has been appointed us to keep, by the command of Him who placed us in this body that we may inhabit it, until He orders us to depart from it. (C.)

However, it is worth while to note carefully how Plato describes the suicide, condemned by him to a disgraceful burial, *Laws*, Bk. IX [p. 873 c]:

The suicide, who deprives himself by violence of his appointed share of life, not because the law of the state compels him, nor yet under the compulsion of some painful and inevitable fortune which has come upon him, nor because he has had to suffer from

¹ [For *decoris* read *decori* p.—Tr.]

irremediable and intolerable shame, but who from indolence or cowardice imposes upon himself an unjust penalty. (J.)

Aristotle also, *Nicomachean Ethics*, Bk. III, chap. xi, says: 'But it is the act, not of a courageous person, but rather of a coward, to fly from poverty or love, or anything that is painful, by death. For it is effeminacy to fly from troubles.' (W.) Seneca, *Phoenician Women* [190-2]:

It is not valor [...]

To shrink from life; but 'gainst the mightiest ills

To stand opposed, and not to flinch or budge. (M.)

Martial, *Epigrams*,¹ Bk. XI, ep. lvii [lvi]: 'In adversity it is easy to despise life; the truly brave man is he who can endure to be miserable.' Vergil, *Aeneid*, Bk. VI [436 f.], allots a place in hell for those 'Who, free from crime committed suicide, and hating light, in madness flung away their lives'. (B.) Procopius, *Gothic History*, Bk. IV [xii. 11]: 'To bring man's life to a violent end is useless, and a piece of frantic madness, and unreasoning boldness in the face of death, although it bears a specious appearance of valour, is regarded as folly by the wise.' Ammianus Marcellinus, Bk. XXV, chap. iv: 'It may be said in all fairness that the man is fearful and cowardly who longs for death when he should not, and flees before it when it is opportune.' Add Abr. Rogerius, *De Braminibus*, Pt. II, chap. xviii; Nicolaus Trigautius, *De Regno Chinae*, Bk. I, chap. ix; Charron, *De la Sagesse*, Bk. II, chap. xi, n. 18.

Grotius, Bk. II, chap. xix, § 5, observes that among the Gentiles, as well as among the Hebrews, suicides were forbidden due burial. Add Josephus, *Jewish War*, Bk. III, chap. xxv. But some of the Hebrews found reason for one exception to the law against suicide, a kind of *εὐλογος ἐξαγωγή* [fitting departure from life], in case a man sees that his continuing to live will be a reproach to God. For since they decided that the authority over our lives belonged not to us, but to God, they felt that it was the presumed will of God alone which might pardon the purpose to anticipate death. And they cite as an instance the case of Samson, who saw that the true religion was being derided in his person, and of Saul, who fell on his sword, lest he be an object of derision for those who hated both himself and his God, and lest his captivity bring about the servitude of his people. For they would have it that the latter recovered his senses after the shade of Samuel had foretold to him his death, and, although he knew that it awaited him if he joined battle, he did not reject it for the sake of his country and the law of his God; therefore he deserved eternal praise, on the pronouncement even of David, who gave his testimony to the proper conduct also of those who had buried Saul with honour.

¹ [For *epist.* read *epigr.*—Tr.]

Some also apply this principle to similar cases, basing their opinion upon the following argument: Inasmuch as no one can be obligated to himself, he who takes his own life cannot thereby do an injury to himself. And the fact that every one is obligated by the law of nature to preserve himself is due to the reason that he has been ordained by God to cultivate human society, which he may on no account forsake, like a deserter, or a soldier who leaves his place in the ranks; and therefore my obligation to preserve myself is a debt of mine, not to myself, but to God and
 180 human society. (Aristotle, *Nicomachean Ethics*, Bk. V, chap. xv, remarks that suicides are not guilty of injury against themselves, but against the state, and for that reason are branded with ignominy.) And so, if that relation to God and mankind be removed, it appears that a man is obligated to himself only through sensitive instinct, and since this does not have the force of law, whatever opposed it should also not be accounted a sin. And so they feel that they have a proper plea, being worthy certainly of pity rather than censure, who lay violent hands upon themselves, because they foresee, with a morally infallible certainty, that a death of suffering and disgrace will be inflicted upon them in a short time at the hands of enemies, and that it is of no advantage to the commonweal for them to die at the will of another; or because they see that others are threatening to inflict something upon them that will make them an object of aversion to other persons. Such are they, who, on foreseeing their death at the hands of a truculent enemy or a cruel prince, have preferred to hasten their fate so as to escape the torture and revilings, or the ignominious treatment of the executioner, or else to secure some benefit by such an action for their friends or family.

An instance of the last reason is given by Tacitus, *Annals*, Bk. VI [xxix]:

For people resorted readily to deaths of this kind from the fear of execution; and also because a man's property was confiscated, and burial was denied to him, if he was sentenced to death; whereas, if he took his fate into his own hands, his body was buried, and his will respected. So great were the benefits of dispatch! (R.)

It is clear from this illustration that the remark of Martial, Bk. II, ep. lxxx, is not always to be approved:

When Fannius from his foe did fly,
 Himself with his own hands he slew:
 Who e'er a greater madness knew!
 Life to destroy for fear to die!

For, as Aeschines, *On the Embassy* [181], says: 'It is not death that men dread, but a dishonoured end.' (A.) Other instances are those when women or modest boys have in this way escaped the violation of their chastity. See the account by Paul Warnefrid, Bk. XV, of

Dugna, a woman of Aquileia. Eusebius, *Ecclesiastical History*, Bk. VIII, chaps. xxiv and xxvii.

It is felt that such persons can give a plausible excuse for themselves. Since they faced a necessity so complete, and escapable only through some kind of miracle, they concluded that they had already been mustered out by their commander, and could assume the forgiveness also of mankind, for whom they were already as good as dead; it made no difference that they anticipated their death by so brief a period, so as not to experience torture and abuse, which might even drive them to some grave sin; nor does it seem right for spirits of quality to be condemned to the necessity of first submitting to abuse by another, and then laying down their lives absolutely in any way their enemy might see fit. Cicero, *Tusculan Disputations*, Bk. I [xxx]:

Cato left this world in such a manner, as if he were delighted that he had found an opportunity for dying; for that God who presides in us forbids our departure hence without his leave. But when God himself has given us a just cause, as formerly he did to Socrates, and lately to Cato, and often to many others,—in such a case, certainly every man of sense would gladly exchange this darkness for that light: not that he would forcibly break from the chains that held him, for that would be against the law; but like a man released from prison by a magistrate, or some lawful authority, so he too would walk away, being released and discharged by God. (Y.)

Add *Digest*, XLVIII. xxi. 3, § 6; XLIX. xiv. 45, § 2; Quintilian, *Declamations*, iv; Antonius Matthaeus, *De Criminibus*, V. i. 9, on *Digest* XLVIII; Grotius, *On Judges*, xvi. 30.

But these question we leave undecided. This much is clear, however, that those who interrupt the course of their life, either from mere weariness of the troubles common to life, or from disgust at the evils which would not have made them objects of the scorn of society, or from fear of trials which they might have borne with fortitude, and so helped others by their example, can offer no defence so valid that they should not be judged to have sinned against the law of nature. Thomas More, *Utopia*, Bk. II, apparently thinks otherwise, but I cannot agree 181 with his conclusion.

But these can surely be cleared of the crime of *αὐτοχειρία* [suicide], who take their own lives because of some disease which has destroyed the use of their reason. Many, also, who rush into suicide are excused by the judicious, because of the magnitude of their consternation. Curtius, Bk. IV, chap. xvi [IV. xvii]: 'Consternation makes men blind to dangers greater than the danger which they seek to avoid.' (A.) *Lucan*, Bk. III [689–90]: 'Amid a thousand forms of death, that single end is an object of dread, by which they have begun to perish.' (R.) 'Death desired through fear' is a phrase of Suetonius, *Nero*, chap. iv [ii]. Add Michel Montaigne, *Essays*, Bk. I, chap. xvii; *Digest*, IV. ii. 14, § 3.

It should be observed, at this point, that it makes no difference whether a man die by his own hand, or whether he lead others in

some way to cause his death. Thus Deianira says, in Seneca, *Hercules Oetaeus* [996]:

For though 'tis by thy hand that I shall fall,
'Twill be my will. (M.)

For whoever did not need to die here and now is not excused if he use the hands of another in securing death; since, of course, one is judged to have done himself what he does through another. And yet the man who lends his hands to such a deed may likewise associate himself with the crime. So we do not approve the following reflections of Florus, Bk. IV, chap. vii:

Who cannot but wonder that these wisest of men (Brutus and Cassius) did not use their own hands to dispatch themselves? But perhaps this was avoided from principle, that they might not, in releasing their most pure and pious souls, stain their own hands, but while they used their own judgement, might allow the crime of the execution to be another's. (W.)

For if it was wrong for them to end their life at that time, it made no difference whether they perished at their own hand or that of another. But if it was right, it is not proper to attribute a crime to their servants. And yet the passage of Florus may be illustrated by the following from Aeschines, *Against Ctesiphon* [244]: 'When a man kills himself, the hand that did the deed is buried apart from the body.' (A.)

But since we deny the absolute power of a man over his own life it is also clear that those laws are not approved, which either command or permit citizens to do away with themselves. Diodorus Siculus, Bk. II, chap. lvii, tells of such a law among the inhabitants of Ceylon, whereby it was decreed: 'They have a law that they may live to a certain number of years, and when those are run up, they dispatch themselves by a strange kind of death, lying down to sleep upon a certain herb which kills a man painlessly.' (B.*)¹ Add *Idem*, Bk. III, chap. xxxiii, on the people of Megabara, a tribe of Troglodytes. So among the Ceans a law stated that those who had passed the age of sixty should take the poison aconite, so that there might be enough food for the rest, Strabo, Bk. X [xi. 3]; Heraclides, *De Politiis*.² Although Aelian, *Varia Historia*, Bk. III, chap. xxxvii, gives as the reason: 'Because they realize that they are of no further use in advancing the interests of their state since their mind is already beginning to fail because of age.' Add Valerius Maximus, Bk. II, chap. vi, §§ 7-8. See Procopius, *Gothic History*, Bk. II [xiv], on the custom of the Herili, among whom those who were weakened by old age or ill health procured their own death, their wives also hanging themselves about the tomb of a husband who had perished in this way. On the Sardi and Berbicci see Aelian, *ibid.*, Bk. IV, chap. i; on the Massagetae, Strabo, Bk. XI [p. 513], and Herodotus [I. 216].

¹ [This last clause is markedly condensed from the original.—Tr.]

² [Really Aristotle, frg. DCXI. xxix.—Tr.]

CHAPTER V

ON SELF-DEFENCE

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| <ol style="list-style-type: none"> 1. A violent self-defence is lawful. 2. Whether it be commanded by natural law. 3. What sort of defence is proper in a state of natural liberty; 4. What sort in commonwealths. 5. Is it proper against one who makes a mistake? 6. The time for such defence in a state of natural liberty. 7-9. How it stands in a civil state. 10. On the mutilation of a part of the body. | <ol style="list-style-type: none"> 11. On chastity. 12. Concerning a box on the ear. 13. Whether a man is bound to flee. 14. Whether the Christian religion teaches otherwise. 15. Death inflicted in self-defence is not a crime. 16. On the defence of property. 17-18. On one who robs by night. 19. On self-defence by a person who is the first to commit an injury. |
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WITH the preservation of oneself, which is commended to every man by his most ardent love of his own person and by reason itself, is connected also self-defence, or the warding off of evils which tend to a man's injury, and are threatened by another man. This defence is of two kinds: either without injury to him who is planning offence to us, or with his injury and death. Now no person in his senses will ever question whether the first is lawful and entirely without sin. But, regarding the second kind, some have raised objections, because by it a fellow-being in our likeness is injured or killed, with whom we are required to co-operate in cultivating a social life, while by his death apparently as great a loss is entailed upon the human race as would come from our own death. And also because greater confusion apparently befalls society if we repulse threatened force with force than if we avoid injury by flight, or, when that is impossible, calmly offer our body to the assailant.

Yet reason clearly shows, and the agreement of the wise as well as of the untutored adds its approval, that a defence of ourselves may be undertaken not merely in the first way, but also, when that is not possible, with the injury of him who is about to assail us. Of course man was created to maintain peace with his fellows, and all the laws of nature which concern other men have, as their first concern, the establishment and maintenance of peace. Yet nature at times allows the recourse to violence, when we cannot in any other way preserve our safety because of the aggression of another. Of course, the obligation to observe the laws of nature and the duties of peace is a mutual one, and equally binding on all men; nor does nature allow one man such a privilege above another, so that he can violate these laws against the

other, while the other is bound to keep the peace with him. But an obligation lies upon both of them, and makes the exercise of the offices of peace a mutual duty. And so when a man, contrary to the laws of peace, undertakes against me such things as tend to my destruction, it would be a most impudent thing for him to demand of me that I should thereupon hold his person inviolate, that is, that I should sacrifice my own safety so that his villainy may have free play. Herodian, Bk. IV, chap. v: 'It is reasonable and necessary for a man who is about to suffer some dread event to defend himself rather than to accept it. Otherwise the victim of misfortune is accused also of cowardice.' But when he shows himself unsociable towards me, and makes himself unfitted to receive from me the offices of peace, all my interest turns to securing my own safety, and inasmuch as it cannot be secured without injury to him, he has only himself to blame, since he drove me to such necessity. Horace, *Satires*, Book II, sat. i [44-5]: 'Let no one ever attack me when I desire peace. But for him who rouses me ("Better not touch me!" I cry loudly) he shall weep for it.' (W.) Were it otherwise, all the benefits which nature or our labour has given us would have been conferred in vain if they could not be defended by force against the person who assails them; and honest men would be exposed as an easy prey for the wicked, if they should never meet the latter with force.

183 Therefore, to forbid the use of force in self-defence, so far from conducing to peace, would mean the end of mankind. Nor, indeed, should it be thought that the law of nature, instituted as it was for the safety of man, favours such a peace as would cause his immediate destruction, and bring about anything but a sociable life. Add Grotius, Bk. I, chap. ii; Bk. I, chap. iii, § 3.

2. It is not entirely clear whether a violent self-defence, and one that entails the injury or death of the assailant, may be an obligation as well. We are not concerned with soldiers or the guards of travellers, who, in killing enemies or thieves, defend their country as well as themselves, or undertake the protection of those who have been committed to their care; they can be included in the line of Seneca, *Phoenician Women* [294]:

To many men art thou refusing life,
If for thyself thou dost refuse to live. (M.)

But we are concerned with those who are moved to self-defence only by their own peril. An illustration of this is to be found in Plutarch, *Phocion* [xxxii]:

When Phocion was assailed for letting Nicanor go and not detaining him, he said that he had confidence in Nicanor, and expected no evil at his hands; but in any case, he would rather be found suffering wrong than doing wrong. Now, such an utterance as this might seem honourable and noble in one who had regard to his own interests alone; but he who endangers his country's safety, and that, too, when he is her commanding general,

transgresses, I suspect, a larger and more venerable obligation of justice towards his fellow citizens. (P.)

Now there are some who would carry this command so far that it could not be abrogated even by civil law, maintaining that the man who allows himself to be killed when he could have defended himself, can be condemned on the same score as if he had killed himself. See Ziegler on Grotius, Bk. I, chap. iii, § 3. And this is something like the instance in Sparta of the Ephors punishing a certain Sciraphidas, because many men had injured him. Plutarch, *Instituta Laconica* [chap. xxxix, p. 239 c]. Also the author of the *De Principiis Justi et Decori*, p. 33 [Velthuysen], inclines to the same opinion. His argument runs that, in addition to other factors working to the preservation of man, we have within us a quick sense of grief, a burning desire for revenge, and hands adapted to injure others and defend ourselves. Since these have not been given us for naught, it is to be assumed that it is God's will that we use them for our preservation. Therefore, if I do not fight with my hands, even to the extent of killing my assailant, it is the same as if I had of my own will cut them off. Although he confesses farther on, p. 118, that this law of self-preservation is not of so binding a nature that there may not arise some cases which either excuse a man from obeying it, or else allow him to be a law unto himself.

To us it seems necessary to consider, first of all, whether it is of any great concern to others that the person who is attacked survive, or whether, as a matter of fact, he apparently lives only to himself. We hold that in the former case the man is *obligated* to secure his own protection by every means possible, but, in the latter case, we maintain that it is only *permissible* for a man to defend himself even to the death of his assailant, especially if the life of the latter is of advantage to many, and there is a likelihood that, if he meets his death in rascality of this kind, he runs the additional risk of eternal damnation. Of course the magnitude of the impending terror may not allow so careful a scrutiny of the merits of individuals, and consideration need scarcely be taken, least of all by the man who will be damaged by another's fury, of a peril into which a man brings himself, and from which he can disengage himself at his pleasure. Isocrates, *Against Callimachus* [39]: 'Is it not absurd for him in this crisis to ask you to pity him, when it is a situation which he himself controls, into which he puts himself, and the risks of which he can even now avoid?' Libanius, *Declamations*, xxiii [viii. 10]: 'For what a man would not have suffered, were he not in the wrong, this he has done to himself by virtue of having been the first to do wrong.' And yet that such an act, from which so great evils come to another should be considered a duty and its omission regarded as a sin, does not seem to be a proper balance, especially since the old saying may be used also in this connexion: 'A man may renounce his privilege, pro-

vided it can be done without injury to a third person.' This principle
 184 is stated in the following way by Quintilian, *Declamations*, vii [4]:

It is in the nature of all benefactions that they do not impose a necessity but bestow a power. Whatever has been devised to honour some one ceases to be a privilege if you force it upon him. Run through the full list of rights, if you please; nowhere is the law so solicitous as to extort from us that which it affords us.

3. But if accurate knowledge is to be secured on the question, how self-defence should be limited, and how far it may properly be carried, we must, before everything else, distinguish as to whether he who defends himself is in a state of nature or in a civil state, since it is held within far narrower bounds in the latter than in the former. Now this distinction has not been carefully enough observed by many writers, and so they have made some generalizations upon innocent self-defence, which are true of only one of the above states. But after it has been clearly shown what right there is in a state of nature, it will be perfectly obvious to what extent, and on what grounds, this right is restricted in commonwealths.

Now the following is a good rule of prudence: 'A wise man should try every means before arms.' For inasmuch as every battle has some element of chance, a man when threatened by another with injury would do better to try the safer means of escape, before he came to open conflict. Libanius, *Declamations*, i [iii. 24]: 'First to endeavour to ascertain what is right by the use of reason, and not to leap to arms, does more become a man.' Thus if I can cut off my would-be assailant's avenue of approach so that he cannot reach me, it would be foolish of me to grapple with him when I do not have to. And if walls and gateway can protect a person, it is imprudent of him to present his breast to the foe. Terence, *Eunuch* [761]: 'When you can provide against a danger, it's silly to let it come near you.' (S.)

Furthermore, it becomes a prudent man to bear a slight injury with patience, if it can be done conveniently, and so to yield a little from his right, rather than to expose oneself by an untimely defence to greater peril, especially if that be demanded which may be easily repaired or compensated for. Plautus, *Amphitryo*, Act II, sc. ii [703-5]: 'You but cross a Bacchante when the Bacchic frenzy fills her, and you'll make the crazy thing crazier still, and she'll hit you all the more: humour her, and she'll call it quits after one blow.' (N.) *Idem*, *Truculentus* [768]: 'If you thump a goad with your fists, your hands are hurt the most.' (R.) Martial, Bk. VI, ep. lxiv [6]: 'Have pity upon yourself, and do not, like a furious dog, provoke with rabid mouth the fuming nostrils of a living bear.' And it is also my judgement, that the man who comes to some sort of agreement with a person over a matter of ten gold pieces, which the latter owed him, acts more wisely than the one who endeavours to secure the sum by a troublesome lawsuit,

especially if fifteen gold pieces have to be paid the lawyers as the price of their eloquence. Martial, Bk. VII, ep. lxiv [65]: 'Wretched, infatuated man! does any one continue at law for twenty years, Gargilianus, who has the option of losing his suit?' Theocritus, *Idylls*, xxiii [xxii. 180]: 'And in such sort, I ween, a great strife is like to end in but little loss.' (E.) Especially is this true, since 'Hard it is to rid oneself of strife with them that are stronger than ourselves', (S.) Pindar, *Olympian Odes*, x [39-40]; and 'even when men strive, indeed, fortune doth not show herself until they reach the final goal'. (S.) *Idem*, *Isthmian Odes*, iv [31-2]. So the greatest praise should be accorded to what Isocrates says about himself, *De Permutatione* [27]: 'It was my policy never to do an injury to others, and in case I received an injury from them, not to seek redress through the courts, but to settle the matters in dispute with their friends.' Lucian, *Eunuchus* [1]: 'For truly it is absurd for philosophers to sue one another, when they ought, no matter how important the matter was, to settle their difficulties with one another in peace.' Add *Digest*, IV. vii. 4, § 1. So also the remark which was applied by Polybius, *Excerpta Peiresciana* [XL. v. 12], to the Achaeans, 185 after they had been in a short battle, often holds in other cases: 'Had we not perished quickly we should not have been saved.' Seneca, *On Anger*, Bk. II, chap. xiv:

Reason often counsels patience while anger counsels revenge, and we, who might have survived our first misfortune, are exposed to worse ones. Some have been driven into exile by their impatience of a single contemptuous word; have been plunged into the deepest miseries because they would not endure the most trifling wrong in silence, and have brought upon themselves the yoke of slavery because they were too proud to give up the least part of their entire liberty. (S.)

Add also Stobaeus, *Anthology*, xix. To this applies the explanation given by Grotius, Bk. I, chap. ii, § 8, on the meaning of *Matthew*, v. 17, although others would maintain that this saying applies to men who are under oppression and have no access to justice. Cf. *Lamentations*, iii. 28-30. And yet in a strong state a person is expected to demand recompense for his injuries before a judge (*Leviticus*, v. 1), not for the sake of revenge (*Leviticus*, xix. 17-18), but with the intent to uphold justice and the laws of his country, and so that scoundrels may find no gain or pleasure in their evil deeds. Lysias, *Against Theomnestus*, chap. i [x. 2]: 'For I regard it as illiberal and highly litigious to bring a man into court on a charge of calumny.' Heraclides in his *Politics* [18]¹ is the authority for the existence of a law among the people of Cyrene, whereby 'The ephors should bring the litigious and malicious to court, and then punish and disfranchise them.' Arrian, *Epictetus*, Bk. I, chap. xxv: 'If a man then listens like a stone, what advantage has the slanderer.' (M.) Seneca, *On Anger*, Bk. II, chap. xxxii: 'It is the part

¹ [Really Aristotle, fig. DCXI. xviii.—Tr.]

of a great mind to despise wrongs done to it; the most contemptuous form of revenge is not to deem one's adversary worth taking vengeance upon. [. . .] 'That man is great and noble who like a large wild animal bears unmoved the tiny curs that bark at him.' (S.)

But the injured party does owe such restraint not so much to the one who does the injury, since the latter, so far as he was able, has broken off all relations of humanity with him, as to his own security and peace of mind. And so, when any one, stung with wrath or pain, has exceeded these limits, he does no injury to the aggressor, but is held only to have acted to excess and unwisely.

However, when my safety cannot be attained by these means, and made entirely secure, the affair must be decided by blows. Under such circumstances, if the other party persists in doing any injury with malice aforethought, and is not led by remorse at his evil design to the desire to return to open and peaceful relations, it will be proper to withstand him even to his death. And even if he does not directly seek my life, suppose he only want to belabour me with blows, or deprive me of some non-vital member, or merely rob me without touching my body, nevertheless, after he has broken the peace with me, and I have no longer any security that he will not burst forth from such beginnings to greater injuries, I may, in order to repel this injury, take even extreme measures. For by his avowing that he is my enemy—and this is the case when he attacks me with injuries and shows no signs of repentance—he gives me, so far as he is able to, an unlimited freedom of action against him. Antiphon, *Orationes*, xi [4 B 3]: 'The aggressors deserve not the same but greater and more numerous penalties.'

There are, to be sure, some who do not approve the term 'unlimited freedom' of resisting, because 'the right of defence and of resisting an injury has never been a natural one, save with respect to that order and its safety, to which a social nature has assigned the first place in securing its end. For to the natural right of resisting there is this exception'—unless the social order is violated by resisting—'for which nature herself has the first and highest concern. And so, if this precaution were not observed, society would become unsocial, not being maintained by a concern for necessary and natural order.' See Boecler on Grotius, Bk. I, chap. iv, § 2.

But it is by no means asserted that a liberty of this kind, i.e., to resist by any means possible, should be allowed in absolutely every case
 186 —since many considerations may arise which would forbid the injured person going to any extreme—but that the person who began the injury has no ground for complaint, if extreme measures are taken against him. And surely life would be most unsocial, if, among those who live in a state of natural liberty, any limit were set on their freedom to resist. For what sort of a life would I lead, if a man might always continue to

lay on me with moderate blows, and I were not allowed to stop or repulse his villainy by any other means than threatening him with death? Or if a neighbour could persist in vexing me, only, it is true, by plundering and devastating my fields, and we had no right to kill him in driving him off? For since the social attitude has as its aim the safety of all, no such laws should be framed as would make it necessary for any very retiring man to be always miserable, whenever it suited some scoundrel to break the law of nature. And it would be absurd for social life among men to be based upon the necessity of bearing injuries. Therefore, the man is a fool and the ignorant betrayer of his own safety, who spares an enemy, persisting in being such and carrying on hostilities, and prefers to die to no purpose himself rather than to destroy another. For the law of nature has willed that practice of gentleness and humanity towards an enemy only to the extent that, if he shows that he is moved by repentance, to be willing seriously to desist from injuries to me, and if he makes good the damage, and gives assurance that he will not give offence in the future, I should spare and pardon him, and after peace has been restored, should meet him half-way in exercising the offices of peace. Hesiod, *Works and Days*, Bk. II [711 ff.]: 'But if he ask you to be his friend again and be ready to give you satisfaction, welcome him.' (E-W.) For nature has forbidden among men, under the stigma of cruelty, pure revenge, which has no other object than the suffering and death of the aggressor. It follows, therefore, that the remembrance of wrongs should, so far as possible, be effaced. And this is the point of the account given by Cicero, *On Invention*, Bk. II [xxxiii] of how the Thebans were brought to trial before the Amphictyonic Council, for setting up a bronze trophy after their victory over the Lacedaemonians, the grounds being, that 'it is unfitting for Greeks to set up an eternal monument of their quarrels with Greeks'. For it was the custom to make their trophies only of wood, so that they might not endure a long time. Add Florus, Bk. III, chap. ii, towards the end. Seneca, *Hercules Furens* [362 ff.]:

If everlasting hate
The hearts of men should feel, if fury dire,
Once in the heart conceived, should never cease;
If prosperous men must ever fight to rule,
And those who fail obey because they must:
Then never-ending wars would nothing leave. (M.)

But men in a natural state cannot only repel some danger in the present, but, after it has been thrust off, they can also proceed against their aggressor until they are satisfied that they have nothing to fear from him in the future. Now in the matter of this security, the following observation must be made: If any one, after injuring me, is at once led by remorse to ask forgiveness, and to make amends for the damage,

I am obligated to be reconciled to him, and I may not properly demand any further security from him than a renewal of his promise. For the fact that he repented of the act of his own accord, and voluntarily came to seek his pardon, constitutes a sufficient proof of his full intention to do me no further harm. But when repentance has been wrung from a man by force, and he has been brought to seek forgiveness only after his powers of resistance have been exhausted, his mere promise appears to be slight security. Therefore, with such a man, either his power to do harm must be taken from him, or some other restraint must be laid upon him, so that in the future he may not be an object of fear to us, since his malice, once expressed and not properly reformed, has made him an object of constant suspicion.

4. But that which is lawful for those who live in natural liberty, and who secure their safety by their own strength and on their own judgement, is by no means allowed those who live in states, especially in relation to their fellow-citizens. For they are required so to restrain a violent self-defence against citizens, be they such permanently or temporarily, as to make use of it only when time and place do not
187 allow them to seek the aid of a magistrate in order to avert that injury by which their life, and something as precious as life, or some irreparable good,¹ are put into instant peril. And yet even then one may only repel the danger, while revenge and security that there will be no repetition of the offence in the future, are left to the decision of the magistrate. For although laws are otherwise supreme in states, and, as Cicero, *On Laws*, Bk. III [xviii], says: 'Nothing is so contrary to law and right [. . .] as to carry anything by violence and agitation in a sound and constitutional government,' yet only in a case of this kind, and 'when arms are raised are they silent, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment'. (Y.) [*For Milo*, iv.] Add Gellius, Bk. IV, chap. xiv; Quintilian, *Declamations*, xiii [11]: 'For this reason we received officials and laws from our ancestors, namely, that no man should be the avenger of his own grievance; and if private revenge is going to repeat crime, endless occasions for wicked deeds would confute themselves.'

By such principles as these it is easy to settle the questions, which are raised by writers at one time or another, as to the degree of innocent self-defence.

5. Some have raised the question, whether an assailant may be repelled in a way that involves his death, who had intended not to attack me but some one else, and who had no evil intent upon me. On this point Grotius, Bk. II, chap. i, § 3, lays down the fundamental

¹ [For *damnum* read *bonum*, as Pufendorf himself corrected the sentence in the *De Officio Hominis et Civis*, I. v, § 16.—Tr.]

principle, that the right of defence primarily and *per se* arises from the fact that nature commends every man to himself, and that therefore he cannot avoid making every endeavour to secure his own safety, but not from the injustice and sin of him by whom the danger is threatened. And so the innocence of my resistance is established by the fact that the other man had no right to attack and kill me, and I was under no obligation to meet death without resistance. Furthermore, since the love of self far surpasses all other considerations in such a situation, a man, when exposed to equal danger with another, if he follows the law of nature cannot do other than look out for himself rather than for another; and since I do not deserve the danger brought on me by another, it is for that reason less odious that the damage turn back upon its author.

After this much has been established it is easy to decide the particular cases which can be given on this score. For if a madman, or some one excited by nightmares, or a lunatic (such men as are said to walk armed through the streets at night), should threaten me with death, inasmuch as he has no right to attack me, and my life is quite properly my own foremost interest, there is no reason why I should place my safety second to his. But this, of course, is based on the supposition that I was able to avoid the threatened danger in no other way, a point which is not so carefully observed in the case of those who attack me with evil intent. The same can be said of the man who, while acting with good faith in the capacity of a soldier, makes the mistake of attacking me as an enemy. For since an enemy could also resist him why should I, who am not at war with him, be expected to offer him my throat? And it is a witness to his imprudence that he forces a friend to take the guise of an enemy, when he should have known against whom he had to make war. The same rule can be applied in the case of the man who was going to lie in wait for his enemy, and falls upon me by mistake. For why should I, because of the aggressor's error, be put into a worse condition than some other person against whom he perhaps had good reason to be angered? In fact the aggressor is guilty of breaking the *Lex Cornelia de Sicariis*.¹ For whatever error there was in the person, there was none in the undertaking, and he had the desire and made the attempt to commit murder. Add *Digest*, XLVII. xviii. 18, § 3; Grotius, *Sparsio Florum*, on *Digest* XLVIII. viii. 14.

6. As a guide for their exercise, cases of innocent defence commonly require a danger that is at hand, and, as it were, right upon one, and they do not allow a mere suspicion or uncertain fear to be sufficient cause for one person to attack another. Indeed, on this point, no entirely accurate distinction is made between natural liberty and civil status. For although in both the so-called point of danger is only intelligible with some latitude, nevertheless, to those living in natural liberty, a far

¹ [The most famous of the Roman murder laws.—*Tr.*]

greater range is allowed, in which to exercise a violent defence, than in the case of those whose safety is encircled by the protection of states.

Now since we are obliged by nature to cultivate peace with others, it is assumed that every one will meet that obligation, unless he is shown by clear signs to be contrary minded, and unless it is clear that he will not obey sound reason, which urges him to this course. But since a great part of mankind is prone to break this obligation, whoever cares for his safety will early surround himself with innocent means of defence, as, for instance, block up the passage before those who plan hostile acts, store up arms and like munitions to repel an attack or deliver an assault, find allies for himself, carefully observe the undertakings of others, and take similar precautions. For that state is properly considered wise which thinks of war even in time of peace. And although for the innocent a great defence has been established in divine providence, yet it is idle for the man who sinks into sluggishness, and takes insufficient thought for his affairs, to expect interventions from heaven on his behalf. Nay, even we who live in commonwealths, where our property is protected against thieves and ruffians by the secure sanction of penalties, hold it a fault of the head of a household if he fails to close the doors at night and to make fast his chests and closets. So the Romans used to seal with their signet ring even the most ordinary utensils against the thievery of their servants, although they had over them the power of life and death. See Tacitus, *Annals*, Bk. II, chap. i.

Now although no real injury is done another by such uses of defence, still, if I am to attack another under the name of my own self-defence, signs are required, forming a moral certainty, of his evil design upon me, and intention of harming me, so that, unless I anticipate him, I may expect to receive the first blow. Among these signs, whereby I secure the right to use force on my own volition, there should by no means be included a man's mere power, unusually outstanding and far above our own strength, especially when it has been increased by his own proper industry, or the kindness of providence, with no oppression of other men. It would be inhuman malice to envy one the resources he had gained in such a way, or to work for their destruction. And certainly it is crude reasoning for some to insist that he who has the power to harm us also wishes to; therefore, cut him down without any further reasons, if you value your safety. Surely such a principle destroys every kind of social life among men, and those who are quoted as authority for it are either unfit to be listened to, or else they are writing of innocent precaution, or of such as have given sufficient proof of their design to do harm. And to the saying of Cicero, *Letters to Friends*, Bk. XI, letter xxviii: 'Why, even slaves have always been free to fear at their own will rather than at the behest of another' (S.), is

opposed the no less acute remark of Vibius Crispus, in Quintilian, *Institutes of Oratory*, Bk. VIII, chap. v [15]: 'Who has given you permission to be so much in fear?' (W.) And Cicero himself says, in the oration, *For Tullius*, as quoted by Quintilian, Bk. V, chap. xiii [21]: 'Who has ever laid down such a maxim, or to whom could it be permitted without danger to the whole community to kill a man because he says he is apprehensive of being killed by him?' (W.) Nor should the sin committed by one man or another be used as a rule of conduct. Add Alberico Gentili, *De Jure Belli*, Bk. I, chap. xiv. Yet, since a man may make a wrong use of his power, innocent precautions, as they are called, should be taken early.

But even if a person shows the desire as well as the ability to work harm, still even this fact gives me no immediate reason to proceed against him, if he has not yet put his purpose into action against me. For because a man has harmed others is no sufficient proof that he will also harm me, especially since special reasons, which are not to be found in my case, may have incited him against others. And an injury done to another does not give me as yet a sufficient reason to attack the aggressor, so long as the injured person, as well as the aggressor, are bound to me only by the ties of humanity. Although it may well be that I am under a special obligation to the injured party, when, for instance, I had agreed upon his plea to lend him my aid. Indeed, it most highly accords with the nature of social relations, for one person, although visited with no injury, to be able to agree to add his strength to that of another, in order to ward off from him an unjust act of violence, although he is also united by the common bond of humanity with him from whom the wrong arises. For with those who have no concern in the matter, the receipt of an injury should always solicit their sympathy or aid, and the infliction of an injury their disapproval; since the position taken in *Exodus*, ii. 14, obtains only in a civil status. But if there be added a well-grounded suspicion that the man, after making away with another, will also turn upon me, and employ his first success to the advantage of his next attempt, I should make all the greater haste to answer the call of the victim, since his preservation makes secure my own safety. And a man is wise if he strives to put out a fire in his neighbour's house, lest, when it has burned down, the fire pass to his own dwelling. 189

And, indeed, when it is established by clear proofs that a man is intent upon doing us some injury, even though he has not yet made any open attempts to do so, those who live in natural liberty shall be at once allowed to undertake violent self-defence, and anticipate the obvious wrong, provided there be no hope that, when he has been approached as a friend, he will put off his evil intention, or that such an appeal will be detrimental to our own interests. For no one is obligated to wait for

or to receive another's attack, so that he may base the justice of his violent defence upon the plea of necessity. And so, in such circumstances, that man should be regarded as the aggressor who makes the first move to employ violence upon another, or who was the first to conceive the plan of harming another, and prepare himself to put it into execution, although the other, on observing his preparations, may have used dispatch, and done away with him while he was delaying his plans. For self-defence does not require one to receive the first blow or only to elude or ward off the blows which are aimed; but he also is entitled to the claim of self-defence who anticipates a person that is still planning offences. Demosthenes, *Philippics*, III [17]: 'For whoever contrives and prepares the means for my conquest is at war with me, before he casts a dart or draws the bow.' (K.) Thucydides, Bk. VI [xxxviii]: 'For the thoughts of our enemies must be punished before they have ripened into deeds. If a man does not strike first, he will be the first struck.' (J.) Procopius, *Persian War*, Bk. II, chap. iii [50]: 'For they break the peace, not who may be first in arms, but they who may be caught plotting against their neighbours in time of peace. For the crime has been committed by him who attempts it, even though success be lacking.' (D.*) Philo Judaeus, *On Special Laws* [III. xv]: 'One must not only look upon those people as enemies who fight against us by sea or by land, but also those who are prepared¹ for either kind of warfare.' (Y.) Add Alberico Gentili, *Pleas of a Spanish Advocate*, Bk. I, chap. ix; *Law of the Visigoths*, Bk. IX, tit. iv, chap. 6.

7. But, as a matter of fact, an equal licence is by no means allowed those who live in states. For they can always repel of their own accord an invader, when their concern is with a stranger, but they cannot attack him while in preparation, or seek revenge after he has inflicted an injury, without orders from their sovereign, lest the state by chance be embroiled in an untimely war. And the same rule is to be observed with far greater care in regard to a fellow-citizen. For I am under no circumstances to attack the latter, if I hear he is preparing to injure me, 190 or if I find him making fierce threats, but he should be haled before our common sovereign, and made to give bond to keep the peace. If he refuses to do this, then it will be proper for me to secure my safety in the same way as if I were living in a state of natural liberty. And so those moralists are highly absurd whom Grotius, Bk. II, chap. i, § 5, quotes to the effect, that 'A man can be lawfully killed if it has been ascertained that he has formed a plot, or is preparing an ambushade, or that he is putting poison in our way, or that he is making ready a false accusation and false evidence, and is corrupting the judicial procedure'. (K.) Nor is their absurdity in any way relieved by their added restriction, 'if the danger cannot be otherwise avoided, or it is not

¹ [Pufendorf's 'are preparing' is incorrect.—Tr.]

sufficiently clear that it cannot be avoided,¹ since, indeed, a little delay may point the way in many instances to a number of means of escape, and to many chance happenings, while many a thing can occur between the cup and the lip. They must surely suppose¹ a civil state, since unjust sentences, accusations, and testimony can be found only in a state. But if we give citizens, in resisting such things, the right to inflict death, what need will there be of a magistrate? Nor, as a matter of fact, is a man in any danger of being condemned if he can prove that a calumny has been invented against him. But if a person cannot satisfactorily prove all this, and chooses none the less to have recourse to slaughter, he will in no wise escape the penalty of the *Lex Cornelia*. But if a man is being actually attacked by force, and is reduced to such extremities that he is unable to call the help of a magistrate or of other citizens, then he may, in order to ward off from himself the onslaught of his assailant, go to any lengths against him, not, however, with the intention of securing revenge for the injury by his death, but only because his own life cannot be snatched from its present peril without killing him. And so, after the danger is avoided, it will not be allowable for him to pursue his assailant, and to cut him down in flight. See *Digest*, XLIII. xvi. 3, § 9.

8. From all this it is evident that in states the time for making an innocent defence is set within very narrow bounds, and even reduced to a point, yet not without some latitude, in which a slight excess is scarcely noticed by the judge. And so, although a discerning judge may easily reach a decision on the innocence of the defence, from the circumstances of each case, yet it seems possible to lay down the general rule that the beginning of the time at which a man may, without fear of punishment, kill another in self-defence, is when the aggressor, showing clearly his desire to take my life, and equipped with the capacity and the weapons for his purpose, has gotten into the position where he can in fact hurt me, the space² being also reckoned as that which is necessary, if I wish to attack him rather than to be attacked by him. For instance, if some one rushes at me with a drawn sword, and there is sufficient evidence that he wants to cut me down while I have no sure place of refuge, but am armed with a gun, I have a right to fire at him while he is still at some distance, and cannot yet reach me with his sword, lest I should be unable to use my weapon if he got too close. And the same is more true of bows and similar weapons, which are of no use in too narrow a space.³ Also, if a man rushes up with the intention of killing me, armed with weapons of shorter range, while I have one of longer range, I am not expected to wait until he comes within a space where he can reach me with his weapons, but before he reaches

¹ [For *sopponunt* read *supponunt*.—Tr.]

³ [For *spacium* read *spatium*.—Tr.]

² [For *spacio* read *spatio*.—Tr.]

that point I will be allowed to receive him with my weapon. This is what the Roman law calls 'to meet a danger in time, which is held to be better than to seek revenge after its consummation', *Code*, III. xxvii. 1. And this space¹ of time for innocent defence lasts until the aggressor has been repulsed, or has retreated of his own accord, either
 191 because he has been struck with repentance at the very moment of his deed, or because his attempt has miscarried—supposing his sword has been broken, or his gun has missed fire, or he has not hit his object—so that for the moment he is no longer able to do any damage, and we have a chance to betake ourselves to a place of safety. Because vengeance for an injury done, and a guaranty against the future, is the business of the judge. See *Digest*, IX. ii. 45, § 4.

Whatever citizens of a state run over this space of time in killing their aggressors cannot free their defence from all blame. And so there is no sense at all in the statement of Baldus, as given by Sichardus, on the passages from the *Digest* just quoted: 'If any one should even say to me, "When I meet you again, I am going to kill you," I am able to take his life without penalty, either at the time he makes his threat, or when it is most convenient for me.' For although I am not expected to wait until he tries to fulfil his threat, still there is another way, in a state, whereby I can and should protect myself from death, even when it is well known, from his previous record, that he is not over-precise in carrying out his threats. And this last condition is added by some in order to modify the opinion expressed by Baldus.

9. The statement, which some add here, that 'the killing of a person in self-defence is excusable only if the danger could not be avoided in any other way', should be interpreted not too strictly, but with some latitude which is allowed to the excited state of one's mind, usually brought on by the imminence of so great a danger. Such a state does not permit a person to survey all the ways of escape with the same care as is his who is free from danger, and enjoys a calm mind. And just as it is rash to descend from a safe place in order to meet a man who is threatening or challenging you, so, if a man attacks me in an open place, I am not expressly obligated to flee, unless there chances to be a place of refuge at hand to which I can retreat without danger, nor am I bound always to retreat. For thereby my back must be turned to him, and a misstep furnishes an added danger, while when once you have been thrust back a step it is not so easy to gain it again.

Nor is my defence faulty because I did not interrupt some undertaking which was enjoined upon me by my duty, or was within my liberty. So, for example, if I slay a man who attacks me, while I am in the street, and about my own business, I am by no means blameworthy, because I would not have run into any danger if I had

¹ [For *spacium* read *spatium*.—Tr.]

remained at home. For of what use would be the sanctity of the public security, or our liberty, if they could not be utilized because of unseen perils with which another may threaten us in his knavery?

The following remark of Theodore Balsamon, *Commentaria in Canones . . . et in Epistolas Canonicas*, canon 43, is certainly absurd: 'Whoever commits murder in defence of his person shall not suffer the punishment for homicide if he killed his assailant because the latter had given him a mortal wound or some similar hurt; but he shall be held guilty of murder if he dispatched his aggressor after he had received but a slight and curable wound.' And they have displayed an idle interest who have concerned themselves so anxiously with the question, 'whether an equality of arms is necessary for an innocent defence.' As if attackers always announce their assault beforehand, and what arms they will use, so that one may have time to get the proper arms! Or as if such defence should be carried on by the laws of gladiatorial combat, in which those who fight to the death in pairs for the sake of the spectacle that they afford, are armed with similar or equivalent weapons!

But it should also be mentioned, in this connexion, that a man cannot claim innocent defence as his plea if he has been challenged by another to a duel, since by putting in an appearance he is in a situation where he must himself die if he does not kill his opponent. For the laws forbade him to meet the danger. Therefore, in weighing such a case, no consideration is taken of the danger, while the man can properly be visited with the penalty for homicide as well as that which has been laid down only for those who engage in a duel.

10. The further question is often raised, whether it is lawful to kill a person who intends not to take one's life but only to mutilate one, 192 when his attempt cannot be repelled in any other way. This question can safely be answered in the affirmative when it concerns the natural state, for nature has commended the integrity of our members to us with so tender a sense that we cannot avoid protecting it in every way possible, and the mutilation of any part of our body, especially a more noble one, is regarded as not much less of a loss than that of life itself. Nay, by such a mutilation life itself is often endangered, and it cannot be always so clear whether the man will not go to farther lengths against me. A further point is, that the man who thus threatens me is my enemy who, so far as in him lies, has given me full licence against him. Moreover, in a civil state, laws scarcely seem to bind citizens to such non-resistance that they should allow themselves to be mutilated rather than go to the farthest extreme in repelling another's violence, especially since this patience seems too much for man's resolution. Surely it would be too much to demand it in favour of a malicious aggressor. But the prosecution for such an injury, when once received, is to be left to the magistrate.

11. On the same plane with defence of one's life is held by practically all people that of one's chastity, which may properly be preserved even to the death of its violator. Such great favour is accorded chastity, because its preservation is held to be the greatest glory of women, while their weakness is an added consideration which must be defended by every possible means against the baseness of foul-minded men. Quintilian, *Declamations*, cccxlix: 'You forced a girl to an injury than which war has nothing more severe.' And since legislators in states might properly inflict capital punishment upon the debauchers who use force, they saw fit also to allow all virtuous women to defend, even to the death of their violator, that which once violated cannot be recovered. Among the Hebrews, as Selden, Bk. IV, chap. iii, tells us, such indulgence was shown to the defence of one's body and chastity, that not only might the person attacked repel the assailant to his death, but also a second party might defend the innocent person, and even kill the assailant, and this not merely if a person's life was in danger, but even if the assailant were seeking to commit sodomy, or to assault one's betrothed. See *Law of the Visigoths*, Bk. III, tit. iii, chap. 6: *Constitutiones Sicularum*, Bk. I, tit. xxii. For this reason the decision of Gaius Marius was highly praised, because he freed, and crowned as well, a soldier who had killed Marius' own nephew, a military tribune, when he made improper advances to him. Plutarch, *Marius* [xiv, p. 413]. Plato, *On Laws*, Bk. IX [p. 874 c]: 'Any one who does violence to a free woman or a youth shall be slain with impunity by the injured person or by his or her father or brother or sons.' (J.) Augustine, *On the City of God*, Bk. I, chap. xviii, says: 'The purity of the body is not lost so long as that of the mind remains, even though the body suffer violence,' (add Gratian, *Decretum*, II. xxxii. 5. 1, 4; Plautus, *Amphitryo* [1142]: 'She has done naught to merit thy reproach: my power was on her.' (N.) Seneca, *Hippolytus* [735]: 'No circumstance but will can make impure.' (M.)) But it does not follow from this that violent debauchers cannot be repelled by any means at one's disposal, just as it does not follow that, because a pious man, after death, is translated to a happier life, he should not oppose a highwayman with all his might.

Here we may well note, however, that, as Lysias, *Orations*, i [33], says, by Attic law the man who seduced a woman by persuasion was more severely punished than he who used force. He adds as the reason:

For those who achieve their purpose by means of violence, the Athenian law thought, would be hated by their victims; but those who use persuasion so corrupt the minds that wives become addicted to them rather than to their own husbands, and they control the whole household, and make it impossible to tell whether the children are sons of husbands or of adulterers.

193 Libanius, *Declamations*, ii. 193 [iv. 71]: 'It is much more wicked to persuade a woman to unchastity than to force her to it by violence.'

12. There is also a famous question, whether the danger of receiving a box on the ear, or a similar affront, gives the right to kill the offender. Now Grotius, Bk. II, chap. i, § 10, thinks that it 'does not offend expletive justice'. His position is as follows: Inasmuch as expletive justice is violated, when something to which a man had a complete right is not given him, or something is done him which he had as complete a right not to receive, he who is killed, because he threatened to box another's ears, cannot complain that expletive justice has been violated in his case. For whoever injures another has in himself no longer any right to keep the most extreme penalties from being visited upon him by the other party; or, in other words, he gives the injured person the fullest right against him, although other considerations may often prevent a person from using his right to the full. Nor is it possible for others to urge, as an objection, that equality which should otherwise be observed in justice. For equality prevails chiefly in the exchange of commodities, and the distributions of what belongs to several. But ill deeds, which are mutually exchanged as if war prevailed, are not generally referred in detail to equality, nor need they be. And the statement of Grotius, that 'the way of killing in war should be patterned after the civil custom and manner of reparation and restitution', has the limitation 'in so far as this is possible', and so this moderation does not arise from any right, which inheres in the foe, but from the generosity and virtue of his opponent. Grotius adds further: 'Charity as such does not obligate us to swallow¹ such an insult in favour of the offender,' although² 'the teaching of the Gospel does not permit that an injury³ of this nature be repelled by such violent means.'

Now we have shown above that, in a natural state, a person cannot be expected to endure even a moderate injury, and especially a repeated one, without using extreme means to repel it. It is told of even the most upright king that he avenged by a war of annihilation an insult offered to his ambassadors. 2 *Samuel*, x. 4 ff.

But there is grave doubt whether to kill a man in repelling a box on the ear may properly be permitted in states. To be struck on the ear is, indeed, a very great offence, the reason apparently being that among many peoples of Europe that is the treatment of servants or of those who are subject to some menial restriction. Therefore it is the custom in many places to give those who receive the right to carry arms, or who leave the rank of apprentice, a box on the ear, so that they will be reminded of their former estate, and recognize that from then on such treatment no longer befits them. Therefore a box on the ear involves the greatest indignity, as if one who bears arms were unworthy

¹ [For *de vorandam* read *devorandam*.—Tr.]

² [For *iniuriatam* read *iniuria tam*.—Tr.]

³ [For *Venum* read *Verum*.—Tr.]

to do so or is not to be reckoned among free men. But it is to be noted at this point that such a blow does not appear to be an insult unless it is given before a person has prepared himself to receive it, for it is a mark of servants, and those still unable to carry weapons, to have to offer their face to blows. Therefore, it will not, properly speaking, be a blow of this kind if men in a quarrel strike one another in the face, or if one is hit in the face while his guard is up. And so it is scarcely clear how a man who is bearing arms, and has them ready for his defence, can receive such a blow as an insult.

Furthermore, it cannot be that a man's honour is touched by an affront of this kind, for one's honour would surely be in a precarious state, if it lay exposed to the whim of any impudent fellow. And whatever contempt is to be found in such an act, can easily be removed or compensated for by the magistrate, in imposing a heavy fine on the offender, and making him show in public some marks of respect to the man whom he has affronted. As to the reputation for bravery, which the common sort feel injured by such an affront, especially if offered to soldiers, such reputation is not maintained only by a private sword-bout, or some man-to-man affray. For that man is sufficiently brave
194 who maintains with all his might the station assigned him by the state, and there are opportunities to show one's bravery far more splendid than those that come by losing control of one's anger, contrary to reason and the laws of the state, or by running the risk involved in useless fights. But if, as often happens, the sword is suddenly drawn at such an affront, and the man with whom the injury began is badly wounded, or killed, in the ensuing struggle, it is reasonable that a relatively light penalty be imposed on the other person. But the position maintained by some should by no means be allowed, namely, that it is not only right, in avoiding a box on the ear, to kill a person, but that the second party can even kill the first in order to recover his honour, if the man has fled after the blow was given. See Boecler on Grotius, *loc. cit.*

But it should be added that, although things ought to be measured by the judgement of wise men, and not by that of the mass of mankind, still, if in any state deep disgrace attends any special kind of injury, those who inflict it upon others should be visited with the most severe punishment, since not all men have enough strength of mind, nor will the standing which many have in a state permit them, to be an object of contempt and ridicule in the eyes of a majority of the citizens. And so I do not see how the magistrate can have the right to be angered at any who maintain, in a time-sanctioned manner, the regard accorded them by the crowd, when they have experienced in addition such injuries as greatly detract from their esteem in the public mind. And hence the magistrate who would forbid duels and combats of individual

citizens must enact the most severe penalties against those who give another a cuff on the ear, or give him an insult to which especial disgrace attaches in the state. For the custom of civil life does not support the refinement of Grotius, to wit, that, since 'honour is an opinion of excellence, and he who endures such an injury shows himself excellently patient, it follows that he increases rather than diminishes his honour'. See *Acts*, xvi. 37.

13. From what has been said, it can be understood whether one who is attacked by another is required to flee, if possible, and so the killing of the assailant is not lawful, unless every means of flight has been cut off. Here it is clear that in a state of nature no right belongs to the assailant, by which the other man is required to avoid his attack by flight. For even when flight is preferred to a combat, it is not for the sake of the attacker, but because it seems more convenient for the person attacked; 'feet are the weapons of hares' says Oppian, *The Chase*, Bk. IV [35]. Therefore, since commonwealths in their relations to one another are in a natural state, no one would maintain that when, for example, one king unjustly attacks another king, the latter is obligated, if possible, to take to flight, lest he kill some of the attacker's troops, if he offers resistance.

But in civil governments flight is to be preferred at all times, if it be possible, to the killing of the aggressor. There is, indeed, no disgrace in such a flight, nor is it unworthy even of a military man, since it is not resorted to because of cowardice, or neglect of duty, but because reason finds no ground for a display of bravery in such a case, if a citizen, from whom a magistrate can easily make me secure, has to be killed unnecessarily. But we have added that recourse must be had to flight, *if it be conveniently possible*. For it cannot be believed that a man must always turn his back to his assailant, or retreat before him, since the former course exposes him to wounds, and by the latter, danger threatens him in a misstep, while once we have turned, we are more exposed to dangers; and when a person has once begun to flee, if perhaps he has no further space¹ left for retreat, or his assailant runs more rapidly than he, he cannot so easily take up a position to meet the charge of his adversary. Therefore, when there is no place of refuge near, to which one can safely withdraw, a man who opposes his breast to the assailant, rather than lay himself open to his blows by flight, has not overstepped the bound of innocent self-defence.

Finally, Grotius, *loc. cit.*, properly censures those also who claim that 'a man may properly be killed if he has said something about us 195 which may be held to have injured our standing among upright people'. As if, should he say what is false, there is no better way to wipe out the stain made by his calumny, or, should he advance what is true, crimes

¹ [For *spacium* read *spatium*.—Tr.]

should be kept hidden by committing other crimes! How much better is the counsel of Plato, *On Laws*, Bk. IX [p. 872 c]:

If any one kills a slave who has done no wrong, because he is afraid that he may inform of some base and evil deeds of his own, or for some similar reason, in such a case let him pay the penalty of murder, as he would have done if he had slain a citizen. (J.)

14. Now the above conclusions are very easily deducible from reason. But there are those who raise some scruple at this point, on the ground of the ordinances of the Christian religion, maintaining that, although it is permissible to kill a man who has no right to threaten your life, nevertheless more praiseworthy will be the conduct of the man who prefers to be killed rather than to kill. The reason for this is that, if the man is killed while committing a mortal sin, he incurs the danger of damnation; and that it does not seem to accord with justice for an injury against us to be repulsed by a greater one against another.

Now although the solution of this difficulty is the task of others, still those who wish to raise the question should bear in mind that there is no leisure in a time of such consternation, or in the heat of a struggle to the death, for one to examine with some care considerations of such a nature, since all his thoughts are centred on how his impending death can be avoided. Furthermore, the man who is attacked is not always so well prepared that he does not feel that he needs some time¹ to compose his spirit and adduce reasons for his conduct; in other words, 'that he may collect his baggage before he journeys forth from life', as Varro, *On Farming*, Bk. I, chap. i, puts it.

Furthermore, it hardly seems probable that I ought to be more concerned about the soul of another man than he is about my own. And so, if he threatens my life without concern for his own soul, why should I ransom his soul at the cost of my most precious possession, and an irreparable one as well? Pliny, *Letters*, Bk. II, ep. x: 'It is not altogether prudent in any man to expect from others what he will not do for himself.' (B.) This is especially true when it is not certain whether he will escape condemnation anyway even if he is not killed at this time. And it is generally accepted that no concern is paid to a danger into which a person rushes at his own fault, and from which he can extricate himself whenever he wishes. And in this case no danger, at least for the present, threatens his soul, provided he stops attacking me in this wilful fashion. Surely, moreover, that opinion gives a greater advantage to villainy than to piety, for by it a man is made, as it were, inviolable; since upright men would always be forced to offer their throats to villainous robbers, lest the latter, if resistance be offered, run the risk of eternal damnation. Compare Grotius, Bk. I, chap. ii, § 8, and chap. iii, § 3.

¹ [For *spacio* read *spatio*.—Tr.]

The saying of the Saviour, whereby we are commanded to 'love our neighbour as ourselves' seems capable of explanation, not so much by the degree of love, as by its sincerity, in that no one gives himself a false or counterfeit love. And the expression 'as thyself' seems to be a kind of proverbial expression, referring to a sincere and strong love. See 1 *Samuel*, xviii. 1, 3. But it is by no means to be inferred that, if love for oneself and one's neighbour cannot be satisfied at the same time, the former is to yield to the latter. See 2 *Corinthians*, viii. 13; Cicero, *Tusculan Disputations*, Bk. III [xxix]:

There is something excellent in this, and no less just than true, that we love those who ought to be most dear to us as well as we love ourselves; but to love them more than ourselves is absolutely impossible; nor is it desirable in friendship that I should love my friend more than myself, or that he should love me so; for this would occasion much confusion in life, and break in upon all the duties of it. (Y.)

Nor does it follow from *Exodus*, xxiii. 4, 5, and *Deuteronomy*, xxii. 4, that charity for one's neighbour should take precedence over our own advantage. For you cannot by any means conclude that, if our ass also has fallen into a ditch, we should help out another's ass rather than our own; or that we are bound to aid him, when the business 196 which must be neglected in rendering such assistance is more important than the ass itself. And besides, it may well be questioned whether a person who assaults one in the manner described may come under the designation of a neighbour. See *Luke*, x. 29 ff., where by a neighbour is understood every man who has need of our help and whom we have an opportunity to assist.

Lactantius, *Divine Institutes*, Bk. VI, chap. xviii, criticized Cicero because he had said in his *On Duties*, Bk. III [xix]:

A good man is he who serves whom he can, and injures none except when provoked.¹ (Y.)

Oh, how he marred (says Lactantius) a simple and true sentiment by the addition of two words! For what need was there of adding these words, 'unless provoked by injury'? . . . He said that a good man would inflict injuries if provoked. Now he must necessarily lose the name of a good man from this very circumstance, if he shall inflict injury. For it is not less the part of a bad man to return an injury than to inflict it. For from what source do fightings and contentions arise among men, except that impatience opposed to injustice often excites great tempests? But if you meet injustice with patience, than which virtue nothing can be found more true, nothing more worthy of a man, it will immediately be extinguished, as though you should pour water on a fire. (C.)

Now as unnecessary combats, which could well be avoided, often arise through the unwillingness of the injured person to submit, so also wickedness is not always cured when submission is made. Nor does the virtue of patience, recommended so highly to Christians, constitute an obligation to undergo any and all kinds of injuries. He who strictly defends himself does not do it directly in order to injure another, but to preserve his own life, while it is not the man who repels a wrong,

¹ [The actual words of Cicero were: 'except when provoked by injury.'—Tr.]

but the one who does it, that inflicts an injury. It is one thing to maintain an innocent defence, and another to plan an inhuman revenge. The latter can be considered as great an offence as to undertake some injury, the former cannot.

Furthermore, those who maintain that it is more praiseworthy to be killed than to kill add this exception: 'Unless the person attacked is a more useful person than the attacker.' But surely, at a moment of such peril, there is scarcely time to concern oneself always with the fine distinction as to which person is the more useful to the larger number of persons, and whether those who are dependent upon me need my services more than those who are dependent upon my assailant need his services. And it is, indeed, quite certain that the man, on whom the safety of many depends, and whose duty it is to guard others from attack, should not give up his own life in sparing an unjust assailant, even though he should be a man of such equanimity as to feel, like Piso, that 'it is as grievous to kill as it is to perish', Tacitus, *Histories*, Bk. I, chap. xxix; for by his own death he destroys the safety of many. Such are they who accompany travellers as their guards; likewise princes, commanders of armies, and others whose death brings after it the destruction of many persons. To them apply the lines of Lucan, Bk. V [685 ff.]: 'Since the existence and the safety of so many nations depend upon this life of thine, and the world so great has made thee its head, it is cruelty to wish to die.' (R.) So also the words of the friends of Alexander in Curtius, Bk. IX, chap. vi [8]: 'What god can promise us long duration of this mainstay and star of Macedonia, when you so often greedily risk your person in obvious perils, forgetting that you are thus exposing to grave risk the lives of so many of your fellow citizens?'

But it does not follow from this that, if the safety of no one, or of but a few persons, depends upon a man, he may not rightly kill an assailant whose life is perhaps of concern to a larger number of persons. On this score an unmarried man, or one without children, would never be able to kill an assailant who has a family, for fear that the latter's children and wife should be left alone and in want. And if some regard for his own wife and children was unable to restrain such a man from committing a crime, why should another man be expected to alleviate their privation at the cost of his own life? Still, the conclusions of Plato, *On Laws*, Bk. IX [p. 869 v c], are worthy of consideration: 'A son, even in defence of his life, and when about to suffer death at the hands of his parents, is allowed by no law to kill his father or his mother, who are the authors of his being, but is commanded to endure any extremity rather than this.' (J.*) He adds a little further on [p. 869 c]: 'If
197 brother kill brother in a civil brawl, or under other like circumstances, if the other have begun, and he only defended himself, let him be free

from guilt, as he would be if he had slain an enemy.' (J.) But the following law which he adds is to be charged against the defects of the age in which he lived [p. 869 D]: 'If a slave have killed a freeman in self-defence, let him be subject to the same law as he who has killed a father.' (J.)

15. It is clear from what has thus far been said, that a murder within the limits of innocent defence casts no blemish upon the perpetrator, and so incurs no penalty. Nor does it belong to the class of deeds for which, although wrong in themselves, human law, in consideration of the violence of human passions and anger, allows impunity, as a husband is allowed to kill an adulterer. See *Digest*, XLVIII. v. 20, 22, 24, 32, and Lysias, i, *Pro Caede Eratosthenis*, where he shows that the Attic law allowed the killing not merely of him who was discovered with one's wife, but even with one's concubine; and, indeed, whoever was caught with one's mother, sister, or daughter, as is shown by Demosthenes, *Against Aristocrates* [lvi], where the reason is given:

In defence of those for whom we fight with the enemy, to protect them from insult and indignity, the law allows us to kill even our own people, if they insult and outrage them contrary to law. For since there is no race of friends and foes, but it is their actions that make the one and the other, the law permits us to punish as enemies those who commit acts of hostility. (K.)

Among the Persians, if a man has killed his wife along with the adulterer, he receives a new garment as a reward, Olearius, *Itinerarium*, Bk. V, chap. xxii. Add Valerius Maximus, Bk. IX, chap. i, § 13; Antonius Matthaeus, *De Criminibus*, III. iii. 13 ff. on *Digest* XLVIII.

But if, therefore, somewhere any penalty or expiation has been laid upon those who have justly killed some one, it either has no relation to death inflicted in innocent defence, or it was introduced without reason; or else it was formulated to the end that it might be understood how great a crime it is to shed human blood in unjust murder, since even the justifiable taking of life seems to need some satisfaction. Philo Judaeus, *Life of Moses*, Bk. I [lvii], writes that Moses is said

to have commanded the high priest to purify the men who had just returned from fighting with the enemy; for even though the slaughter of the enemies of one's country is according to law, still he who kills a man, even though justly in self-defence, and because he has been attacked, still appears to be guilty of blood by reason of his supreme and common relationship to a common father; on which account those who had slain enemies were in need of rites of purification, to cleanse them from what was looked upon as a pollution. (Y.*)

But the benefit of an asylum, which involved the punishment of temporary exile, does not seem to have served the man who had undertaken to save his life by killing his assailant, but only the one who had committed involuntary manslaughter, yet such as he could have avoided, had he shown due diligence. *Numbers*, xxxv; *Deuteronomy*,

xix; 1 *Chronicles*, xxix. 3, has nothing to do with defence, while David seems to have been forbidden to build the temple, not so much because he had received any stain from the slaughters of war, as because he who had secured for himself so much glory from war should not deprive his son of the opportunity to gain fame by the achievements of peace.

The scholiast to Euripides, *Orestes* [820] [Homer, *Odyssey* XI. 109, etc.], says that it was an old custom among the Greeks, for those who had justly killed a person, to raise their sword after the act to the sun, in proof of their innocence, as if he who 'sees all things and hears all things' were called to be a witness to their deed. And yet these same persons were in need of some expiation, and were required to undergo a year's exile. An instance of such an exile is in Plato, *On Laws*, Bk. IX [pp. 865-6]; see *Digest*, XLIX. xix. 16, § 8, and Grotius, *Florum Sparsio*, ad loc. cit. In Athens, also, cases of murder, which a man maintained he had committed justly, were tried in a special court called the Delphinium, from the temple of Apollo Delphinus, as is told by Demosthenes, *Against Aristocrates*, and the scholiast to Aristophanes, *Equites*. Also among the Ethiopians, whoever had committed an involuntary homicide was exiled, until he had been purified by the Gymnosophists. See Philostratus, *Life of Apollonius of Tyana*, Bk. VI [v]. In Vergil, *Aeneid*, Bk. II [720 ff.], Aeneas says: 'It would be a heinous sin for me, just come from so bloody a war and from recent slaughter, to touch <the holy objects>, until I have washed¹ myself in a running stream.' (B.) In Canon 18 of the Council of Nantes, held under Pope Formosus,² the question is thus treated:

If any one by accident and without intention has committed homicide, let him repent for forty days on bread and water, and after this term let him be separated for two years from the public prayers of the faithful, and let him not communicate or offer; after two years let him offer in public prayers, but not communicate; after five years let him be received into full communion, but let the abstinence from meat continue at the discretion of the priest.

But not even this canon would be concerned with defence, and is perhaps more rigorous than is just. In the same way the matters in the *Laws of the Lombards*, Bk. I, tit. ix, chap. 19, and *Capitularies of Charles*, Bk. IV, tit. xxvii; Bk. VII, tit. ccxcv, it would seem, need not necessarily be applied to that homicide which is within the bounds of innocent defence, or, if they do, they stand properly convicted of too great severity. De Mornay, also, on *Digest*, I. i. 3, says that to this day judges in France most carefully observe the rule that defendants in trials of this sort are almost never acquitted without at the same time being condemned to make special contributions to the poor, or sometimes also Christian offerings for the soul of the dead person. This last seems to smack somewhat of superstition;

¹ [For *Abulero* read *Abluero*.—Tr.]

² [For *Formoso* read *Formoso*.—Tr.]

although it is reasonable that the necessity for such a homicide should be a cause of grief to upright people.

16. Now the defence of one's life and limbs, as well as of one's virtue, as being irreparable possessions, has so much in its favour that it is free also from the restrictions of the positive divine law regarding the Sabbath (see 1 *Maccabees*, i. 32 ff.; Josephus, *Antiquities of the Jews*, Bk. XII, chap. viii). For those who thought otherwise are not without reason held up to ridicule by Plutarch, *On Superstition*, and by Agatharchides, as Josephus, *op. cit.*, Bk. XII, chap. i, tells us. Add Grotius on 1 *Maccabees*, ii. 37. And so I wonder how the same writer, in his *Against Apion* [I, p. 1050 E], can feel that it was such a laudable thing for them to have set a lower valuation upon their own lives and their country's freedom than upon the observance of that law; unless you apply this judgement only to their intention.

Touching the defence of possessions, which are things that certainly can be restored, and are not all so absolutely essential to a man, the question may be raised whether extreme methods are to be employed in their preservation. For many would approve the words of Taxiles in Plutarch, *Alexander* [lix]: 'Why must we war and fight with one another, Alexander, if thou art not come to rob us of water or of necessary sustenance, the only things for which men of sense are obliged to fight obstinately?' (P.) Euripides, *Suppliants* [775 ff.]:

For the one loss is this
That never mortal maketh good again,—
The life of man, though wealth may be re-won. (W.)

The judgement and custom of all nations is clear on this question, since they allow a defence of one's possessions even to the death¹ of assailants. Nay, it is certain that most wars are fought so that others may be deprived, not of their lives, but of their possessions; and an enemy would cut a ridiculous figure if, in order to avoid being met with arms, he should maintain with all earnestness that he was come merely to carry off some property. Therefore, it is certain that to kill a man who undertakes to steal or destroy another's possessions involves no injury, even though such possessions cannot equal the life of a man. For in a natural state whoever threatens any kind of injury with evil intent becomes an enemy, and as such is protected by no law, inherent in him, against suffering the extreme consequences. And since another has no more right to take my possessions than to take my life, I also have no less right to defend them than to defend my life. Nay, since my life cannot be preserved without possessions, he who tries to deprive me of the latter, assaults the former as well. It is obvious also that civil society and the human race can in no way have security

¹ [For *necem*usque read *necem* usque.—Tr.]

and peace, unless they have the power to ward off by extreme means
 199 those who would carry off the things which men pursue with a very great love.

Now those who have perturbed themselves with great distress about this matter have rested their case on two hypotheses: first, that a just punishment should always be so nearly equal to the crime that the good of which the guilty person is deprived should be no greater than the injury or loss done the other party. It will be shown in another place that this is false. Second, that the damages done an unjust assailant in defence of oneself and one's property are properly speaking punishments, and so are managed according to the rules of vindictive justice. This likewise is false. For a punishment proceeds from a superior to a subject by reason of sovereignty, and its degree is set by a consideration of the public good. But defence is older than civil sovereignty and is found quite as much among peoples where no one has any sovereignty over another; while it is moderated by the instinct for one's own safety, and the necessity of preserving one's own possessions. But the natural licence of defence is markedly restricted among those who live in the same state, because the inner tranquillity of a state cannot continue if every one is granted the right to return hostilities for any kind of an injury. And so citizens may use violent defence only in so far as their natural liberty is not curtailed by the genius of civil society, as well as by civil laws. Now although a citizen may have been allowed, in beating off a fellow citizen who attacks him, to inflict greater harm than the assailant threatened him with (according to Demosthenes, *Against Aristocrates* [60], there was such a law in Athens whereby 'if any man resisting any unlawful seizure or violence shall immediately kill the aggressor, the law orders that the death shall not be punishable' (K.)); still the rule is that private citizens may not use extreme means in repelling injuries which are directed towards reparable things. For with little trouble and no confusion reparation can be secured by the exercise of public powers, but outside of states it can be secured from unwilling people only by means of war. And so there is no need for us to be so solicitous with Grotius, Bk. II, chap. 1, § 11, to balance off the object stolen against the life of the robber by favour toward the defender and hatred toward the robber. Unless we be willing to say with Boecler, *ad loc. cit.*, that, since it is usually very difficult to decide in such a case what was within or beyond the law, it is not repugnant to nature to show indulgence and overlook a murder of this sort. It is, therefore, enough in states if a person does not overstep the bounds of defence set by civil laws. But if this has been done, it does not constitute an injury to the assailant, but merely an offence against the civil laws.

But if a person is killed in stealing a reparable thing, will that not

be a sin against the law of charity? On this point we feel that there is only place for charity toward one who undertakes hostile acts if there is a lively expectation that by such means he can be moved to repent of his evil deeds and return to a life of peace. When this hope is shattered, he who spares an enemy is unfaithful to himself. But if reason persuades me that a possession, which is of little value, and therefore deserves no concern, should not be defended so zealously, let this not be out of any favour for the thief or robber, but because I would not go to so much trouble for a thing of little value, or because I would not seem too petty and avaricious.

17. At this point there should also be some discussion of that most famous law, as given in *Exodus*, xxii. 2, on the right to kill a thief who steals at night, but not one who steals in the daytime. This is like a law of Solon, which is thus stated by Demosthenes, *Against Timocrates* [cxiii, p. 735]:

If a man stole anything in the daytime of greater value than fifty drachmas, he might be taken off to the Eleven, and if he stole anything by night, it should be lawful to kill or wound him in pursuit or take him off to the Eleven, at the option of the party. (K.)

The reason for this law is given by Ulpian the Rhetorician [Scholia 200 to Demosthenes, *Against Timocrates*, cxiii, p. 735, l. 28]: 'For in the daytime a man can call for men to help him, but not at night.' Plato, *On Laws*, Bk. IX [p. 874 B]: 'If a man catch a thief coming into his house by night to steal, and he take him and kill him [. . .] he shall be guiltless.' (J.) The same law was written into the Twelve Tables [VIII. xii Bruns]: 'If any man commits theft at night and is killed, let his death be justified.' On this law Gaius remarks, *Digest*, IX. ii. 4. 1: 'The statute of the Twelve Tables allows any one to kill a thief who is caught at night, provided always the party gives notice of his intention with a shout.' (M.) Jacques Godefroy, *On the Twelve Tables*, observes that the last words, those about 'calling out', are an insertion of Tribonian. And that it was not in the Twelve Tables is proven by a passage in Cicero, *For Milo* [iii]: 'The Twelve Tables permitted that a nightly robber might be slain any way, but a robber by day if he defend himself with a weapon.' (Y.) M. Seneca, *Controversies*, Bk. X [vi]: 'The law which permits a thief by night to be killed in any fashion whatsoever, does not speak merely of a thief who has been convicted, but simply of a thief in general.' Gellius, Bk. XI [xviii], where he tells how Draco assigned capital punishment for thieves, but Solon required only double restitution, adds that the Roman Decemvirs¹ took a middle course between the severity of the former and the leniency of the latter: 'They permitted a thief taken in the act to be put to death, if he either committed the depredation in the night, or if, when taken, he defended himself with any weapon.' (B.) The Twelve Tables

¹ [For *Decem viros* read *Decemvirs*.—Tr.]

required an outcry only in the case of the thief by day, when he defended himself with a weapon [VIII. xiii Bruns]: 'If men commit theft in the daytime, and defend themselves with a weapon, call on your fellow citizens and raise a cry. If they be slain then, let there be no penalty therefor.'¹ Compare *Digest*, IX. ii. 4, § 1, where in the same way the word 'equally' was interpolated by Tribonian. Although it is not unlikely, as Cujas, *Observations*, Bk. XIV, obs. xv, recognizes, that in the course of time, and on the authority of experts, this law was in part made less severe. And that is clear from Ulpian, *Ad Edictum*, Bk. V, whose words are preserved entire in *Collatio Legum Mosaicarum et Romanarum*, first published by Pierre Pithou. These laws in an abbreviated form are given in *Digest*, IX. ii. 5. Add *Digest*, XLVIII. viii. 9.

The reason for this change may have been that some persons would rush out of their houses and attack passers by, afterwards alleging that they killed them when they were in the act of robbery; or because there is not so good a chance to rob houses that are close together and well fortified, so that a robbery is scarcely possible without some negligence on the part of the householder. Compare Justin, Bk. II, chap. ii, § 6. And so Cujas, *loc. cit.*, feels that this law of the Twelve Tables was no longer in force in cities and towns, but was maintained only in the country, basing his view upon *Code*, III. xxvii. 1. Although this last law does not concern thieves who endeavour to rob by stealth, but highwaymen and violent robbers, as is clear from the following reason: 'That they may find the death which they threatened, and themselves meet that which they were aiming at others.' However, this oft-quoted law is incorrectly explained by Sextus Caecilius, in Gellius, Bk. XX, chap. i [8], as applying to 'the treacherous violence of nightly plunderers'. (B.)

But the reason for the distinction between the robber by day and the robber by night seems to us to be mainly this: A robber by day may be caught, and the stolen property recovered, but this is not possible with a robber by night, when once he has made his escape from the building; nor can a man be recognized in the dark, nor, if he be, perhaps, recognized by one person, can he be convicted, while witnesses are not easily aroused from their beds. But in this statement that which seems to most people to cause the greatest difficulty is the assumption that, since the laws in question do not ordain capital punishment for robbers, it is absurd for greater licence against them to be allowed to private individuals than the highest civil authority has been willing to take to itself. We can reply to this that all the laws on the punishment of thieves presuppose that the thief is caught, and the stolen property

¹ [The only certain words in the Twelve Tables are: *Luci* (in daylight) [. . .] *si se telo defendit* (if he defends himself with a weapon) [. . .] *endogue plorato* (and raise a cry).—*Tr.*]

is restored or compensated for. When this was done, they felt that a twofold, or fourfold penalty, according to the condition of their commonwealths, was sufficient. But it does not follow from this that, therefore, in a case where there would be no reparation, the laws could not allow citizens some greater privilege than that which was theirs in the condition of natural liberty. For legislators have not felt it necessary, in fixing penalties in states, to follow the privilege granted by the law of war in a natural state. Thus there are states where adultery is not a capital crime, and yet husbands are allowed to kill with impunity adulterers caught in the act. Nay, I suppose no one questions that, for those who enjoy natural liberty, an injury perpetrated or threatened to their bed is a sufficient cause for war, and every one knows what is the licence of war. And yet, upon the perpetration of adultery, the laws were not willing to extend the penalty for that crime to the point which the licence of war undertaken upon that score might allow. 201

You may apply to this question the point made by Richard Cumberland, *De Legibus Naturae*, chap. v, § 26. Since a civil magistrate often cannot take cognizance of offences of this nature they frequently go unpunished; and for that reason, whenever a penalty can be inflicted, it is made very severe, in order that the more boldness increases because of frequent impunity, the more it may be suppressed by fear of extreme punishment. But, as to the statement of the Roman law, that the thief by day may be killed 'if he defends himself with a weapon', it plainly means that I can kill a thief in order to protect my property, and not merely when he falls upon me with a weapon, but also when he endeavours to repel me with a weapon as I advance to take from him the stolen property.

18. In view of all this, it is clear that it is useless for some to advance, as the reason for this law about the nocturnal thief, that otherwise the crimes would go unpunished if the thief escaped in the night. Even in Grotius, Bk. II, chap. i, § 12, there are some things which cannot be approved. He says: 'It was the desire of the legislators that no one should be killed for the sake of property merely.' (K.) We cannot deduce this from those laws which make mention of thieves who break into a house in order to make off with things secretly. Sometimes, indeed, in a night robbery it may happen that, in going to protect my goods, my life also may be imperilled. In such a case the murder of the thief is proper on a double count, while my innocence is not impaired on the ground that I apparently threw myself into the danger, by desiring to retain or recover my possessions. For I am engaged in a lawful and a practically necessary act, from which nothing can be imputed to me that happens through no fault of mine. But if a person were not allowed at all to kill another for the sake of his own

property, I do not see how a man may be free from guilt who, without rashness, in defence of his property, threw himself into such a peril that he had either to kill or be killed. Just as a man pleads in vain for the indulgence of self-defence when, upon being challenged, he engages of his own accord¹ in a duel.

But a further reason which Grotius brings forward for this law does not seem to be sufficiently sound: 'That at night it is difficult to procure witnesses, and therefore, if a thief is found slain, it is easy enough to give credence to the man who alleges that he killed the thief in self-defence, especially if a dangerous weapon is found near the body.' (K.) Even if we concede that the Hebrew word can be taken as 'an instrument for cutting through', yet, if that was the reason for the law, it would have been clearer to have said, 'if he has been found with a weapon'. Although it does not follow that, if a thief has been discovered with a weapon, he therefore had designs upon the life of the man by whom he was killed. But it also does not follow from the law of the Twelve Tables that a day thief could not be killed, unless he had defended himself with a weapon; therefore, there is a presumption against a night thief that he did defend himself with a weapon. On the contrary, that law allowed a night thief to be killed 'in any manner'. In *Digest*, XLVIII. viii. 9, the words, 'if he was unable, while striving to save the article, to spare the thief without danger to himself', were added in later ages to the laws of the Twelve Tables. It cannot be shown that, before this addition, a man who killed a thief by night was guilty of homicide, even if witnesses were at hand by whom it could be established that the man who killed the thief was not in peril of his life from the intruder. The illustration of the maiden ravished in the fields has nothing to do with the case. For in this instance the law
 202 expressly commands that it be assumed violence was offered her, but, in the case before us, nothing is found of any presumed danger to one's life. Nay, it is rather the way of thieves, not to fight, but to take to their heels. Yet we confess that, if a man catches a night thief, provided he can conveniently do so and, once his property has been saved, brings him before a magistrate, he acts far more generously than he who kills him when it was not necessary. Add also Groenewegen, *De Legibus Abrogatis*, on *Digest* IX. ii. 4, where he observes that the Dutch laws do not require that one should give notice of a night thief by raising an outcry. Compare *Law of the Visigoths*, Bk. VII, tit. ii, chap. 16; *Law of the Burgundians*, *Addit.* I, tit. xvi, chap. 1 and 2; *Law of the Frisians*, tit. v; *Constitutions of Sicily*, tit. xiii; *Capitularies of Charles and Louis*, Bk. VI, chap. xix.

19. The final question is, whether a man who was the first to commit an injury can rightly resist him who undertakes to secure

¹ [For *ultero* read *ultra*.—Tr.]

revenge. Some answer this in the affirmative, for the reason that few men, who requite injuries according to their own judgement, take a revenge in proportion to the injury received. But we feel that the pronouncement should be made a little more precise. Now by the law of nature, he who offers another an injury is required to render satisfaction, while every one is expected to grant pardon for his offence to the man who entreats him and is repentant, after he has made reparation for the damage, and given security that he will not offend again. Quintilian, *Declamations* V [ix. 18]: 'The conclusion of hatred is always honourable; and, so long as hatred is nothing but the desire to do harm, a change of heart for the better has always something creditable about it.' Thus Marcus Antoninus [Aurelius], Bk. I, § 7, commends in his own behaviour his readiness, 'To show oneself willing to be reconciled to those who have lost their temper and trespassed against one, and ready to meet them halfway as soon as ever they seem to be willing to retrace their steps.' (H.*) Add *Idem*, Bk. XI, § 8; Seneca, *On Anger*, Bk. II, chap. xxxiv; III. xxvi, xxvii, xlii. Thus among the Chinese, who hold moral philosophy above all studies, there is no one so cruel as to desire to revenge with death an injury done him, while whoever yields before another, and does not wish to hurt him, is considered a prudent and outstanding man. Neuhof, *Descriptio Sinae*, chap. i. Therefore he who refuses to make satisfaction, and resists one who asks for restitution, piles one injury upon another. But he who refuses the proffer of just satisfaction, and endeavours to secure vengeance entirely by arms, plans an unjust use of force and may properly be resisted. Compare Livy, Bk. IX, chap. i; Grotius, Bk. II, chap. i, § 18, together with the remarks of Boecler, *ad loc.* An illustration of this point is the private combat described by Davila, *De Bello Civili Franciae*, Bk. XV, p. 1027.

CHAPTER VI

ON THE RIGHT AND PRIVILEGE OF NECESSITY

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| <ol style="list-style-type: none"> 1. The kinds of necessity. 2. The basis of the right and privilege of necessity. 3. What right it gives a man over himself or directly over others. 4. What right it allows indirectly. | <ol style="list-style-type: none"> 5-7. What right it allows over the property of others. 8. What right the preservation of our own property allows us over the property of others. |
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THE power of necessity is a phrase upon the lips of all men, because it lacks the restraint of law, and is understood to form an exception in all the rules of men, while it carries the right to do many things which, apart from it, were held to be forbidden. M. Seneca, *Controversies*, Bk. IV, cont. xxvii: 'Necessity is a powerful defence for the misfortunes of men.' Callimachus, *Hymn to Delos* [122]: 'Necessity is a great goddess.' Add the speech of Lentulus in Livy, Bk. IX, chap. iv. Whence this power arises, and how far it extends, is a matter worthy of very careful study, especially since some writers apparently attribute to it little or no efficacy in determining the morality of actions.

It should be observed, first of all, that Cicero, *On Invention*, Bk. II [lvii-lviii], makes a twofold division of necessity: that which is 'simple and absolute, which cannot be resisted on any account, and which can be neither changed nor weakened; and, secondly, necessity with limitations'. The latter, again, falls into three classes, as it concerns *honourable conduct* (which is very like the words of Pliny, *Letters*, Bk. I, ep. xii: 'The highest motive has for wise men the force of necessity'), or *safety*, or *convenience*. Of these three the first is the 'highest', the second 'close to it, the third, that of convenience, is of slight importance', and can never contend with the other two.¹ And although honourable conduct takes precedence over safety, yet now and then the latter can be preferred to the former if, in consulting for our safety, what for the present has been detracted from honourable conduct, may at some later time be restored by virtue and justice. When this is not possible, honourable conduct is to be preferred. Others would urge that whenever the necessity of safety is preferred to that of honourable conduct, it may be defended not so much on any ruling of right, and in any direct way, as on the excuse of human weakness, expressed by such words as indulgence, pity, and mercy; but the necessity of convenience

¹ [This is the necessary sense of the passage, which is only a slight paraphrase of Cicero (who says *cum his . . . duabus*), and it is so taken by Barbeyrac, although without note. In other words Pufendorf's *priori*, which would restrict the comparison to the second class, is clearly a printer's error for *prioribus*, which includes the first two classes.—Tr.]

has much less force whether for defence or excuse, unless the matter comes before a judge who has a greater regard for his own interest and prejudice than for right and wisdom.

But our first concern in this matter is to inquire what force the necessity of safety has to free some act from the obligation of general laws. Whether, in other words, we may sometimes do what the laws forbid, or neglect to do what they command, when, through no fault of our own, we are in such straits that we cannot secure our safety in any other way. Here it appears that whatever right, or privilege, or indulgence is allowed necessity proceeds only from the fact that a man cannot avoid straining every nerve for his own preservation, and therefore it is not easy to presume such an obligation to be resting upon him, as ought to outweigh the zeal for his own safety.

2. Of course no pious man can question the right of God, who is the absolute master of our life, and has but lent it to us for a while to lead at His pleasure, to lay upon us so strict a law that we should suffer death rather than depart from it one finger's breadth. Such a law was believed by the Jews, according to 2 *Maccabees*, vii, to be that on eating the flesh of swine. And this was entirely right, since the eating of swine's flesh was considered the same as a denial of the true faith. Had that not been the case, it would have been no sin, when there was no other food, to eat the flesh of swine, so as not to perish of hunger. But a civil power, as well, often lays upon a person such severe commands that a man should accept death rather than depart from them. The obligation of positive laws, however, is not always presumed to be so binding. For whoever passed these, or introduced among men particular ordinances, since they had as their purpose the promotion through these laws and institutions of men's safety or convenience, are supposed always to have had before their eyes the weakness of human nature, and how man cannot help avoiding and repelling whatever tends to his destruction. For this reason most laws, and especially positive laws, are understood to make an exception of a case of necessity, or to lay no obligation, when such an obligation will be attended by some evil, destructive of human nature, or too great for the common constancy of mankind; unless such a case is included expressly, or in the nature 204 of the matter. And so necessity does not cause a law here and now to be violated directly, or a sin committed, but it is presumed from the benevolent mind of the legislator, and from the consideration of human nature, that a case of necessity is not included under a law which has been conceived with a general scope. A passage bearing on this is *Matthew*, xii. 2, 4. Add Casaubon, *Exercitationes ad Baronium*, I, n. 9. The passage in *Matthew* shows that the substance and reason of that law does not command the presumption of such rigour that one should

perish of hunger rather than eat the showbread. Palladius, *De Re Rustica*, Bk. I, chap. vi: 'Necessity keeps no holidays.'

However easily such concessions may be allowed in positive laws, it is a matter for further investigation whether they can be extended also to natural laws; especially whether what natural law commands or forbids to be done can be forborne in a case of necessity. Regarding the first question, the nature of affirmative commands requires that, in order for a man to be obligated here and now to the performance of some act, they presuppose the opportunity, matter, and ability necessary for an action; and these are always understood to be wanting, when something cannot be done unless I perish in the doing, for the casting away of love and care for oneself is classed among things which are impossible, and which surpass the ordinary constancy of men. Therefore, unless it is either expressly stated in a law, or understood from the character of the undertaking, that my life must be sacrificed rather than an act be neglected, affirmative laws are regularly understood to allow an exception for a case of supreme necessity, especially when a person was not to blame for falling into such a necessity. Consequently, I am not expected to give bread to a starving person, if I myself need it. See *2 Corinthians*, viii. 13. Nor, if another is in danger of drowning, am I bound to draw him out, if I must perish in his place. Seneca, *On Benefits*, Bk. II, chap. xv: 'I must give to him that wants, yet so that I do not want myself; I must help him who is perishing, yet so that I do not perish myself.' (S.)

But, as far as negative commands are concerned, this much is certain, first of all: No acts can properly be undertaken which tend directly to offend God; for instance, a man, to escape death, may not blaspheme or deny God, and renounce the worship of and obedience to Him. For, in view of the reason that God can certainly visit upon a man a far greater evil than natural death can be, it is highly probable that He will repay with some far greater reward the man who loses his life to God's glory. Carpyllides,¹ in *Anthology*, Bk. I [IX. lii. 5 f.]: 'Verily righteous men do not lose the reward of their piety.' It would be wrong to sin against the glory of God in order to avoid a lesser evil, although persons who give way before the pains of torture surely deserve compassion. But it should be observed, in connexion with those laws which cover the mutual duties of men, that there are certain precepts of natural law which presuppose some human deed or institution, that, as any one clearly recognizes upon a consideration of its end, should not be extended to a case of extreme necessity; and therefore the same exception also is in the law. It should, furthermore, be noted that a man cannot be said directly to have violated a law by some act unless the act is rightly imputed to him.

¹ [The better form is Carpyllides.—Tr.]

Now an act may proceed from a man in two ways, either as from a principal cause, or as from an instrumental cause. And the latter case again is of two kinds, either as it makes no motion, except such as is impressed upon it by the principal cause, and is opposed to its natural inclination, if it have such; or as it applies itself of its own and intrinsic impulse to perform some act, although the first cause impel and direct it. And so, if a man concur in some act in the second way, as an instrumental cause, the act may be imputed not to the principal cause alone, but to the man himself as well, as though it were his own act and had proceeded from him. But, if one concurs in the first way, the action will be imputed only to the principal agent, and not to the instrument. The further requirements for this case will be explained more fully below. 205

3. After these preliminary remarks, let us pass on to the special questions which are usually discussed in this connexion. Now it admits of no doubt that, although a man in general has no right over his own body, to destroy it at his pleasure, or to deform, or mutilate it, he will yet be allowed to cut off some part that is infected with an incurable disease, or that has been rendered useless by a wound, in order that his whole body may not perish, or that the well parts be not infected, or that the use of other parts be not impeded by some useless portion. It has been discussed above whether a supreme necessity allows some right over life, that is, whether a person may embrace an easy end so as to escape an ignominious death, or one that is attended with exquisite tortures. Let us now observe what right over others is allowed by necessity.

The use for food of the bodies of men, not slain by us, in cases of extreme famine, when all other means of sustenance are wanting, is certainly a thing deserving of every commiseration, but not in itself sinful. But it is hardly clear what judgement should be pronounced on those instances when, in times of famine, some among a number of men have been killed against their will, or upon selection by lot, since this involves a struggle between the law of homicide on the one hand, and on the other the gnawing of hunger, the stomach which has no ears to hear, and the fact that all must perish unless this saddest of all expedients is adopted. Homer, *Odyssey*, Bk. VII [216-17]: 'For nought is there more shameless than a ravening belly, which biddeth a man perforce be mindful of him.' (B. & L.) See 2 *Kings*, vi. 28-9; *Deuteronomy*, xxviii. 53; *Lamentations*, iv.¹ 10; Josephus, *Antiquities of the Jews*, Bk. IX, chap. ii; *Jewish War*, Bk. VI, chap. xxi; Diodorus Siculus, Bk. III, chap. xl. Add also the story of the seven Englishmen who, when they were driven out into the open sea, and their food and water was exhausted, selected by lot one of their number who, to be sure, offered no objection, and killed him. With his blood and flesh

¹ [For vi. read iv.—Tr.]

they assuaged their intolerable thirst and hunger, and on coming to land were acquitted of homicide by a judge. Ziegler quotes this illustration from Nicholas Tulpius, *Observationes Medicae*, in his remarks on Grotius, Bk. II, chap. i, § 3. He feels that 'this was a heinous sin on the part of the sailors, in that they conspired to the death of one man, and, as it might have happened, to the death of themselves, and placed the peril of their bodies above that of their souls. Nor should any one of them have valued his life so little that he would do away with it to satisfy another's hunger. Nor should the others, in consideration of their stomachs, have shown such savagery toward their companion.' But it may be said in reply that it is too harsh to maintain that those persons have 'conspired to the death' of another, who feel that one person should be chosen by lot so that the rest, who would otherwise all perish together, might be saved. See *Jonah*, i. 7 ff. And so they needed to fear no peril to their souls by such an action. He holds his soul too cheap who throws it away without any such necessity. Nor can it be called cruelty when he who dies for the safety of all, suffers less agony in bowing his neck to the sword than the other does in giving the stroke.

I should like to have another case of this kind examined. In the event of shipwreck, if more persons leap into a boat than it can carry, and no particular person has any special right in the boat, shall not lots be cast to decide who shall be ejected? and may a person who refuses to abide by the lot be thrown overboard without further deliberation, on the ground that he is seeking the destruction of all? But we reserve our decision for the time being on such highly unusual examples.

4. A case of the following sort more frequently happens: where two men run into some actual danger to their life, from which both must perish, unless one of them does something, because of which the other, who would perish in any event, meets death a little sooner than he would otherwise. Or of necessity we indirectly throw in the way of another some peril of death or serious injury with the intention, not
206 of doing him any harm, but only of committing some act from which it is likely he will suffer harm; and yet we should much prefer to meet our necessity in some other way, and would lighten the injury to the best of our ability. We feel that just as an injury of this nature to another is not bound up with any sin, so he who experiences it should receive and consider it as a misfortune brought on by circumstances, for which he should bear no malice toward the person who did it. Some examples follow: If I, who can swim, should fall into deep water together with one who cannot, and he should grip me in his arms, as usually happens, while I have not strength enough to get both him and myself out, who could charge me with a fault if I thrust him from me with all my might, so that I may not perish with him, even though he

could have been kept by me above the water for some few minutes? In the same way, when, in a shipwreck, I have seized a plank not large enough for two persons, and another person swimming toward me also wishes to get on it, apparently resolved to destroy me along with himself, apparently nothing prevents my using every kind of violence to keep him off. So also, when an enemy, threatening death, presses hard upon two men in flight, one of them may break a bridge behind him or close a gate, and so leave the other in immediate danger of his life, provided both cannot be saved together. Such a necessity frequently arises in war, so that a few must be left to their fate in order that the main body may be preserved. Arrian, *Anabasis of Alexander*, Bk. VI [xxv]: 'The care of individual persons was necessarily neglected in the zeal displayed for the safety of the army as a whole.' Vergil, *Aeneid*, Bk. IX [722 ff.]: 'When Pandarus beheld how their fortunes stood, what evil chance has changed the day, with all his might he backward rolls the gate on swinging hinge by his broad shoulder's strength, and many a friend excludes, and leaves them to contend as best they may.' (B.) The same author, in *Aeneid*, Bk. XI [883 ff.], tells how, when the Latin cavalry was defeated, 'Some shut the gates; nor dare to open to their friends, or within the walls receive them, although they beg and pray.' (B.) Compare Livy, Bk. XXVI, chap. xv, where the Thurians make an ignoble use of this excuse. Florus, Bk. II, chap. xviii, says of the Numantians: 'At last they determined to flee; but this their wives prevented, by cutting, with great treachery, yet out of affection, the girths of their saddles.' (W.) In the same way Tacitus, *Annals*, Bk. XIV, [xxxii-xxxiii], criticizes it as a mistake of military tactics that, in the siege of the temple at the colony of Camalodunum, 'the veterans [. . .] did not remove their women and old men, reserving only the youth for their defence [. . .]'. (D.*) (Add Livy, Bk. V, chap. xl.) And by contrast he tells how,

Suetonius resolved, with the loss of one town, to save the whole province. Nor could the tears and wailings of those who implored his protection divert him from giving the signal for marching, and incorporating with the marching body those who would accompany him. Whoever stayed behind, whether from the weakness of sex, or the infirmities of age [. . .] fell beneath the rage of the enemy. (O.)

Yet, since such necessity was not yet upon him, Darius, in the account of Curtius, Bk. IV, chap. xvi [9], nobly refused to break down the bridge over the river Lycus, adding 'He had rather furnish a passage to his pursuers than leave other fugitives destitute of one'. (A.)

As an example of the first kind, suppose some one stronger than I pursues me intent upon my death, and, in a narrow passage through which I must flee, some one happens to meet me; if he will not make way when warned, or cannot do so for lack of time or space, I shall certainly have the right to hurl him to the ground and continue my

flight, even though he be likely to receive some serious hurt from my blow, unless I happen to be under some special obligation to that person, so that I should of my own accord face danger in his place. But if the person who blocks another's flight should be unable to get out of the way, although warned, such as a child, or a lame man, whoever tries to leap or jump his horse over him, in preference to exposing his person to the enemy by any delay, will certainly deserve to be excused.

But the reason is obvious why the example, which some adduce, is not free from guilt: 'An officer, fleeing from battle with the enemy who are in pursuit, cuts down in the throng one of his soldiers who is in front of him, so that his own flight may not be delayed.' For the officer was strong enough to force a passage merely by his own momentum. Yet he will be excused if he happened to do some hurt with his weapons quite unintentionally. But if some one has blocked my path out of mere wantonness or lack of feeling, and refused to allow me some way to flee, I can knock him down directly as if he were an enemy, however much he may be hurt by such an act. Compare Lactantius, *Divine Institutes*, Bk. V, chap. xvii, who is in no way opposed to our conclusions. But in general, just as every means to avoid danger to one's life enjoys great favour, so, on practically the same grounds, flight is defended or excused, although it be attended with some injury to those who are in the way, provided a person is threatened with some mutilation or other serious wound of his body. For whoever threatens such harm can be resisted by any means at one's disposal, and on the same grounds one's alarm excuses an unforeseen and unfortunate encounter, when danger is being avoided by flight.

5. Let us see, in the next place, whether the necessity of preserving our life gives us any right over the property of others, so that we are enabled to use it for our own advantage against the will of the owners, whether we seize it by stealth or by open violence. In order to answer definitely this question, it seems necessary to us to note, in a few words, the reasons for the introduction of different kinds of ownership, which are discussed in greater detail below. The most important advanced are, [1] that thereby the quarrels arising from the original community of ownership are avoided, and [2] that the industry of men is increased, in that each man has to secure his possessions by his own efforts. Certainly property was not distinguished with the purpose of allowing a man to avoid using it in the service of others, and to brood in solitude over his hoard of riches, but so that each man might be able to dispose of its use according to his pleasure, and that when he was minded to share it with others, he might at least have the opportunity to put another person under obligation to him. Therefore, after the introduction of the ownership of things, men were given the ability not only of carrying on commerce with signal advantage to all mankind, but also,

after securing such means, of making a richer display of humanity and kindness to others, while before that time they could aid others only by their own personal service. See *Ephesians*, iv. 28.

Furthermore, such is the force of ownership, that a man is able himself to dispose of his property, even such as he is obligated to hand over. It follows from this, that a person may not himself lay hands at once on property owed him by another, but should demand of the owner that he hand it over to him of his own accord. If, however, the owner refuses of his own accord to meet his obligation, the power of ownership is by no means so great that property owed another may not be taken from an unwilling owner, through the authority of a judge in commonwealths, or, in a state of natural liberty, by the might of war. And although, from the point of view of mere natural right, a man is expected only on the basis of an imperfect obligation, in so far as it arises from the virtue of humanity, to aid another in the latter's extreme necessity, with property of which he himself has no such present need, yet nothing prevents this imperfect obligation from being strengthened by civil law into a perfect one. Selden, *De Jure Naturali et Gentium*, Bk. VI, chap. vi, says that this was done by the Jews, where a man who had refused to give the alms which he should, could be compelled to do so by a court decision. Hence it is not surprising that they would not allow their poor to seize anything for their use from another, but only by their mere asking to receive from individuals, or the official collectors of alms. And so filching from another, even under extreme necessity, was held by them to be theft or robbery. But if such a precaution is not taken for the poor in some particular commonwealths, and if the obduracy of men of means cannot be overcome by prayers, while there is no means whereby a person may come to the aid of the man who is in want either of money or assistance, would you have him die of hunger? Can any human institution have such power that, if another neglects to do his duty toward me, I must perish rather than depart from the customary and usual manner of procedure? I should not feel, therefore, that a man has made himself 208 guilty of the crime of theft if when he has, through no fault of his own, fallen into extreme want of food necessary to maintain life, or of clothing to protect his body from the bite of cold, and has been unable either by entreaties, or money, or the offer of his services, to get others in easy circumstances, and even in luxury, to give them to him of their own accord, he should make away with them by violence or by stealth; and especially so if he intends to make good their value whenever a kindlier fortune may smile upon him.

It is idle to deny that such a necessity may arise. For let us suppose that a man is stranded in some foreign land without money, without friends, and unknown, because he has suffered shipwreck or had his

money taken by robbers, or because, while he was abroad, his affairs at home had suffered a reverse. If no one be found who is willing to aid him in his distress and give him work, or if, as frequently happens, they should be led, by his elegant and undamaged clothes, to believe that he was seeking this assistance without good reason, must the poor man on this account die of hunger? It is true that, in *Proverbs*, vi. 30-1, whoever takes anything belonging to another in order to satisfy his hunger is called a thief, and is liable to punishment for theft. But it is clear to any one who examines the passage somewhat carefully that the thief meant there was by no means driven on by an extreme necessity, such as we presuppose, nor did he fall into such a state of starvation by the unkindness of fortune and without blame or laziness on his own part. For the context shows that he had a house and furniture sufficient for him to restore sevenfold, which he could have sold or pledged, had he set out to find a buyer or lender in times of plenty and peace; since it is not stated that the theft is supposed to have been committed in time of war, or because of the high cost of food. Furthermore, the man who had no further means of maintaining himself was supposed to sell himself into slavery. See *Leviticus*, xxv. 39; Selden, Bk. VI, chap. vii; *Proverbs*, xxx. 9, which last-mentioned passage is not opposed to our position.

Some advance the following as an illustration of this kind of necessity: A man in a foreign and unknown country is unjustly attacked, and there is no way of safety except by flight. Nearby there is a horse belonging to another person, which he apparently can find no way to return, since its owner is not known to him, and the horse must be taken a long distance away.

6. Grotius, Bk. II, chap. ii, § 6, has undertaken to solve this difficulty in the following way: Those who first introduced the distinct ownership of particular things are understood to have added to it the limitation that the force of ownership, whereby others are excluded from the use of a person's own property, should expire, in case the other person cannot be kept alive without the use of the same; and so, in a case of such necessity, private property, without which another must surely die, is understood to revert to original common ownership. Or, in other words, when men first instituted distinct ownership, all individually entered into agreement to keep their hands off the property of others, except in so far as the owners allow them, with the reservation, however, that at the urge of extreme necessity any one's possession, without which a person's life could not be preserved, was to be used as if it belonged to all. For since written laws must be allowed that interpretation, which varies as little as possible from natural equity, the same must be done all the more in the case of customs which are maintained only by tacit agreements. And it is certainly just for every one

to have the right to preserve his life with the means which at the time constitute his sole hope.

But in this theory there are matters which can be questioned. For if, under stress of necessity, any man secures the right to appropriate the property of others to his own use, as if it lay open to all, there appears no good reason why any man, if he is strong enough, may not take such possessions from their owner, even if the latter is straitened by an equal necessity. But this is not allowed by Grotius. Furthermore, certainly no restitution need be made of things of this kind, which I take as my right, on the ground that they are open to all; and yet Grotius requires such restitution. Also a distinction should be made between the case in which a man fell under such necessity through no fault of his, and that in which his own sluggishness and negligence are to blame. Unless such a distinction is drawn, a right is apparently given to lazy scoundrels who have fallen upon want through idleness, whereby they may appropriate to themselves by force what has been secured by the labour of others; and so, since their idleness maintains their want, they put the industrious under the necessity of maintaining against their will such a useless herd. All wise men agree that, just as those in distress through no fault of their own may properly be helped, so also the proper reply to lazy drones is that which the ant, as the fable has it, gave in the winter to the hungry grasshopper [Aesop, 401, &c.]. The remarks of Plutarch, *Laconian Apophthegms*, [pp. 223 c and d, 229 d], are in point here: 'A pirate spoiling¹ the country, and when he was taken, saying, "I had no provision for my soldiers, and therefore went to those who had store and would not give it willingly, to force it from them"; Cleomenes said, "True villainy goes the shortest way to work."' (G.) Add Pandolfo Collenuccio, *History of the Kingdom of Naples*, Bk. V, p. 373. 209

Since, therefore, every property owner may make a distinction between those who are in straits through circumstances, and those who are in such a condition due to their own fault, it is quite clear that a property owner will have a right over his property even against a person who is in extreme necessity, to the extent, at least, of being able to decide whether such a person is or is not deserving of his pity, and so of having the opportunity to win the favour of the one in need by his opportune helpfulness. For it is agreed that among all people the greatest weight attaches to a kindness if it relieves extreme distress; while there is no ground for gratitude if a person does for another only what the latter might have taken by force on his own right, and as if it were coming to him.

And so, in my opinion, this matter is better explained on our theory, if we say that a man of means is bound to come to the aid of one

¹ [For *in cursiones* read *incursiones*.—Tr.]

who is in innocent want, by an imperfect obligation, which no one should, as a rule, be forced to meet; and yet the urge of supreme necessity makes it possible for such things to be claimed, on the same ground as those which are owed by a perfect right, that is, a special appeal may be made to a magistrate, or, when time does not allow anything of the sort, the immediate necessity may be met by taking the thing through force or stealth. For the reason why only an imperfect right is allowed, especially to such things as are owed on the grounds of humanity, is that thereby a man finds the opportunity to show that his mind is intent upon voluntarily doing his duty, and at the same time possesses the means to bind others to him by his kindness.¹ When any one considers such an attitude superfluous, must some poor fellow die of hunger because he cannot overcome by his prayers the inhumanity² of some man of wealth? Nay, rather, whoever refuses to show humanity should lose his property as well as his merit.

From what has been said, it is easy to see that there is some reason for the exception which Grotius adds to his thesis. For since only an unavoidable necessity allows one to use force in claiming what is owed by an imperfect obligation, it is obvious that every effort should be made to see whether a necessity can be avoided in some other way than by the use of force or stealth; for instance, by seeking a magistrate, promising restitution, when once the current of our fortune begins to move more gently, or by offering our services in exchange. In the second place, one cannot descend to such means when the property holder is under an equal necessity, for we assume that he is living in plenty. And this is a point, I think, which should be further stressed: A man ought not to be stripped of his possessions against his will, if it be clear that he will at once fall under the same necessity, if the possession in question passes to another. For, under such circumstances, every one's first duty is to himself. An interesting illustration to the point is that of Herodotus, Bk. VIII [cxi], when Themistocles demanded contribution of the people of Andros, relying upon two great divinities, 'Persuasion and Necessity', and they countered with two equally strong
 210 divinities, 'Poverty and Inability'. The rule of the Jurisconsults, which Grotius here adduces, that 'when the cause of both parties is equal, the position of the possessor is the better', seems to have no connexion here; because judgement is returned for the possessor only when the right of the plaintiff is not yet established.³ But, in the case before us, there is no question about the right of the owner, since the only point raised is whether I am bound by the mere law of humanity to perish that another may be preserved. This no one would maintain. After all, the remark of Curtius, Bk. VII, chap. i [33], is clearly to the

¹ [For *beveficio* read *beneficio*.—Tr.]

³ [For *liquidem* read *liquidum*.—Tr.]

² [For *in humanitas* read *inhumanitas*.—Tr.]

point of the matter: 'The only difference between us is that he claimed another's, and I, with superior justice, kept my own property.' (A.)

In conclusion, we maintain that restitution should be made, if at all possible, in the first place, when the article taken was of great value, or else of such value that the owner cannot afford to give it for nothing. But if the article be of little value, and such as cannot burden a man's means, it will suffice if we show, when the opportunity arises, as if we owed him gratitude, that we would have been glad to be indebted to him for his kindness, if his stinginess had allowed. But for Grotius to claim that there should also be restitution is scarcely agreeable with his own hypothesis. For, if the right of original common ownership returns, when a case of necessity arises, so that any one may take back on his own right the property of another, no restitution need be made. But since restitution *must* be made, it is quite clear that the right of an owner over his property did not cease upon the necessity of another, but that he was obligated to grant it of his own accord to another gratis, or for some set sum, or in some other form of payment. But since the owner refused to do this, the right of necessity allowed another to seize the article, but under the very burden that the owner could lay upon the seizer; that is, that he lay him under an obligation, either of gratitude, or of making good the value of the object involved.

7. On this question others also are as greatly divided as are Grotius and myself. The gloss upon [*Decretals*, V. xviii] *De Furtis*, 10 [3] Cap. *Si quis*, takes the law to apply only to moderate, but not to supreme necessity. Diego de Covarruvias, Chapter *Peccatum*, II, § 1, n. 3, agrees on the whole pretty much with Grotius:

The reason why, in a case of extreme necessity, a man may, without incurring the guilt of theft or rapine, take the property of another in order to relieve his present necessity, is that such a condition renders all things common. For it is the ordinance of nature herself that inferior things be designed and directed to meet the necessities of men. Therefore, the division of goods which was introduced after the institution of natural law does not derogate from that natural reason, which ordains that the extreme necessity of men is to be relieved by the use of temporal goods.

He adduces a passage of Ambrose from Gratian, *Decretals*, *Distinctio* XLVII [viii]: Antonius Perezus, on *Code* [VI. ii] 3, adds the following grounds for the same opinion: A man is compelled by a superior force to act thus, nor is it presumed that the owner is unwilling, because he is supposed to agree to it, and to come of his own accord to the aid of a person in need, on grounds of humanity; and he does not seem, in his extreme necessity, to take a thing that belongs so much to another, but that belongs to all. Yet he should, when freed from the necessity of his want, make restitution for what he took.

Anton. Matthaeus, on *Digest* XLVII. i, § 7, feels that a distinction should be made between the crime and the penalty, and so he

admits that a crime is committed under the stress of want, but he feels that because of the pressure of the necessity, the penalty should be forgone for the guilty party, or at least abated. He undertakes to prove, from the following reasons, that a robbery is committed in this case: A man, who takes another's stores in a time of famine, has it in his mind to make some profit. The reply to this is that a man scarcely seems to take another's property in order to make some profit, if in so doing he was undertaking to provide for his own extreme necessity, with the purpose and avowed intention of returning it as soon as he could. Furthermore, it cannot be called 'a fraudulent seizure of another's property' when the one party lay under an imperfect obligation to give the thing, and such a right reposed in the other that, in his present situation, he could take it in any manner most convenient to him.

- 211 The same writer throws out the further claim that 'no such violence can be offered a wise and good man as to induce him knowingly to stain himself with any evil, and, in cases of such a nature, in the words of Cicero, *On Duties*, Bk. III [v], "Every man should bear with his own adversities, rather than detract in the least from the prosperity of another".'¹

But it is easy, for one who is under no compulsion of necessity, to give the rein to specious philosophizing. See Oppian, *On Fishing*, Bk. III, lines 197 ff. Surely in a deed of this kind, as we have determined it, there is no greater disgrace than in the fact that sometimes distinguished men in time of famine are forced to descend to the use of vile food, proper only for animals. Nor is the increase and decrease of advantages concerned when, in order to prevent a person from perishing of hunger or exposure, some slight thing is taken from a man of means, or from some one who is not seriously inconvenienced by its loss.

He observes, in connexion with *Digest* XIV. ii. 2, § 2, that, although the general need requires that whoever threshes out his grain at home should bring it to the assistance of the public store, this is not, however, to be distributed to individuals, so that they may carry it off as they wish, on the ground that they have none, while others have more than enough. For this matter shall be conducted under the general control of officials.

But must a person die of starvation when there is no hope of assistance from an official?

Finally, there is no point to the addition which some make, to the effect that there 'is no dispensation in this part of the law'. For in what has already been said, reason enough was adduced why it should not be presumed that the law on theft should not be extended to the question before us.

¹ [This passage is rather freely quoted.—Tr.]

8. In conclusion, a necessity that touches our own property apparently allows one the permission to destroy or to appropriate the property of another, but with the following restrictions: that the threatened loss to our property came through no fault of ours; that it cannot be averted in any more convenient way; that we do not destroy another's article of greater value for one of our own of less value; that we make good the value of the article, if it would not have been lost anyway; and, finally, that we bear a part of the loss, if the other's property, which now is sacrificed to preserve ours, would otherwise have been lost along with ours. This is the basis of the equity of the *Lex Rhodia de Iactu*, which provided: 'If merchandise is cast overboard to lighten the ship, that should be made good by a contribution of all which was given for all.' See the entire heading, together with the commentators upon it, and upon the laws of the sea. On the same account it will be lawful to cut ropes and nets on which my boat has been driven, if it can be saved in no other way. See *Digest*, IX. ii, 29, § 3. Yet even if this happened through no fault of mine, the loss is shared equally. Thus, if a fire breaks out and is threatening my house, I shall have the right to raze my neighbour's house, provided that those whose houses were saved in this manner make good the damage. For although *Digest*, XLIII. xxiv. 7, § 4, lays down the rule that when the fire has reached the house which was razed, the man who had this done shall be cleared of the damage, yet the general feeling tends more to equity (add *Digest*, IX. ii. 49, § 1), whereby, if a house is destroyed to save other houses from an approaching fire, the loss must be met by the neighbours whom the fire might have reached, even though it did not reach the house which they destroyed. For it would certainly be unjust for me to save my property by the destruction of that of another, and then he alone bear the loss while I go free. From the same principle the Roman Jurisconsults deduce the conclusions which are handed down under the head of *damnum infectum*, where the owner of a rickety bit of property, by which my property is immediately endangered, is compelled to undertake to make good the damage that may come from the fall of his building; and if he refuses to do this, I obtain by a praetor's edict the right to take over such a building. A similar case is that handed down by the interpreters of Roman Law, whereby, if a person has an estate entirely bounded by other lands, which form no part of his property, and has no entrance to it, the judge can compel the man's neighbour to give him an entrance, at least for some 212 consideration.

Now Grotius, Bk. II, chap. ii, § 10, deduces from the laws given above that one who wages a just war may guard a place in territory at peace with him, if the danger is not imaginary but real, that his enemy will seize the place and from there do him irreparable damage;

provided nothing is taken which is not necessary for his precautions, for instance, he will merely secure the place, while its jurisdiction as well as its products are left to the sovereign, and provided, finally, he intends to hand back the place as soon as his necessity is past. To these conditions it should be added that the sovereign should first be warned that he may himself guard the place, the expenses for such an undertaking being offered him, or, if he prefers, he may render the place untenable for defence. Furthermore, if some expense has been incurred in fortifying the same place, the rightful lord is not bound to refund it, unless he has intended to go to the same expense anyway; nor should the expense incurred serve as an excuse for holding the place when the necessity is past, since the possessor in going to this expense had an eye only to the defence of his own territory, and not to the improvement of the place. But Boecler quite properly remarks on this passage of Grotius that it is established by the usage of all ages and peoples, that no one holds himself bound to allow another, even in fear of danger from an enemy, to occupy any place or citadel of his, if he can prevent him. And that, therefore, if another does so, it is for reasons which may very easily claim pardon, but not for such as can be defended in the name of natural law without the aid of the manner and passion of the orator. It may further be added that a suspicion could easily arise in the minds of the enemy that the sovereign of the place was secretly plotting with the other against him, and in this way the burden of another's war could easily be laid upon him. And even if the enemy is convinced that the place was seized against the sovereign's will, nevertheless, should he decide to drive him from it, the sovereign is exposed to the devastation of war, which one may without censure avoid in any way possible. And it is surely the height of folly for you to receive into your house more guests than you can later on conveniently get rid of, and to whom you must, whether you wish or not, play the friend; guests, too, who may be able, if the fancy so strike them, to show even you yourself the door.

SAMUEL PUFENDORF¹
ON
THE LAW OF NATURE AND NATIONS
BOOK III

¹ [Here and in the headings of the subsequent books for *Puffendorfi* read *Pufendorfi*.—Tr.]

CHAPTER I

THAT NO MAN SHOULD BE HURT, AND IF ANY LOSS HAS BEEN CAUSED,
IT SHOULD BE MADE GOOD

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| 1. A man should not hurt another man and his property. | 6. How many ways a hurt may be inflicted. | |
| 2. If any loss has been caused it should be made good. | 7. An example of reparation in a case of murder. | |
| 3. The nature of loss or damage. | 8. In the case of one who has maimed a person; | 213 |
| 4. Who may cause a damage. | 9. Of an adulterer; | |
| 5. On what rule those who cause loss are under an obligation. | 10. Of a ravisher; | |
| | 11. Of a thief. | |

THUS far we have shown what duties the law of nature enjoins upon a man toward himself, and how much freedom or indulgence it allows him in the preservation of his person and his property. We must now turn to those injunctions which concern the duties to be observed toward other men. These duties we divided above into *absolute* and *hypothetical*. Under absolute duties, which obligate all men even before the formation of any human institution, we allow, with all confidence, first place to these two: I. *No one should hurt another*; and II. *If he has caused another a loss, he should make it good*. This duty, indeed, is of all duties most inclusive, embracing all men as such; and the most simple as well, since it consists merely in the inhibition of action, except when there is a struggle between the reason and the passions, which need restraint at almost every turn, and among which not the last place is held by that over-weening love of one's own advantage. Nay, this duty is of the greatest necessity, since without it the social life of men could in no way exist. For if a man does me no good turn, and does not join with me even in the ordinary duties, I can still live in all tranquillity with him, provided he hurts me in no way. Nay, we desire nothing more than this from most¹ of mankind, mutual assistance being rendered only within a limited circle. But how can I live at peace with him who does me injury, since nature has bred into each man so tender a love for himself and his own possessions that he cannot help using all possible means to ward off the man who is about to do him harm? Seneca, *On Anger*, Bk. II, chap. xxxi:

It is a crime to injure one's country: so it is, therefore, to injure any of your countrymen, for he is a part of our country; if the whole be sacred, the parts must be sacred too. Therefore, it is also a crime to injure any man: for he is your fellow citizen in a larger state. What if the hands were to wish to injure the feet? or the eyes to hurt the hands?

¹ [For *perie* read *parie*.—Tr.]

As all the limbs act in unison, because it is the interest of the whole body to keep each one of them safe, so men should spare one another, because we are born for society. The bond of society, however, cannot exist unless it guards and loves all its members. (S.*)

Now not only those things which nature herself has immediately granted us, such as our life, our body, our limbs, our virtue, our plain reputation, our liberty, are guarded by this precept and ordered to be held, as it were, sacred, but also the strength of this precept is understood to extend to cover all institutions and conventions, whereby anything is secured for men, as though without it they would be useless. And so, this precept forbids that any possession of ours, no matter on what ground it is held, be taken from us, destroyed, damaged, or removed from our use, either entirely or in part. Although, of course, the same duty resides, as a matter of fact, in many affirmative precepts, by virtue of their preventing some one act by laying down what is opposed to it. How clearly the necessity of this law presents itself to the minds of men is apparent from Seneca, *On Benefits*, Bk. IV, chap. xvii:

Ask any of those who live by robbery, whether he would not rather obtain what he steals and plunders, by honest means. The man whose trade is highway robbery and the murder of travellers would rather find his booty than take it by force; you will find no one who would not prefer to enjoy the fruits of wickedness without acting wickedly. (S.)

Cicero, *On Duties*, Bk. III [v]: 'To take away from another, and for one man to advance his own interests by the disadvantage of another man, is more contrary to nature than death, than poverty, than pain.' (E.)

2. A further consequence of this command is: *If any one has done another some hurt, and has caused him in any way some loss, which can properly be imputed to the aggressor, the aggressor must, so far as he can, make good the loss.* For it is surely a vain thing to have given orders that a person receive no hurt, if, when such hurt befalls him, he must accept the loss at his own cost, while the man who offered him the hurt may enjoy the fruit of his injury in peace and without making restitution. 214 For men are so depraved that they will never refrain from hurting each other, unless they are forced to make restitution, nor will it be easy for a man who has suffered some loss to make up his mind to live at peace with another, so long as he has not received proper restitution.

3. Although the word *damnum* [damage] properly applies to things, it will be taken by us in a broader sense, so as to include every injury which concerns a man's body, reputation, and virtue. And so the word as we use it signifies any hurt, destruction, diminution, or seizure of something which we now possess, or the interception of something which we should have had by perfect right—whether it was given us by nature, or allowed us by the agency or law of man—or, finally, the avoidance or refusal of some act which a person was under a perfect obligation to perform for us. An illustration of this is in Quintilian, *Declamations*, xiii, where it is shown at length that a man, who covered

the flowers in his garden with poison, from which his neighbour's bees die, had been the cause of his neighbour's loss. The argument which carries the case is as follows: Since all men agree that bees are roving animals, which cannot possibly be trained to get their food in any one place, therefore, wherever it is right to keep them, the neighbours of such a place are understood to be under a kind of liability or easement, whereby the bees are allowed to wander here and there without any one preventing them. Add *Digest*, IX. ii. 27, § 12; IX. ii. 49.

But it must be observed, at this point, that, inasmuch as a thing may be owed us in two ways, either by a perfect, or by an imperfect obligation, to which a perfect and an imperfect right correspond respectively, damage which another is bound to restore can be done us only in things owed under the first category, but not in things owed us under the second category. For since these last duties ought to be performed upon a kind of voluntary impulse arising from a man's good nature, and I have no faculty to force him to perform them, it would be improper to claim some injury if I had not been the recipient of such deeds, or to demand compensation for things which I could expect from another only by way of a voluntary gift. And just as I cannot count my own such things as I am but capable of receiving, so I cannot complain that I have suffered damage when such things are not forthcoming. The point is well stated by Aristotle, *Nicomachean Ethics*, Bk. V, chap. iv: 'A man does not take more than properly belongs to him, if he refuses pecuniary help from illiberality.' (W.) Therefore, the other, who receives no help because of this fault, does not have *ἐλαττον*, or any less. The same point is brought out in the speech of Cicero, *For Gnaeus Plancius* [iv], where he maintains that although a member of the family of the Laterani might outrank one of the Plancii, the people had it in their power to reject the former and give office to the latter, since a perfect right to hold such offices belonged to neither of them. He continues: 'This is the privilege of a free people, to be able by their votes to give or to take away what they please to or from any one.' (Y.) And yet, in the same passage, what the people *ought* to do is contrasted with what it *could* do, the word 'ought' being used for that less perfect obligation, whereby we are supposed to undertake the exercise of every virtue.

But Grotius, Bk. II, chap. xvii, § 3, advises, in this connexion, that care be taken not to confuse¹ things which belong to a different subject. For if the voting body of citizens, which by virtue of its governing sagacity is expected to give offices to the most worthy, assigns some one person the power to select the officers in their name, and if this delegate selects unworthy men instead of worthy, the failing candidates cannot make complaint of any injury or any damage done to them. But the

¹ [For *confundantur* read *confundantur*.—Tr.]

body of citizens has the right to demand from their representative a reason for his actions and compensation for the damage done the state by the election of an unworthy candidate. Likewise, even though a citizen, however well endowed he may be with the qualifications for some office, has no¹ right to it that will hold good against the state, he still has the right to run for it along with other candidates; and if some one obstructs his candidacy by violence or fraud, he will be entitled to demand a compensation, not, indeed, for the entire value of the office, but for the uncertain hope of it. 215

But, in determining the amount of damage, it should be observed that under that heading comes not merely the thing belonging to us or owed us which is damaged, destroyed, or frustrated, but the fruits as well which come from it, whether they have already been received—in which case they may already be estimated as separate items—or are only hoped for, provided the owner might have received them (see *Digest*, VI. i. 62, § 1); although the expenses, necessary to secure such fruits or profits, should be deducted, lest we become more rich at another's cost. But the estimate of expected fruits is raised or lowered, according as they are nearer to or farther from the time of their uncertain harvest. Thus a crop lost in the blade must be estimated at a lower figure than one that is yellow in the full head. Consideration will also be taken of the so-called civil fruits. For example, whoever burns a man's house must not merely rebuild it, but also make good the rent which would have come from it in the meantime. See *Code*, III. xxxii. 5. Add also *Digest*, IX. ii. 22, § 1; IX. ii. 23. Philo Judaeus, *De Victimis*, is the authority for the statement that, if a man had caused another some loss, and had repented of his deed, he had to restore the loss and add a fifth part of its value, by way of compensation for the person who had suffered the injury.

And it is also obvious that whatever loss results afterward from some damage, as by natural necessity, is considered one with the original damage. See *Exodus*, xxii. 6; *Digest*, IX. ii. 27, § 8; IX. ii. 30, § 3; M. Seneca, *Excerpta Controversiarum*, Bk. V, cont. v; Strabo, Bk. XII [ii. 8], gives an account of how King Ariarathes

blocked the narrows through which the Melas empties into the Euphrates,² made the whole of the neighbouring plain a lake, and finding islands therein as big as the Cyclades, he lived upon them, playing like a boy. But the dam broke suddenly and all the water rushed out, and the flooded³ Euphrates carried off a great deal of land in Cappadocia, and destroyed numerous houses and estates, and did no small damage to the Galatians who inhabit Phrygia. For all this injury he was fined three hundred⁴ talents by the Romans, to whom the injured people referred their case for judgement.

¹ [For *hant* read *haut*.—Tr.]

² [So also in the MSS. here and below, although there is no doubt at all but this should be corrected to 'Halys'.—Tr.]

³ [For *intume factusque* read *intumefactusque*.—Tr.]

⁴ [For *xxx* read *ccc*.—Tr.]

Libanius, *Progymnasmata* [p. 12 D, *Chriae*, ii. 13]: 'That which furnishes the starting-point bears the responsibility also for all that follows.' Add *Digest*, IX. ii. 7, § 7; *Law of the Visigoths*, Bk. VIII, tit. ii, chaps. 1-3, and tit. iii, chap. 3.

4. We have shown above, Bk. I, chap. v, § 14, in discussing the persons responsible for damage, the ways in which the deed of one man may be imputed to another. Nay, a man can cause damage to another not only immediately and of himself, but also through others. Damage, caused immediately by some person, can be imputed to another, who may therefore be called upon to make reparation, since he contributed to the deed of the former, either by doing [what he should not have done],¹ or by failing to do what he should have done. And such a person may be the principal cause, or stand on an equal footing with the performer, or be only an accessory and less than the principal cause.

Now in all these degrees of responsibility, it should be borne in mind that such persons are bound to make reparation for the damage, if they have in fact caused it, or have contributed in any way to the entire damage, or to a part of it. For it often happens, in the case of those who, by some participation or non-participation, contribute, in some way less than the principal, to the deed of another, that the man who caused the damage would have done so anyway, without their participation or non-participation, and so their connexion with the affair was in a way superfluous. In such a case, although their intent and effort constitute a crime, yet since no part in the present damage
 216 came from them, no compensation can be demanded of them. But no attention is paid to those who maintain that, even if such men had not given their assistance and advice, there would still have been no lack of others who would have lent their services to the deed, and so the damage would have been done anyway, even without their participation. For it is a sufficient answer that their assistance made some real contribution to the cause of the damage. Nor would such other persons have been guiltless if they also had put their hands to the deed. And so it seems that we can lay down the following rule about those persons who are or are not under obligation to offer compensation for a damage: When a man has contributed no actual assistance to an act from which damage has resulted, and did nothing beforehand to cause such an act, while he has received no gain from it, he will not be obligated to make compensation, even though he may be guilty of some sin from the mere occurrence of the act. After this it will be easy to determine just what persons are obligated to make compensation. Thus who would deny that they, who find satisfaction in the calamities of others, brought on by the injuries of other men, and even cast them in their teeth, are to be accounted sinners? See *Psalms*, cxxxvii. 7. Yet who would maintain

¹ [These words were added by Barbeyrac.—Tr.]

that such people should make reparation for the damage? The same conclusion is to be drawn concerning people who, upon the performance of some base deed, praise, excuse, or defend it in public, provided their conduct does not interfere with securing compensation for the wrong; or concerning those who, before the deed is done, pray for its success, or, while it is being performed, rejoice in secret and give it their approval. For the words of Cicero, *Philippics*, II. xii [29]: 'What is the difference between a man who has advised an action and one who has approved it? or what does it signify whether I wished it to be done, or rejoice that it has been done?' (Y.) are not a serious statement, but this is only a reply made to refute the idle objection of some other person. Even if it had been made in all seriousness, it could not be extended to an obligation of reparation. And so a wrong application is made of Cicero's words by Ammianus Marcellinus, Bk. XXVII [xi], when he says of the praetorian prefect Probus:

He never desired any defendant or servant of his to do an unlawful thing, yet if he found that any of them had committed a crime, he laid aside all consideration of justice, would not allow the case to be inquired into, but defended the man without the slightest regard for right or wrong. (Y.)

For he added boldness to their sins by giving them confidence in so powerful a patron, and thus put an obstacle in the way of their making reparation for their damage. [Thus there is here something more than simple approbation, or an excuse for the evil which they have done to others.]¹

As to those who give counsel, it is certain that a man must make reparation, if he points out the way to inflict some damage. But if a person only gives some general advice, for instance, that one try a hold-up or robbery, or if he give his approval to something already decided upon, as nowadays the timid counsellors or flatterers of princes do, he should by no means be required to make reparation. Compare Antonius Matthaeus, *De Criminibus Prolegomena*, chap. i, §§ 7-9.

Finally, it should be observed, regarding those who concur in another's villainy by failing to do what they should, that they are bound to make reparation for their omission, only if they omitted what they were under a perfect obligation to do, not what was dictated by the law of charity and humanity. For since I cannot yet claim the things that are owed me on this score as my own, so I cannot seek reparation for them, if they are not fulfilled, no matter what is said to the contrary by Ziegler, on Grotius, Bk. II, chap. xvii, § 9.

5. But if several persons have concurred in an act, from which damage has resulted, the order to be followed in furnishing reparation will be that those shall be made primarily responsible who by their authority, or by some other means amounting practically to pressure,

¹ [This sentence was added by Barbeyrac, in order to complete the argument.—Tr.]

gave the impulse to the deed. See *Digest*, IX. ii. 37 pr.; IX. iv. 2, 3, 4 pr.; *Law of the Visigoths*, Bk. VII, tit. iii, chap. v; VIII, tit. i, chap. i. For in such cases the perpetrator of the deed, or whoever put his hands to it, will be only the instrumental cause. But whoever undertook a deed without duress shall be held primarily responsible, and secondarily the
 217 others who contributed in any way to the deed; but on condition that, if reparation has been made by the first party, the latter are free from reparation (but not from punishment). But suppose the same act has been performed by several persons, who, as causes, are in the same class, shall each of them be held for the whole amount, or only for their equal share? On this point Grotius, Bk. II, chap. xvii, § 11, gives as his opinion: 'The others, who have caused the act, are individually responsible for the whole loss, if the whole act has proceeded from them, though not from them alone.' (K.) This is quite obscure, unless it is simplified by an illustration which, we feel, will suit his meaning, such as the following. Three men set fire to a house at the same time. The entire act of burning the house seems to have come from each of them—yet not from each alone—since the house would have burned just the same if only one of them had applied the torch. But if several men come to blows with another, one of them wounding him on the head, a second breaking an arm, a third gouging out his eye, they will not be held individually responsible for the entire injury, but each one for so much as he himself did. Yet often, on the escape of one of the party, those who are caught bear the entire cost, especially when there was an agreement among them to commit the felony.

The matter will be clearer if we distinguish between divisible and indivisible acts. The latter are those which are participated in by several persons, but in such a way that the whole act would have resulted from the agency of one person, and no set part of the act can be assigned to the individual participants; such are a fire, the breaking of a dike, and the like. For the damage resulting from the act would have followed, even if only one of the number had put his hands to the task, and so precisely what part of the fire or flood came from each person cannot be determined. If several persons associate in an act of this kind, each of them will be held for the entire cost, in such a way that, if all of them are caught, each of them shall pay an equal share of the damage; but if only one should be seized, and all the rest escape, the entire cost may be demanded of the one. Moreover, if some of those caught have not the means to pay, the entire sum shall be required of those who have. Furthermore, reparation for damage differs from the exaction of a penalty, in that, if one man pays it, the rest are set free, since it is not just for the same damage to be compensated for twice, although this is often done as a punishment; while it is common for the entire penalty to be inflicted on every man who concurred in the same

deed. A case of this kind is in Quintilian, *Institutes of Oratory*, Bk. VII, chap. vi [2]: 'Let a thief pay fourfold what he has stolen: Two thieves stole in company ten thousand sesterces; forty thousand are demanded from each; they represent that they ought to pay only twenty thousand each.' (W.) In this case it seems that the judgement should go against the thieves, since, by the Roman laws, a charge of theft, whether twofold or fourfold, concerned only the exaction of punishment. *Institutes*, IV. v. 3; *Digest*, II. i. 7, § 5; II. i. 8; XLVII. vii. 6 pr.; XLVII. x. 34. Add *Digest* IX. ii. 11, §§ 2, 4; IX. ii. 51, § 2; *ibid.*, XLIII. xxiv. 15, § 2; XLVII. ii. 21, § 9. Hotman, *Quaestiones Illustres*, qu. 33.

6. Now when we injure any one, or inflict upon him some damage, this may be done either with evil intent and deliberate design, or by some fault of ours without any clear purpose, but still with some negligence on our part, whether of greater or of less degree; or, finally, by mere chance, in which case the injury cannot be properly imputed to us. Lysias, *Orations*, xxx [xxxi. 10]: 'No one experiences a misfortune voluntarily.' But, among some peoples, attribution is made not only of such losses as are caused by others with our assistance, but also of such as came, with no positive influence of ours, from our servants, flocks, and beasts. See *Exodus*, xxi. 28 ff., 33 ff.; and Grotius, *ad loc.* Now there can be no question that a man, who has caused some damage with evil intent, should be held to compensation, and that so strictly that everything which results from his act should be included. They also should make reparation who, without any clear purpose, cause damage by negligence which they could easily have avoided, since it is not one of the least requirements for social life that we act circumspectly, so that our manner of living cause no apprehension in others, or be more than they can bear. And one is often under a special obligation to take the greatest forethought. See *Digest*, I. xviii. 6, § 7; I. xviii. 14; IX. ii. 27, §§ 9 at end, 29, 34-5; IX. ii. 27; IX. ii. 29, §§ 2-4. According to *Deuteronomy*, xxii. 8, the Jews felt there were equally good reasons for forbidding a man to have broken stairs¹ and vicious dogs. Even the slightest degree of culpability may be enough to cause the necessity of reparation, provided the nature of the undertaking is such as does not allow the most scrupulous care, or the guilt of him who receives the injury is no greater than is his who inflicts it, or the great confusion or circumstances attendant upon the undertaking prevent accurate circumspection, such as when a person, brandishing his sword in the heat of battle, wounds the comrade at his side. Thus, in Aelian, *Varia Historia*, Bk. III, chap. xlv, the Pythian priestess made the following reply to a young man who stabbed his comrade while attempting to cut down a thief: 'Thou didst slay thy comrade in defending him; his blood hath defiled thee not, but thy hands are purer than they were before.' Add Epictetus, *Enchiridion*,

¹ [Or 'ladders'. The Authorized Version has 'battlements for thy roof'.—Tr.]

chap. xxxix, and Simplicius, *ad loc. ca. fin.*; *Digest*, IX. ii. 44, IX. ii. 52, § 4, and the commentators upon these passages.

But it is clear that reparation cannot be made in a case of pure chance, when, of course, no one's fault enters in. For when I have done nothing that can be imputed to me, there is no reason why I, who did some damage against my will, should atone for its evil consequences, any more than should he who was affected. Add *Digest*, IX. ii. 5, § 2; IX. ii. 7, § 3. But should some poverty-stricken man, in a mere accident, be injured by a man of means, it will be seemly in a person of such station to confer some kindness upon the poor man.

Now Grotius, Bk. II, chap. xxvii, § 21, feels that suits for damage done by a slave, or loss inflicted by an animal, have their origin in civil and positive law, since the owner, being not directly to blame, is by nature not concerned in them. But other writers maintain that such suits are entirely in agreement with natural equity, even though natural law does not specifically require them. Plato, *Laws*, Bk. XI [p. 936 c D]:

If a slave of either sex injure anything, which is not his or her own, through inexperience, or improper practice, and the injured person be not in part to blame, the master of the slave who has done the harm shall either make full satisfaction, or give up the person who has done the injury. (J.)

A very early illustration of the same principle is found in Sextus Aurelius Victor, *De Origine Gentis Romanae* [vi], where Evander gave over his thievish servant Cacus to Recaranus-Hercules for punishment because he had stolen the latter's oxen. But the reason why the owner of an animal should bear the damage, rather than the one who was hurt by the animal, even though the latter had stirred up the beast to act contrary to its disposition, and the owner was free from blame, is apparently this: The institution of ownership does not take precedence over this law of compensation for damage. And so, since I had the right, when property was still held in common, to seek compensation for an injury, by any means at my disposal, from any animal that had hurt me, it is understood that this right was not taken from me when the title of property became divided. Furthermore, since the owner gets profit from his animal, while I suffered loss from it, and compensation for damage receives more favour than the acquisition of profit, it is plain that the owner of the animal can be called upon to make good the damage done by his beast, or, if the worth of the animal does not equal the loss, to give it up for punishment.¹

The same principle applies all the more in the case of a slave, since such a person is by nature liable to furnish compensation for any damage he has done. But since he has no property wherewith to make compensation, and his body belongs to his owner, it is surely right for his master either to make good the loss, or to give over his slave.

¹ [For *noxæ* read *noxæ*.—Tr.]

Especially is this true, since licence would be given the slave to injure everybody at his pleasure, if compensation for damage could be 219 secured neither from him who owns nothing, not even his own person, nor from his master. Nor would it be any satisfaction for the injured person if the slave's owner should punish him most severely with stripes and imprisonment. See the commentators on the Roman Law, on *Digest*, IX. i, and *ad Legem Aquiliam*; also Constantin l'Empereur, *Baba Kama; Capitularies of Charles*, Bk. III, chap. xlv; as well as *Digest*, XXXIX. i. But there can be no doubt that the owner should pay for the losses caused by his animals of their own fault, or upon his inciting them, whether his beast has hurt another because of its natural and customary ferocity, or caused a person some loss in following its common instinct. For the owner should not have kept such animals, or else should have had them confined, so that they could not cause damage.

But a general rule should be laid down on reparations, namely, that, if the damage was done from malice, compensation for it does not obviate the necessity for punishment. See *Digest*, XLVII. ii. 48. Although the voluntary payment of reparation, as a certain witness of remorse, lessens the offence not a little. *Luke*, xix. 8. There is a passage worthy of our notice in Michael Glycas, *Annals*, Bk. IV [p. 587 ed. Bonn], on Michael the Paphlagonian:

The emperor Michael all his life long lamented his sin against Romanus, endeavouring to appease God by good works, founding monasteries, and showing kindness to all those who were in need. Now all this would have availed had he thrown away the crown for the sake of which he had done the wrong, had he divorced the adulteress, and as a private citizen deplored his sin. But he did none of these things; he kept Zoe as his wife, held fast to the crown, met the expenses of his good deeds from the public and general revenues, and thought to obtain forgiveness thereby. He conceived of the Deity as both foolish and wicked, in trying to buy forgiveness with the money that belonged to other men.

Valerius Maximus, Bk. II, chap. viii, § 4: 'There is as much difference between giving something and restoring what had been taken away, as there is between the beginning of a benefit and the end of an injury.' To illustrate this we will subjoin some examples which are given by Grotius, *loc. cit.*

7. An unjust murderer is bound to meet whatever expenses, if any, were incurred for physicians, and to give to those whom the slain man had supported, from a duty possessed of the force of a perfect obligation, such as his parents, wife, children (but not needy persons whom he maintained out of generosity), as much as they had hope of having by way of support, due consideration being given not only to the ability of the dead man, but also to his age, as well as to that of the dependants. The manner of computing the support is shown in *Digest*, XXXV. ii. 68. But we can scarcely admit the position of Ziegler, on Grotius, *loc. cit.*, when he maintains that consideration should be taken of the for-

tune which the dead man might have amassed, had he lived longer, on the ground that he would have left a richer legacy to his dependants. For such a fortune, beside being uncertain, cannot be considered as now among our possessions, and the future lies open to losses as well as gains, nor can it be definitely determined how much of that fortune the dead man would have consumed.

Now an unjust murderer is one that kills a man who had a right not to be killed, and who, therefore, in his death, had an injury done him. This right, in view of the fact that nature enjoins¹ that man be a social animal and² abstain from mutual injury, belongs, by general consent, to every man. But a man may, so far as in him lies, renounce this right, at least so that he may be harmed by certain persons; and this he may do tacitly or expressly. A man makes void such a right tacitly when he attacks another man without a just cause. For since the other person is justified in using any means at his disposal, in order to repel such an attack, he who is hurt, when his unjust assault is being repelled, has no one to blame but himself. A man also expressly renounces the same right when he engages in war with another after formal declaration. For it is the law of war that one may go to any length in order to
 220 destroy one's enemy. An illustration of this is in Plutarch, *Laconian Apophthegms* [p. 233 F, xxxiv]:

Two boys fighting, one wounded the other mortally with a hook. And when his acquaintances, just as he was dying, vowed to avenge his death and have the blood of him that killed him: 'By no means,' he said; 'it is unjust, for I had done the same thing if I had been stout and more speedy in my stroke.' (G.*)

Add *Digest*, IX. ii. 4, 5, 7, § 4; *Ibid.*, 51, § 1. And although in that war some sin may possibly be committed against charity, yet such a violation alone will not obligate one to the payment of any compensation.

There can be no compensation for the life of a free man, and even if there were, there is no one to whom it can be paid. For his life does not belong to his nearest of kin, it is merely to their interest that he be living; and so, if the value of that interest be given them, they cannot demand a compensation for his life. It is different with a slave, since he belongs entirely to his master, and is bought and sold like other commodities; he has his value, and on his death there is one who may demand it on his own right. If it seems overly harsh and inhuman for a slave to have a value like cattle, the reply will be made that the value is placed not on his person, but on the amount of services which can be secured from him.

Those are likewise bound to render compensation for damage who kill a person wantonly, which is as heinous as evil intent. See *Digest*, XLVIII. viii. 4, § 1, and Godefroy, on *Digest*, IX. ii. 10. Likewise, those who commit murder by their own fault, and without proper

¹ [In *juret* read *jubet*.—Tr.]

² [For *aqua* read *aique*.—Tr.]

consideration, illustrations of which are in *Institutes*, IV. iii. 5 ff.; so also if a soldier is practising with his arms in some place other than that set apart for the purpose, and kills some one; or if a countryman should do the same in a place where soldiers regularly practise. For if a person is accidentally struck by a soldier in such a place, the soldier will go scot-free, because it is the man's own fault that he was there, and the soldier was about his duty. Add *Digest*, IX. ii. 9, § 4, and Antiphon, *Orations*, vii [Tetral. II. iv]. Likewise, if a pruner of trees cut off a branch near a public road or a street, and killed a slave passing by, and did not give warning. If he gave warning, and the slave did not heed it, the pruner is blameless; as is the case if he killed a person away from the road and in the middle of a farm, even if he did not give warning, since a stranger had no right to be in such a place. *Digest*, XI. ii. 31; add *Law of the Burgundians*, tit. xlv. Likewise, if a doctor has abandoned a stricken man, or through malpractice has given him deadly drugs. See Pliny, Bk. XXIX, chap. i; *Law of the Visigoths*, Bk. XI, tit. i, chap. 6. Likewise, if a multerer because of lack of skill or strength was not able to keep his mules from killing a person—provided that he of his own accord applied for such a position, but not if he was forced into it, and had called attention to his lack of skill and strength. Add *Digest*, IX. ii. 5, § 3, *Ibid.*, 7, §§ 2, 5, 6, 8; *Ibid.*, 8, 9 pr., § 3; *Ibid.*, 11 pr., 31, 52, § 2; compare *c.* 8. 9 ff.; 10, *De homicid.*¹

In the Koran, chapter *On Wives*, a Mohammedan who has in ignorance killed another of his own faith is commanded to make good to his relatives the entire loss which they have sustained, and to redeem one Mohammedan from captivity. It is probable that those who were given a place of refuge by the divine law, *Numbers*, xxxv; *Deuteronomy*, xix, were also obligated to a like compensation, since the man whose axe-head slipped from the handle is not entirely free from guilt, as he should have fastened it more securely. But we cannot understand how it agrees with the state of orderly civil society for the avenger of blood to be allowed to kill with impunity such an involuntary murderer, if he were caught outside the place of refuge; unless we conclude that this indulgence was made to the vengeful nature of that particular people. Compare Tacitus, *Germany*, chap. xxi; Homer, *Odyssey*, Bk. XV, line 272.

8. Whoever has mutilated another shall likewise be held for the 221 expenses incurred in curing the hurt, and for the difference between the amount which the person maimed now earns, and the amount which he used to earn. Compare *Digest*, IX. ii. 13 pr.; IX. iii. 7. Worthy of note in this connexion are the Jewish laws, which are cited

¹ [This reference we have been unable to verify. Barbeyrac omits it and Kennet reproduces it with a typographical error. Homicide is frequently treated in the *Corpus Juris Canonici*, as in *Sext* V. iv, and *Causa XXXIII, Quæstio III*, 10. 24. 28 &c., but none of these passages seems to correspond.—Tr.]

by Constantin l'Empereur, *Baba Kama*,¹ chap. viii, § 1. He who does physical injuries to his neighbour is responsible on five counts: for the *damage, pain, cure, cessation from work, and disgrace*.

They compute the *damage* as follows. Suppose, for instance, the assailant has put out a man's eye, cut off his hand, or broken his leg, they consider a man as if he were a slave to be sold in the market, and estimate how much he was worth before, and how much now. For they felt that, if the difference between the position and status of individual men were taken into consideration, there would be no fixed standard of valuation, for in view of the different life callings, and the diversity of individual status, the person injured might be always advancing some reason why he could enlarge to some extent his damage or the injury to his body, and always demanding an increase in the compensation for it. And so they wanted all injured persons on this score to be valued like slaves, whose worth could not be questioned. Thus, for example, if a person worth fifty shekels before the injury could afterward be sold for only thirty, the guilty party paid twenty shekels, the amount to which the injured person had decreased in value.

Regarding *pain* they said that, for instance, if a man had burned another with a spit or a nail, be it only on the finger-nail, where there is no blister, they reckoned how much a man of that condition would have wanted, in order to be willing to undergo such pain. For you might easily find a man of wealth and easy ways who could not be induced for a great sum to bear even so slight a pain; while you might find that a poor man of good physique and hardened to toil would not for ten pence draw back from a great pain. In estimating the pain they proceeded as follows: They conceived, for example, that the king had ordered that a man of such a position have his hand cut off, and then they reckoned how much such a man would give to have his hand removed by some easy application, rather than cut off with a single blow. This was the amount the guilty party had to pay the injured one on the score of his pain. Compare *Digest*, XLVII. x. 5, § 1, where, since between beating [*verberatio*] and striking [*pulsatio*] the distinction is made that the former is to strike one with pain, and the latter without pain, it apparently follows that even pain can have a valuation.

Regarding the *cure* their practice was, if any pustules appeared after the cure had been effected, and they were caused by the wound, the man who delivered it was liable for the expense of healing them; but if they were not due to the blow, he was free. If the wound healed and then broke out again, the assailant was responsible for its further cure. It might be added that the offender was obligated only if the wound opened of itself, but not if it opened through the fault of the victim or malpractice on the part of the physician.

¹ [For *Babakama* read *Baba Kama*.—Tr.]

In setting the allowance for *cessation from work*, which the victim suffered because of the wound, they considered the injured person as if he were a watchman of cucumbers. The learned men of the Jews developed the point more fully in the following way: The injured man had already received compensation from his assailant for the wound on his body, as well as for the pain inflicted. And so, suppose he had lost his foot or hand, they maintain that they have no concern with what wages he would have made if he had still had his hand or foot, but since he has already been compensated for his hand and foot, they undertake only to reckon what damage he suffers, because of the continuance of his handicap, in regard to his occupation, which he could have continued, if well, even though he had lost his limb. Therefore, they conclude that the maimed person can get for each day of his sickness the sum of money he would have drawn daily from watching a cucumber patch. But since it makes some difference whether a person, on losing the use of his hand or foot, is disabled for a while from the wound, and later on, after recovery, is as whole as before, and whether he completely loses the limb itself, Maimonides advances a more subtle 222 method of fixing the cost of inactivity by the employment of specific instances. If a person does not lose a limb, but is only made ill and confined to his bed, or if his hand merely swells and he finally recovers, the other man shall reimburse him for each day of his inactivity according to what a worker draws from the trade from which the injured man is withdrawn. But if the aggressor has crippled him, or cut off his hand, after the worth of the hand has been paid, or the damage made good, for his period of inactivity they regard him as a watchman of cucumbers, and, after reckoning the daily wage for such an occupation, and how many days he was ill, they compute the sum and this is paid him. Likewise, if a man has lost a foot, they regard him as a watchman at the gates of a city; if he has lost an eye, as a grinder at a mill, and in the same way they reckon similar cases.

Finally, in atoning for *disgrace*, all estimates must be based on the position of the man who causes it, and of the man who suffers it. For it is far more grievous to suffer disgrace from a common man than from a nobleman, and what is a slight affront to a humble person may be most bitter to a distinguished personage. Here we should note, in passing, certain reservations upon the place in which the disgrace occurs: If a man, in falling from a house, hurt a passer-by, and at the same time disgrace him, for example, by knocking him with the impact into the mud, he shall be held responsible for the damage, but not for the disgrace.

Thus far from the laws of the Jews. The same matters are taken up in *Digest*, IX. iii. 7, and *Digest*, IX. i. 3. Here it should be noted that the statement, that no valuation is put upon scars and disfigurement, should be restricted to free men alone. For since the luxury-loving

Romans put a great value upon comely slaves, there was ground for compensation if a man disfigured a slave of that kind by wounds. Nay, it is quite right to set a valuation on the disfigurement by wounds of the face of a virgin, or of an unmarried woman, since beauty of face often takes the place of a dowry. And in general a disfigurement is, indeed, very unfortunate, since it makes us displeasing to others, and exposes us to the jests and slights of fellows of the baser sort; except that scars from wounds in war are covered with a mantle of repute for valour. See the case of M. Servilius in Livy, Bk. XLV, chap. xxxix; add Seneca, *On Benefits*, Bk. V, chap. xxiv; *Digest*, IX. ii. 13 pr.

But it should be carefully noted, in connexion with compensation for mutilation, that the limb itself is not appraised and valued, since it is a thing not to be measured in terms of money, but the loss that arises from the impaired or lost use of the limb, is made good, with consideration of different times, men, and faculties. When a judge is taking cognizance of these considerations, he must compare the different members, with an eye both to their uses and the pain involved in each. Boecler, on Grotius, Bk. II, chap. i, § 6.

9. The illustration of an adulterer and adulteress, who are obligated not merely to relieve the husband from caring for the illegitimate offspring, but also to compensate the legitimate children, if they suffer any loss from such children sharing the inheritance with them, belongs to cases which give damage to others indirectly, and as a consequence of an act. For otherwise adultery does not directly concern monetary damage. On cases of this kind Ziegler, on Grotius, *loc. cit.*, § 15, notes that it is quite right for the husband to be freed from the task of providing for the illegitimate offspring; but that there is some question whether the legitimate children should be compensated for a loss which they experience from such children sharing in the inheritance. For the question concerns only the inheritance of the mother's estate, in which illegitimate children cannot share, except as the law prescribes. Therefore, when the civil law summons illegitimate along with legitimate children to the inheritance of the mother's estate, the damage comes from the law and not from the adulterer.

To these points it may, perhaps, be added that illegitimate children are not obligated for reparation to legitimate ones, because the latter have not a perfect right to the estate of their living parents, and
 223 that only from the violation of a perfect right does the necessity of compensation arise. In the same way, a parent does no injury to his children if he marries a second time, although their hopes in the inheritance may thereby be considerably diminished.

But, as a matter of fact, the preceding example of adultery is apparently derived, first, from the terms of civil laws upon the succession of illegitimate children to their parents' estate, and, second, from

penal laws aimed at those convicted of adultery, and it is entirely correct to maintain that the reparation mentioned above is owed by adulterers, even though undetected, both to the husband and to the legitimate children. For the children surely had a right that no other man than the lawful husband of their mother should beget co-heirs with them—a right sought for them by the purpose of the marriage pact. By the same pact, also, it was the husband's right not to maintain, as his own, even at the expense of his wife's dowry, the fraudulent offspring of another.

10. Whoever has deflowered a virgin by violence or deceit is obliged to compensate her to the amount to which her hope of marriage has been lessened by the loss of her honour. For indeed the flower of virginity is the equivalent of no small dowry. A fine passage on this is in Apuleius, *Apologia* [92]:

A beauteous virgin, even though she may chance to be utterly destitute, is still provided with an ample marriage portion; for she brings to her new husband the winning nature of her disposition, the charms of her beauty, the first fruits of her maidenhood. The very recommendation itself of virginity is rightly and deservedly esteemed¹ by all husbands. (A.)

It is, therefore, only just, that whoever has stolen the honour of an unwilling maiden, should at least so freely recompense her that she can find a husband by the generous size of her dowry. Although the most convenient solution is for the debaucher to marry the maid, unless there is a difference in their rank, or some other obstacle. See *Exodus*, xxii. 16–17; *Deuteronomy*, xxii. 28–9. However, if a maiden willingly agrees to such open wantonness, she has only herself to blame. But, as a general thing, there is a presumption of greater blame attaching to the man than to the maiden. Still, if a man entice a woman to share his couch by a promise of marriage, he shall be required to marry her. For one cannot object that pacts are invalid if entered into for a base end. For by natural law no interval is required between a promise of marriage and its consummation (see *Tobit*, vii. 10, 18), this being due only to civil customs and laws (see Gratian, *Decretum*, II. xxvii. 2. 39). Therefore, by the law of nature the following does not seem a base condition: 'You will be my wife if you immediately, as my wife, give me your body.' But even if there seem some impropriety in a hasty marriage of this sort, it is not judged sufficient to invalidate the agreement, because of the favour accorded marriage.

11. Thieves and robbers are required to return their stolen property, along with its natural increment, beside the damage sustained and the interrupted profit, even though they are in addition forced to undergo punishment on the score of their theft or robbery. For the injured person seeks compensation for his loss, and the good of the state demands punishment, which a judge certainly cannot lay to the injured person, with the result that the latter would thereby be

¹ [For *accepissima* read *acceptissima*.—Tr.]

forced to go without his own property. Therefore, it is absurd that in some places the judges keep the stolen property for themselves, ordering the injured person to content himself with the fact that the thief was punished. See *Caroli V. Ordinatio Criminalis*, art. 218. Add *Digest*, XV. i. 3, § 12; XLVII. ii. 56, § 1; XLVII. ix. 7 pr.

In the same way this further custom is not agreeable with natural law, that the injured person pay¹ the expenses for the punishment of the thief, since it is the official duty of the magistrate to restrain crimes with punishments. And if the necessary amount for this purpose cannot be secured from the person on trial, it should be met by the state, and not by the injured party, especially because from other fines a balance redounds to the public treasury. For example, if a state begins a war because some of its citizens were injured by a certain person, the expense of the war does not fall upon those alone for whose vindication the war is waged. But the matter is different if the judge has given the injured person the choice whether he prefers to receive back his property, or see the thief hanged. For if he has chosen the latter,
 224 he has nothing further to ask for. But it is improper of the judge to give such a choice to the injured person, since the punishment of criminals is not owed to the whim of individuals, but to the public welfare.

But if the stolen property has been dissipated, Grotius, *loc. cit.*, feels that the compensation should not be on the highest valuation, nor the lowest, but on the average valuation. Ziegler, *ad loc.*, however, quite properly disagrees with this. For why should we show the thief such favour? And since I am justified in asking the highest price when I sell an article, otherwise not for sale, to suit some one's pleasure, why should I have to make some deduction for a thief who took an article against my will? Add *Digest*, XII. iii. 9; IX. ii. 2 pr.; XIII. i. 8, § 1. And in this case restitution is also owed by the thief or his heirs—yet not beyond the amount of the inheritance—even when the thief has paid for the crime with his life.

Nor is it at all unjust, or something very close to cruelty, to make the defendant, even after the infliction of the death penalty or of corporal punishment, pay the damage and any other losses. And only ignorance would allege in this connexion the trite maxim: 'Death pays all'; *Novels*, XXII, chap. xx. Death pays personal obligations, but not debts which cling, as it were, to possessions, and follow them into the hands of their new owners. Of such a sort is the debt to make compensation for damage.

The manner of settling other injuries is easy, and some of them will be treated below individually in their proper place. On the damage done by animals, called *pauperies*, the Roman Jurisconsults have discussed this matter at length on *Digest*, IX. i.

¹ [For *facien das read faciendas*.—Tr.]

CHAPTER II

ALL MEN ARE ACCOUNTED AS NATURALLY EQUAL

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| 1. A man should hold every other man his natural equal. | 5. How property is to be divided among mankind on the basis of equality. |
| 2. The nature of natural equality. | 6. One may sin against it by pride; |
| 3. Popular reasons for it. | 7. And by insults offered others. |
| 4. The consideration of equality makes men mutually helpful. | 8. Are there such beings as slaves by nature? |
| | 9. The source of inequality between men. |

IN addition to that love which every man cherishes for his life, his person, and his possessions, by which he cannot avoid repelling or fleeing before everything that tends to their destruction, there is to be observed, deep-seated in his soul, a most sensitive self-esteem; and if any one undertakes to impair this, he is rarely less and often more disturbed than if an injury were being offered his person and property. Although a number of factors unite to intensify this esteem, its prime source is, apparently, human nature. For indeed the word 'man' is felt to have a certain dignity, and the last as well as the most telling reply with which the rude insults of other men is met, is, 'I am not a dog or a beast, but as much a man as you are.' Statius, *Thebaid*, Bk. XII [555-7]:

Suffice it, noble Theseus, that with thee
They bore a manly form, a thinking mind,
And all the properties of human kind. (L.)

Now since human nature belongs equally to all men, and no one can live a social life with a person by whom he is not rated as at least a fellow man, it follows, as a precept of natural law, that 'Every man should esteem and treat another man as his equal by nature, or as much a man as he is himself'.

2. That this equality between men may be better understood, it 225 should be observed that Hobbes, *De Cive*, chap. i, § 3, confines it to a parity of strength and other human faculties, with which mature men are endowed, and undertakes to show why, therefore, men have reason, because of their nature, to stand in mutual fear of one another. For he can inspire no terror in me whose powers do not extend far enough to do me harm.¹ And yet, although one man may be a bit inferior to another in strength, he may still, by the aid of cunning, agility, and familiarity with weapons, be able to inflict death upon even the most robust of men. Seneca, *On Anger*, Bk. I, chap. iv [iii]: 'No one is so low in station as not to be able to hope to inflict punish-

¹ [This sentence is logically out of place and is simply omitted by Barbeyrac, who properly remarks that the section has several circular, inexact, and superfluous expressions, and accordingly takes some liberties in rearranging the material.—Tr.]

ment even upon the greatest of men: we all are powerful for mischief.' (S.) And so, since death is the greatest of natural ills that can be produced by man, and any mature man can inflict it upon any other; and, furthermore, since those who can inflict equal things upon one another, are equals, and whoever can inflict the greatest evils, namely death, can likewise inflict equal¹ ones, it follows that men are by nature equal one to another. Vergil, *Aeneid*, Bk. X [376]: 'Their lives and hands are many as our own.' (B.) But when Hobbes adds that 'the inequality, which now prevails, has been introduced by civil law', in my judgement he has been caught napping. For previously he had spoken about the natural² equality of men's physical powers, to which it is erroneous to contrast that inequality which has been brought about by civil law, forasmuch as this latter affects not the physical powers of men but their status and condition. For indeed the civil law does not cause one man to be stronger than another, but only to take precedence over another in dignity.

Nor is Hobbes's meaning any the more clear when he asserts, *Leviathan*, chap. xiii, that the equality of the faculties of the mind is greater than physical equality. He says, indeed, that 'prudence is but experience, which equal time equally bestows on all men, in those things they equally apply themselves unto'. Yet we see one man surpass another in accurately observing the consequences to be drawn from principles, in skilfully applying what has already been observed, and in distinguishing the similarity and dissimilarity of cases. And so, of men engaged an equal length of time in the same undertaking, one excels in skill, while experience fails to compensate for the other's dullness.

Nor is the fact that men are so unequal in prudence due only to 'a vain conceit of one's own wisdom, which almost all men think they have in greater degree than the vulgar; that is, than all men but themselves, and a few others, whom by fame, or for concurring with themselves, they approve'.

For this disparity is to be observed not only when a man compares himself with others, but also when he compares other men in whose respective excellences he has no personal interest. Nor do we always favour one who agrees with us, but often the man whose career and success has commended him to us. And although one's love of esteem makes him indignant at any reflections upon his dullness and imprudence,

¹ [So Pufendorf. For *aequalia* he may have intended to write *aeque minora*, i.e., 'are equally able to inflict lesser ones'. Kennet's version is only a desperate effort to deal with a corrupt text. Barbeyrac (whose translation has been turned back into Latin in the edition of Frankfort and Leipzig, 1744) gives something like this, which better represents the meaning of both Hobbes and Pufendorf: Leaving out the sentence beginning 'For he can', Barbeyrac proceeds, 'For, says he, although one man may be inferior to another in strength, he may still, by the aid of cunning, plots, agility, and familiarity with weapons, be able to inflict death, so that any mature man can inflict upon another, no matter how strong and vigorous, the greatest of all natural ills. Thus, since those who have to fear equal ills from one another are equal, and those who can cause one another very great ills, can also *a fortiori* cause less, it follows that all men are by nature equal to one another.'—*Tr.*]

² [For *neturali* read *naturali*.—*Tr.*]

and greatly incensed at such as boast of their own prudence as being superior to that of others, yet it does not follow that no one, for that reason, ever concedes that some one else is more prudent than he. For suppose that out of the same danger one by his skill has come off whole, and another has been seriously injured, will not the latter acknowledge that the former showed greater prudence? But our equal liberty provides that the more prudent man may not, by a right of his own, challenge the mode of life of a less prudent one, unless the latter give his consent, especially if the latter acknowledges that he is satisfied with his own degree of skill.

But although equality of strength may result in a man's being unwilling rashly to insult another, since the issue may fall either way, when equal meets equal, and it is folly to undertake to plan some evil for another which will mean your own ruin, still it is another kind of equality with which we are now concerned. This is something that the 226 human race has every interest to keep intact in every way, and here also, as in other things, nature has shown her wisdom, in that she has not meted out with the same measure to all mortals the goods of body or mind, but that there exists a just harmony in the midst of that variety is due to the equality of which we are speaking. Indeed, just as in well ordered states, one citizen is above another in position or wealth, but all share equally in liberty, so however much one man may excel others in mental and bodily gifts, he is none the less bound to exercise toward them the duties of natural right, and he may expect the same of others as well, nor, for all his gifts, is he allowed any greater licence to injure others. Thus, however niggardly nature or fortune has been toward a man, he is not condemned on that score to share less fully than others in the benefits of the law. But whatever one man can claim or hope for from another, the same others can claim or hope for from him, other things being equal, and whatever law a man appeals to against another, he must under every circumstance admit against himself. Or, as Phaedruss, I. xxvii says, 'Every one ought to take it patiently, when his own example is turned against himself.' Diodorus Siculus, Bk. XIII, chap. xxx: 'It is but just that a man should himself submit to that law which he has himself established.' Here also belongs Quintilian, *Declamations*, III: 'We must needs think that every one in passing judgement approves of that which he himself would have done in a similar case.' Seneca, *De Ira*, I. xiv: 'Nor does an honest judge render an opinion in his own case different from that which he renders in another's. Add Cumberland, *De Legibus Naturae*, ii. 7. Seneca, *Letters*, xxx, 'The prime part of equity is equality.' Euripides, *Phoenician Maidens*, 538 [535-8]: 'Better to honour, son, Equality, which knitteth friends to friends, cities to cities, allies unto allies.' (W.) Hence it is impossible to approve the following principle

laid down by Cicero,¹ *On Duties*, III. vi: 'Therefore, the very law of nature which preserves and governs the interests of men, decrees undoubtedly that things necessary for living should be transferred from an inert and useless fellow to a wise, good, and brave man, who, if he should perish, would largely take away from the common good.' (E.) Therefore, one cannot approve the remark made in Michel Montaigne, Bk. I, chap. xxx, of that American [i.e. American Indian] who came from New France in the reign of Charles IX; when he was asked what was the most striking thing to be seen in France, he replied that among other things the most striking was that, although some were living in every luxury, and others were eking out their existence by begging from door to door, the latter did not attack the former and seize their possessions. For just as those who excel in the gifts of mind, body, or fortune should not disdain the less fortunate, so the latter should not envy the former, or undertake to destroy their property.

And this equality we can call an *equality of right*, which has its origin in the fact that an obligation to cultivate a social life is equally binding upon all men, since it is an integral part of human nature as such. But it should be observed that the bond of this obligation can be broken by special circumstances. Between obligations enjoined by a superior and such as come from a mutual agreement, there is this difference, that the latter cease to bind a man when the other party to them has broken his agreement, while the former still bind one to some undertaking, even if the other party has ceased to fulfil his duty; and this is true because that, wherein the other party fell short of justice, can be made up by the author of the obligation. But the obligation to exercise the duties of natural law toward others, although enjoined by the supreme will of God, agrees with an obligation arising from any convention in this respect: That when a man departs from it, he cannot demand any longer those duties from the other, and the other person has the further right to use force in making him render satisfaction. But the character of civil society has forced this liberty, which is inherent in a state of nature, to be limited in commonwealths.

227 3. Other reasons there are as well, highly plausible to the common eye, which aid not a little in meditating upon and illustrating this equality. Not the least of these is the fact that all mortals find their origin in a common stock. And so Boethius, *The Consolation of Philosophy*, Bk. III [vi], scores the pride of nobles:

Why brag you of your stock? Since none is counted base,
If you consider God the author of your race,
But² he that with foul vice doth his own birth deface. (R.)

¹ [Whose general position, by the way, is sadly misrepresented here.—Tr.]

² [For *Nivitiis* read *Ni vitiiis*.—Tr.]

Another reason is that our bodies, fragile and an easy prey to a variety of accidents, are all of the same substance. So we are all conceived in the same manner, in the same manner is our substance formed in the depths of our mother's womb, and the same portal ushers the noble as well as the plebeian into the divine light of day. See *Wisdom*, vii. 5. Finally, we all journey to the same goal; 'Death with foot impartial knocks at the poor man's cottage and at princes' palaces.' (B.) [Horace, *Odes*, I. iv. 13 f.] 'We are all in debt to death,' says an unknown poet [Simonides] in the *Anthology* [X. cv]; and the bodies of all men return to the same corruption and dust. Claudian, *Against Rufinus*, Bk. II [473 ff.]: 'Hither come all the children of men whose life is ended; here there abide no marks of earthly fortune; no reverence is shown; the common beggar ousts the king, now stripped of his empty title.' (P.) Phocylides [III]: 'All the dead are equal.' Lucian, *Dialogues of the Dead* [X. xxv. 2]: 'Hades is a democracy; one man is as good as another here.' (F.) Cicero, *On Laws*, Bk. II [xxiii]: 'It is highly conformable to nature, to sweep away by mortality all the distinctions of fortune.' (Y.) Statius, *Thebaid*, Bk. X [712], speaks of 'titles lost in gloomy death'. (L.) Add *Sirach*, x. 9 ff.

Moreover, it is constantly emphasized by wise men that we are exposed to every kind of happening and to the sport of fortune; or better, that God guarantees to no man a stable and unshaken happiness and a continuance of his present state, but by the secret counsel of His providence He is wont to speed whom He pleases through various kinds of happiness. 'He can', yea, and often does, 'interchange the lowest and the highest; the mighty God abases and exalts the lowly.' (B.*) Horace, *Odes*, Bk. I, ode xxxiv [12]. *Idem*, Bk. II, ode xiii [13]: 'Man never heeds enough from hour to hour what he should shun.' (B.) *Idem*, Bk. III, ode xxix [49 f.]: 'Fortune, exulting in her cruel work, and stubborn to pursue her wanton sport, shifts her fickle favours, kind now to me, now to some other.' (B.) Manilius, *Astronomica*, Bk. III [525 ff.]:

This Nature orders too, and hence there springs
That various discord that is seen in things.
In one continual stream no fortune flows.
Joy mixes grief, and pleasures urged by woes,
In constancy in every part appears,
Which wisdom never trusts, but to thy fears. (C.)

Add Seneca, *Consolation to Marcia*, chap. xi. An excellent passage to the same purpose is in Seneca, *Thyestes* [597 ff.]:

He
Who wears a crown upon his brow,
To whom the trembling nations kneel,
[. . .] he, the king,

With anxious mind the sceptre bears,
 Foresees and fears the fickle chance
 And shifting time which soon or late
 Shall all his power overthrow.
 Ye, whom the rule of the land
 And sea has given o'er subject men
 The fearful power of life and death,
 Abate your overweening pride.
 For whatsoever fear of you
 Your weaker subjects feel to-day,
 To-morrow shall a stronger lord
 Inspire in you. For every power
 Is subject to a greater power.
 Him, whom the dawning day beholds
 In proud estate, the setting sun
 Sees lying in the dust.
 Let no one then trust overmuch
 To favouring fate; and when she frowns,
 Let no one utterly despair
 Of better fortune yet to come.
 For Clotho mingles good and ill;
 She whirls the wheel of fate around,
 Nor suffers it to stand.
 To no one are the gods so good
 That he may safely call his own
 To-morrow's dawn; for on the whirling wheel
 Has God our fortunes placed for good or ill. (M.)

Another passage from Arrian, *Epictetus*, Bk. I, chap. xix, also bears on this point: 'Epaphroditus had a shoemaker, whom he sold because he was useless; then by some chance he was bought by one of Caesar's officials and became Caesar's shoemaker. If you could have seen how Epaphroditus honoured him!' (M.*)

Many tenets of the Christian religion can be adduced to the same effect: That men are not judged the friends of God according to position, power, and wealth, but according to the sincerity of their piety; and, at the last judgement, in the assigning of final rewards and
 228 punishments no attention will be paid to those things by which mortals here rate themselves above others.

4. From this equality as we have posited it, there flow other precepts, the observance of which has the greatest¹ influence in preserving peace and friendly relations among men. Now it is clear at the outset that, if a man wishes to avail himself of the assistance of other men for his own advantage, he must in his turn lend his own talents to their accommodation. 'Hand washes hand' is the old proverb. Surely a man considers others his inferiors if he demands that they labour for him while he himself always desires to be independent, and whoever maintains such an attitude cannot avoid offending others, and giving occasion

¹ [For *maximam* read *maximam*.—Tr.]

to a breach of peace. It was a hardy reply of Caractacus, in Tacitus, *Annals*, Bk. XII [xxxvii]: 'And if you Romans must needs lord it over the world, does it follow that all welcome your yoke?' (R.)¹ Lactantius, *Divine Institutes*, Bk. III, chap. xxii [III. xxiii]: 'Nothing is done wisely which is useless and evil if it is done by all.' (C.) And just as surely as it implies a contradiction to draw different conclusions from things which entirely agree, so one cannot lay down different rules in exactly similar cases that concern myself and another. Nay, since every man knows his own nature best and the nature of other men, at least so far as concerns their general inclinations, just as well, it follows that he who decides one way in another man's right, and another way in a similar right of his own, is guilty of a contradiction in the very plainest matter, and this is evidence of a seriously disordered mind. No sufficient proof, indeed, can be advanced why something that I feel to be proper for myself, I should feel to be improper for others who are my equals, other things being equal. Thus, just as those men are best fitted for a social life who are willing to allow the same things to others as to themselves—as Horace, *Satires*, Bk. I, sat. iii [73 ff.], puts it: 'He who expects his friend not to be annoyed at his wens will excuse the other's warts. It is fair play that one who asks indulgence for shortcomings should give it in return.' (W.)—so those are plainly unsocial who, from a feeling of their own superiority, would have every liberty allowed themselves alone, overlook every fault in themselves, pardon nothing in others, and claim for themselves, although they enjoy no special right above others, honour before all other men, and a special share in things which are the common property of all. For just as in the erection of a building, a stone which, because of its angular and rough shape, takes more space than it fills, cannot be easily cut or shaped because of its hardness, and prevents the completion of the structure, is rejected as useless, so πλεονέκται [greedy men], who, in their miserliness, rob others of the necessities of life by keeping more than they can use, and who cannot be changed in their way, such is the stubbornness of their make-up, constitute a permanent menace and burden upon society. And hence the following is a generally acknowledged precept of natural law: *One who enjoys no right peculiar to himself shall not claim more for himself than for others, but he shall permit others to enjoy the same right that he himself does.* A tribune of the people speaks as follows in Dionysius of Halicarnassus, Bk. VII [xli]:

Nor less supported are we by this unwritten and unenacted law of nature, when we request of you, fathers, that the condition of the people may be neither better nor worse than your own [. . .]. We look upon it as our duty to confer magistracies, precedence, and honours upon those among you who are distinguished by their virtue; but at the same time we think it reasonable that to suffer no injury, and to receive justice adequate to the wrong sustained, shall be equal and common to all those who live under the same government. (S.)

¹ [Pufendorf by substituting *non* for *nam* makes a statement out of the rhetorical question.—Tr.]

Lactantius, *Divine Institutes*, Bk. III, chap. xxi: 'He who wishes to place men on an equality ought to take away [. . .] arrogance, pride, and haughtiness, that those who are powerful and lifted upon high may know that they are on a level even with the most needy.' (C.) Add Seneca, *On Anger*, Bk. II, chap. xxviii. And so the following words from Livy, Bk. III, chap. liii, abound in the deepest insolence: 'He is sufficiently and abundantly humble who lives in a state on an equal footing, neither inflicting nor suffering injury.' (S.) As if it were an unworthy thing that the privileges of nobility do not allow it to dispense with this most just law: *What you do not wish done to you, do not to another!* A similar case is the most arrogant satisfaction offered by the
 229 Duke of Joinville to Marescot, in Gramondus, *Historiarum Galliae*, viii, towards the end.

On the principle presented above rests the compliment to Trajan, in Pliny, *Panegyric* [ii. 4]: 'He regards himself as one of us, and this very fact makes him all the more excellent and eminent. He is no less conscious that he is a man than that he is ruling over men.' For on coming to the throne he had promised that he would be such a ruler over his subjects as any of them would wish his ruler to be. The same spirit is seen in the remark of Galba to Piso, in Tacitus, *Histories*, Bk. I, chap. xvi: 'In distinguishing good from evil, the most effectual and compendious course is, to consider what you would approve or repudiate were you a subject and another the sovereign.' (O.) Seneca, *Letters*, xlvii [111]: 'This is the kernel of my advice: Treat your inferiors as you would be treated by your betters.' (G.) But from what has been said the following words of Lucan, Bk. V [340 ff.], seem an unbearable bit of insolence: 'Never does the care of the Gods thus lower itself, that the Fates should have leisure to attend to your death and your safety. On the movements of the great do all these things attend. Through a few does the human race exist.' (R.) This view is called a Gigantean state of mind by Bacon of Verulam, *The Advancement of Learning*, Bk. VII, chap. ii, 'whereby those great disturbers of the world are possessed, who seem to have no other end in life than that all men should be happy or miserable according as these disturbers themselves are their friends or enemies, and that the world should bear, as it were, their likeness; all of which is a veritable war against God.'

5. The same equality also shows how a man should act, if he has the task of adjusting right among several persons: *He should treat them as equals and should favour no one above another, except in so far as some particular right belongs to a man.* For if he fails to observe natural equity by favouring one man above another, he is liable immediately to scorn and injury from the person thus slighted, because he did not give him what was his right, and took away from the dignity accorded him by nature. Livy, Bk. XXXIV, chap. iv: 'For that that should not be law-

ful for you which is permitted to another, may perhaps naturally excite some degree of shame or indignation.' (E.) It follows, that, in case the thing to be distributed cannot be divided among several¹, it should, if possible, be used in common by those who have equal rights in it, on the understanding that if the quantity of the thing permits, they may use it as much as they wish. But if the thing does not permit this, they may employ it in a limited degree, and in proportion to the number of those who use it; for any other way of observing equality cannot be imagined. But if the thing can neither be divided nor held in common, its use shall either pass around in turn (Curtius, Bk. VII, chap. vi: 'The king, sensible that it was difficult to decide on their pretensions, and that a preference would be regarded by the rejected party as an injury, directed that they should carry him alternately' (A.)), or, if even this is impossible, and the equivalent cannot be given to the rest by one of the number, it shall have to go to one of them by lot. For in cases of this kind no more convenient solution can be found than the lot, because it avoids any suspicion of disdain, and takes nothing from the dignity of him who is not favoured. *Proverbs*, xviii. 18. Compare Hobbes, *De Cive*, chap. iii, §§ 15-18, where he divides casting of lot into *arbitrary* and *natural*. The former takes place with the consent of the contenders, who agree beforehand on a solution or outcome which they cannot control or foresee by any plan, and so such a lot in respect to men depends upon mere chance and the turn of fortune. Under natural lot he places *first occupation*, according to which a thing, that cannot be divided or held in common, goes to him who was the first to lay hand on it with the intention of keeping it; and *primogeniture*, by which all family possessions which can neither be divided nor held in common by several children, go to the eldest.

But if we desire to go a little more accurately into the matter, there is really no kind of lot but arbitrary. For there is no apparent reason why a solution, which no one can secure by his own ingenuity, should confer on any man a right that will prevail against his equals, 230 unless this right has been accorded the same solution by the choice and agreement of men. Therefore, a thing which is no one's property, belongs to the one who seizes it, because, when individual ownership of things was introduced among men, it is generally understood that men entered into a tacit agreement that, if there were any things not assigned to particular individuals, and the public weal did not demand that they be left in common for all succeeding generations, they should pass to the man who was the first to seize them. And thus even the right of primogeniture owes its origin to an agreement or constitution of men. For why, otherwise, should the other brothers, born of the same parents, be in a worse condition because of something

¹ [For *intet* read *inter*.—Tr.]

which they were unable to remedy? And so Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xii, concludes: 'Brothers are equals except so far as they differ in years.' (W.)

Now the reason why the term lot is applied to these two rights is because they cannot be controlled or foreseen by human endeavour, and because to be passed over by them does not constitute any affront. But they will be treated more fully in another connexion.

6. An offence is done to this equality also by pride, whereby a person, for no reason at all, or else an insufficient one, raises himself above others, and looks down upon them as if they were not his equals. Descartes, *Les Passions*, art. 152, has well shown how far such conduct departs from true generosity or greatness of mind. After laying it down that wisdom consists in the main in knowing in what way and for what reason a person should esteem or despise himself, his argument proceeds as follows¹: The only just cause for our esteeming ourselves, proceeds from the proper use of our free power of choice, and from the control which we exercise over our will, since there is nothing, except such actions as depend on the will alone, for which we may with reason be either praised or blamed. Therefore, true generosity, which is responsible for a man esteeming himself as highly as he properly can, consists in a man's realizing that nothing is really his beyond this free disposal of his will, that he should be praised or blamed only for its proper or improper use, and that he be conscious of a firm resolution on his part to use it properly. Furthermore, those who realize and are conscious of this principle in their own actions, easily persuade themselves that all other men feel the same way about themselves, since there is nothing in all this which depends upon another. Such men, therefore, never despise others, and are ready to excuse their faults on the ground that they are due more to some error than to malice. Also, just as men who place no great value on wealth, honours, beauty, mental equipment, and learning, feel that they are little inferior to those who excel them in these lines, so, upon finding themselves thus endowed, they conclude they are not for that reason alone greatly superior to others whom they excel. And hence there is observed in generous men an honest humility, which consists in our reflecting on the weakness of our nature, and the mistakes which we may once have made, or may make again, that are in no way smaller than those which can be made by others; and so this humility prevents us from rating ourselves above any man, since we reflect that other men can use their free will, of which they have an equal share, just as well as we can. But those who have a good opinion of themselves for any other reason whatsoever, are filled not with true generosity, but with a swollen pride, which is always baneful, and all the more as there is less reason for such self-esteem.

¹ [For *de hinc* read *dehinc*.—Tr.]

And the most unjustified of all reasons for pride is that of being proud without reason, or, in other words, when a man feels that he has no merit in himself for which he should be esteemed, but thinks that glory consists in laying claim to it, and believes that the more of it men claim 231 for themselves, the more they actually possess. This fault is so absurd, that one could scarcely believe that there were men who would prostitute themselves to it, were there not so many flatterers who, by their empty praise, entice the more stupid among men into such pride. Pindar, *Olympian Odes*, ix [58-9]: 'Untimely boasting is in unison with madness.' (S.)

Not even if a man has attained honours and power has he reason to be proud. This is well illustrated by the words in which Menelaus expostulates with Agamemnon in Euripides, *Iphigenia in Aulis* [337 ff.]:

Hast forgotten how thou fain wouldst lead the Greeks to Ilium's shore,
How to all men wast thou lowly, clasping hands of amity,
Keeping open doors for whoso of the folk would seek to thee,
Bidding all accost thee freely, challenging the modest heart,
Seeking by thy shifts to buy advancement as in open mart?
(Tacitus puts it in a word: 'In order to be emperor,¹ crouching like a slave.'
(O.) [*Histories*, I. xxxvi. 13].)

Ah! when thy power was won, thou changest all thy mien: no more
Wast thou unto friends of days gone by a friend as theretofore,
[.] The noble-souled
Ought not, raised to high estate, to turn him from the paths of old,
Nay, but more than ever loyal then unto his friends should be,
When his power to help is more than ever, through prosperity. (W.)

And one should keep before his eyes the passage of Lucian, *De [Pro] Imaginibus* [*Imagines*, xxi]: 'No one would envy a person who outshines him, if he sees that he takes his good fortune with a spirit of moderation.'

7. It is a more serious offence against this equality if a man expresses his contempt for others by outward signs, such as overt acts, remarks, grimaces, laughter, and any kind of insult, which often consists in giving some inappropriate or cheap gift. Add *Digest*, II. viii. 5, § 1; *Matthew*, v. 22. Such an offence is to be considered all the worse, in so far as the minds of others are moved thereby to greater wrath and desire for revenge. Many, indeed, there are who prefer to expose their life to danger, and to break the peace with another man, rather than allow an insult to go unavenged.² For it violates that possession in which the soul of man takes its greatest pride, and for which it has so sensitive an affection—his glory and esteem, in the preservation and vigour of which rests all the satisfaction of his spirit.

8. A further conclusion to be drawn from what has been said is that the old idea handed down from the Greeks, to the effect that certain men are slaves by nature, merits complete disapproval. This, if

¹ [Instead of *imperio* Tacitus has *dominatione*.—Tr.]

² [For *in uliam* read *inuliam*.—Tr.]

taken in so crude a form, is directly at odds with the natural equality of men. And so Strabo, Bk. I [p. 66], passes a wise judgement on those who advised Alexander to treat the Greeks as friends and the barbarians as enemies: 'It would be better to make such divisions accord to good qualities and bad qualities; for not only are many of the Greeks bad, but many of the Barbarians are refined.' (J.) It is, of course, clear that some men abound in such mental equipment that they not only can look out for themselves, but can also undertake the direction of others, while others through stupidity are incapable of directing even themselves, so that they do a thing badly or not at all, unless they are directed and urged on by others; and because nature has often endowed them with a strong physique, by it they can render signal services to the rest of mankind. When such men live under subjection to the authority of some more prudent man, they have, without doubt, found a status suitable to their mental equipment. Now if these men agree to some distribution of control, it is surely consonant with nature that the power to command should be conferred on the former, and on the latter should be laid the necessity of obedience, and this upon some basis agreed to by both. In this sense is to be taken the statement of
 232 Aristotle, *Politics*, Bk. I [ii]: 'For he who can foresee with his mind is by nature intended to be lord and master, and he who can work with his body is a subject, and by nature a slave; hence master and slave have the same interest.' (J.) This is paraphrased by Daniel Heinsius in the following form:

Nothing is more agreeable with nature than that such things as are so fashioned by nature as to excel in prudence and mental attainment, and to foresee everything in the far distant future, should command and rule over all other things which excel less in such respects. While, on the other hand, those who are so born that they can carry out the commands of the more prudent with a vigorous and strong body, are fashioned by nature for obedience and service to the state. And so what is for the good of the master is also for the good of the slave, and the same usefulness and advantage belongs to each.

A similar thought appears in Apuleius, *De Philosophia* [II. xviii]:

It is better that a man who is neither by nature nor by industry prepared for a right way of living, should not govern but be governed; should be a servant and not a master; should on account of his own lack of control over himself be under the power of others; should accept the part of obedience rather than of command.

Yet it would be most absurd to believe that nature herself has, in fact, given to the more prudent rule over the more dull, or even any such a right, whereby the former can force the latter to serve them against their will. For if sovereignty is established in fact, some human agency must precede, and a natural aptitude for ruling does not of itself give a man the rule over him who is constituted by nature only for servitude. Nor can I, without more ado, use force in imposing upon another what is good for him. For men enjoy an equal natural liberty,

and if they are to allow it to be curtailed, their consent must be secured, whether that consent be express, or tacit, or interpretative, or else they must have done something whereby others have secured the right to deprive them of their equality, even against their will. And so the remarks of Quintilian, *Declamations*, xiii [8], are entirely justified:

What has nature produced that is not free? I forbear to speak of slaves, whom the hard fortune of war has delivered over as prey to their conquerors, although they were born by the same laws, the same fortune, the same necessity. They draw breath from the same sky, and it was not nature which gave any of them a master, but only fortune.

Ulpian, in *Digest*, I. i. 4, observes that 'by natural law all men are born free'. This statement, Grotius, Bk. II, chap. xxii, § 11, maintains, must be understood of liberty *κατὰ στέρησιν* [by deprivation] and not of the liberty *κατ' ἐναντιότητα* [by opposition], that is, that a person is not by nature a slave, for no person is free in the sense that he cannot become a slave.

This might be stated in another form as follows: Since nature made all men equal, and since slavery cannot be understood apart from¹ inequality—for although it is the part of a slave to recognize a superior, liberty does not require one to have an inferior, but it is sufficient if a man is not subject to a superior—therefore, all men by nature, antecedent to any act of man, are understood to be free. But natural aptitude, or the presence of such qualities as are necessary to a certain state, does not of itself put one in that state. For he who is worthy to rule, or fitted to lead an army, does not forthwith become king or general. Nor can that Lollius, whom Horace, *Odes*, Bk. IV, ode ix [34 ff.], describes, claim the fasces immediately on any right of his: 'He had a mind experienced in affairs, well-poised in weal or woe, punishing greedy fraud, holding aloof from money that draws all things to itself, a consul not of a single year.' (B.) For the account of Plutarch, *Pelopidas* [p. 290, chap. xxiv], that he held authority longer than the laws allowed, lest the sluggishness of his successors should ruin the state, is an exception to the rule. Add Cornelius Nepos, *Epaminondas*, chaps. vii, viii, and Livy, Bk. XXVI, chap. ii.

At this point we must explain the saying of Albutius in Seneca, *Controversies*, Bk. III, cont. xxi [VII. vi. 18]: 'No one is born free, no one a slave; fortune has assigned these names to individuals later on in life.' That is, so long as all men were equal, men could not be conceived as differing in respect of any such state as is opposed to that natural state of equality. But when those who had passed from that state were called by the special name of slave, those who retained that state were designated free men. The principle can be explained by an illustration. So long as there is no soldier in a state, all the citizens are rated in the same class; but when part of the citizens are assigned military duty,

¹ [For *circo* read *citra*.—Tr.]

there arise the opposite terms of 'soldiers' and 'country-men', since no one could be called a 'country-man' before there was a 'soldier'. In this sense can be taken the statement, which Aristotle, *Politics*, Bk. I, chap. iii, quotes and then rejects: 'The distinction between slave and freeman exists by law only.' (J.) For had not slavery been introduced by human institution, the future state of men would have been uniform, and there would have been nothing to distinguish a slave from a freeman, since there would have been none of the former class. Just as it is stated in *Institutes*, I. v: 'Though we are all known by the common name of "man", three classes of men came into existence with the law of nations, namely, men freeborn, slaves, and thirdly, freedmen.' (M.) Although the statement of Aristotle may allow this explanation: The rights of liberty and slavery, as they are considered among men living in states, are defined by civil laws.

But there are also other considerations which demolish the crudely held belief regarding slaves by nature. For there is scarcely a man so dull as not to think that his manner of life is more correct and advantageous when directed by his own wish, than when directed by the command of another—a feeling more to be seen in whole nations, none of which is so abject that it does not prefer to be directed from within, rather than to be subject to others. And finally, since nature does not set up any actual government, while those servants by nature, as Aristotle calls them, are for the most part of good physique, there will be a battle, uncertain in its outcome, between intelligent men and these latter, in which the former can by no means assure themselves of victory.

A further point made by Aristotle, *Politics*, Bk. I, chap. i [I. ii], must also be rejected: 'Wherefore the poets say,

It is meet that Hellenes should rule over barbarians;
as if they thought that the barbarian and the slave were by nature one.' (J.)

Euripides, *Iphigenia in Aulis*, [1400–1401]:

Right is it that Hellenes rule barbarians, not that alien yoke
Rest on Hellenes. They be bondsmen, we be freeborn folk. (W.)

On such a score it would be easy to mark down as barbarians all peoples whose customs differ from ours, and attack them on this excuse alone. But it is clear that these ideas of the Greeks arose, partly because the Greeks enjoyed so great a degree of liberty in their democracies, while the Persians were firmly bound to obey a single man, and partly from a hatred which they exhibited towards the latter to a most unrestrained and unnatural degree. For this reason Isocrates, *Panegyric* [184] and *Panathenaic Oration* [163], calls the Persians the 'natural enemies' of the Greeks, and says that in their assemblies, before any business was begun, 'curses were pronounced upon citizens who suggested

peace or friendship with the Persians'; and that the Eumolpids and heralds, in the festival of the Mysteries, from hatred for the Persians, forbade other barbarians as well, as if they were murderers, to join in the sacred rites.

But these ideas can be defended more easily, perhaps, if we say that Aristotle, in making some slavery natural and other slavery legal, meant that the former is when a dull but strong man is in slavery to one who is equipped with natural ability to direct, whereby each of them lives in a state advantageous to himself; but it is legal slavery when a bad turn of fortune, or the rank of his mother, forces a man of good mind and ability, through fear or the hand of the law, to serve a man who is his inferior. When this takes place, such a slave cannot help entertaining hatred towards his master. But when, on the other hand, a mutual comparison is made of the qualities which nature herself has created as suitable for each of the two statuses, a kind of friendship strikes up between the slave and his master. However, it must always be regarded as an established fact that a mere natural aptitude does not give the possessor of it a perfect right to impose servitude upon another, nor lay upon the former an obligation to assume it. 234

9. A few remarks should be made, at this point, on that equality which is a consequence of a natural state, and which we can call *equality of power* or *of liberty*. By this all men are recognized to be naturally equal, in so far as no one, apart from an antecedent deed or agreement of man, has any power over another, but every man is the governor of his acts or power. This equality was afterwards removed by a civil state, wherein, since one or more persons received the power to give orders to others, the rest were put under the necessity of obedience, resulting in the greatest inequality imaginable between rulers and subjects. But since one finds in a civil state, even among fellow citizens, inequality not merely in reputation and dignity (see below, Bk. VIII, chap. iv), but also in the power which one man has over another, it should be borne in mind that a part of that inequality is due to the status of head of a family [*paterfamilias*], which preceded the formation of a state, and the power, which, under this institution, they secured over their wives, children, and slaves, the heads of families brought over into states. This inequality, therefore, owes none of its origin to states, but is much older than they are, and so the institution of head of a family was not given by states, but was carried over into them, although here and there with considerable limitation and curtailment.

Now if any further inequality of power is found among citizens, it clearly arises from the highest civil authority, since whoever have entered a state, have transferred to those in supreme control all the power that they had over themselves, as far, of course, as was necessary for the nature of the state. And so, if any person had already transferred

some of his power to another, before the formation of the state, such power is either destroyed by his entering the state, or else is subject to the final disposition of the state. But after a person has subjected himself to the supreme authority, there is no way whereby he can give another any of his power which will prevail against the right now secured by the supreme authority, since, were this so, one would have two masters, neither subordinate to the other, whom one cannot serve at the same time. Therefore, whatever inequality between citizens arises after the formation of states, owes its origin either to the public administration, whereby the supreme authority delegates to certain citizens the exercise of some special authority over the rest, or to some special privilege granted by the supreme authority.

But no inequality arises from a difference in wealth between citizens as such, except in so far as great wealth makes it possible actually to injure others, or to do them some good; and for this reason it has been the custom for poorer men to make furtive advances, in order to secure the favour of the more wealthy, and to submit themselves to them, either so that the latter may do them no harm, or else that they may confer on them some benefit. Compare Lucius Antistius Constans, *De Jure Ecclesiasticorum*, tit. iii. But this civil inequality conflicts in no way with those rules which we have already deduced from natural equality.

CHAPTER III

ON THE GENERAL DUTIES OF HUMANITY

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|---|---|-----|
| 1. A man should advance the interests of another man. | 9. On admitting strangers. | |
| 2. Either indefinitely; | 10. On allowing a residence to foreigners. | |
| 3. Or definitely, by common humanity. | 11. On furnishing a market. | |
| 4. Lesser instances of the latter. | 12. Whether one is bound to buy another's goods. | |
| 5. On allowing passage through our land to other persons; | 13. On permitting marriages. | 235 |
| 6. Also to goods. | 14. Whether a person can be denied what is allowed to all men in general. | |
| 7. Whether toll can be demanded for passage. | 15. On beneficence. | |
| 8. On approach to a foreign coast. | 16. On a grateful, | |
| | 17. And an ungrateful mind. | |

It is, indeed, a little thing not to have hurt another, or not to have taken from him his proper esteem, which things do but remove any just reason for hatred. But some benefit as well must be conferred upon another, if the minds of men are to be united by a still firmer bond. A man has not paid his debt to the sociable attitude if he has not thrust me from him by some deed of malevolence or ingratitude, but some¹ benefit should be done me, so that I may be glad that there are also others of my nature to dwell on this earth. The mutual dependence and relationship which nature has constituted between men, demand the exercise of mutual duties. Seneca, *Letters*, xcv [51]: 'But what a small thing it is not to hurt the man to whom we ought to do good!' Plato has a fine passage in *Epistles*, ix [p. 358 A], to Archytas of Tarentum: 'Each of us is born not for himself alone. We are born partly for our country, partly for our parents, partly for our friends.' (P.) The same thought is thus expressed by Cicero, *On Duties*, Bk. I [vii]:

We are not born for ourselves alone, and our country claims her share, our parents, and our friends, their share; and, as the Stoics hold, all that the earth produces is created for the use of man, so men are created for the sake of men, that they may mutually do good to one another; in this we ought to take nature for our guide, to throw into the public stock the offices of general utility by a reciprocation of duties; sometimes by receiving, sometimes by giving, and sometimes to cement human society by arts, by industry, and by our resources. (E.)

Idem, *On Duties*, Bk. III [v]: 'To undergo the greatest labour and inquietude for the sake, if it were possible, of preserving or assisting all nations [. . .] is more in accordance with nature than to live in solitude, not only without any inquietude, but even amidst the greatest pleasures.' (E.) Add Lactantius, *Divine Institutes*, Bk. VI, chaps. x, xi. Philo Judaeus, *That God is Immutable* [iv]: 'For all men will be

¹ [For *aliquid* read *aliquid*.—Tr.]

deservedly miserable, who seek their own advantage alone, despising all other things, as though they were born for themselves alone, and not for numberless other persons, father, mother, wife, children, and the human race.' ¹ It was one of the maxims of the Gymnosophists, according to Heliodorus, *Ethiopica*, Bk. II [31]: 'Not to neglect in its danger a soul when it had once entered a human body.' Libanius, *Declamations*, xix [xiii. 26]: 'When I use the word man, I mean compassion, I mean human kindness.' Add Philostratus, *Life of Apollonius of Tyana*, Bk. V, chap. i. Marcus Antoninus [Aurelius], Bk. III, § 4: 'All that is rational is akin, and it is in man's nature to care for all men.' (H.) *Idem*, Bk. IV, § 3: 'Rational creatures have been made for one another.' (H.) Add *Idem*, Bk. IV, § 4; Seneca, *Epistles*, xcv [52]:

We are members of a great body. Nature has made us all akin; we are formed of the same elements and produced to the same ends. She has implanted in our breasts mutual affection, and made us apt for social intercourse. She has constituted justice and equity. By her constitution it is more wretched to do an injury than to suffer one, and by her commands our hands are always ready to help. Let this verse be ever in our hearts and upon our lips: 'I am a man, and regard nothing as alien that concerns man' [Terence, *The Self-Tormentor*, 77]. Let us consider that we are born for the common good. Our human society is altogether like a vaulted stone roof, which would fall were it not held up by the natural thrust of stone against stone.

236 Add Bacon, *Essays*, chap. xiii. But how much more foul will be the sin of him who finds pleasure in the misfortunes of others, especially of the innocent, or of him who grieves at their successes!

2. Now the interests of other men are advanced by us either indefinitely or definitely, and this so that something is either taken or else not taken away from us. This comes about in the first way if a man carefully cultivates his mind or body, so that he may be enabled to better the interests of others, or if, by the quickness of his wits, he makes such discoveries as will render the life of man more orderly. They will discover the best way to render such service who take to heart the words of Columella, *On Farming*, Bk. XI, chap. i [27]: 'In every phase of life it is of the utmost importance that a man realize he does not know what he actually does not know, and seek ever to add to his knowledge what he was ignorant of before.'

From this it appears that those who fail to develop themselves by some honest occupation, sin against the law of nature, and are of no use to themselves and a burden to others, while they look upon their soul as only salt to keep their body from decay [Cicero, *On the Nature of the Gods*, II. clx, after Chrysippus]—'ciphers only, fit for nothing but to eat their share of the earth's fruits' (W.) [Horace, *Epistles*, I. ii. 27]. To remove such people from the state, the Egyptians had the custom that all the inhabitants should give their names to a magistrate,

¹ [Markedly condensed from the original.—Tr.]

stating at the same time by what occupation and manner of life each made his living. The man who returned a false report, or followed an improper calling, suffered the penalty of death. Diodorus Siculus, Bk. I, chap. lxxvii. A similar law among the people of Sardinia is recorded for us by Aelian, *Varia Historia*, Bk. IV, chap. i. In this class belong also those who are satisfied with the fortune left by their parents, and think they have been freed from any accusation of slothfulness, since the industry of others has secured them the means of existence. On the same score, Vergil, *Aeneid*, Bk. VI [610-11], very properly assigns a place in Tartarus to those 'who in selfish greed brooded over gotten wealth, nor shared it with their own'. (B.) An illustration of the same thought is to be found in a law of the Milesians, that 'a man who had squandered the whole of his patrimony, should not be allowed funeral rites in his country'. (Y.) Diogenes Laertius, *Democritus* [ix. 39]. Such men are also described by Manilius, *Astronomica*, Bk. IV, [537 ff.]:

He wrongs his father and he cheats his son.
His race in vain with expectation wait,
For in himself he buries his estate.
So vast his gluttony, his lust so wild,
That he devours himself,¹ yet is not filled.
And while his appetite proceeds to crave
He eats his funeral and he spends his grave. (C.)

And so the Apostle gives as one of the reasons why every one should work: 'That he may have whereof to give to him that hath need.' *Ephesians*, iv. 28. Horace [*Satires*, II. ii. 103]: 'Why does any man who does not deserve' (poverty), 'want while you abound?'

Another class of men who belong here are those who, like swine, give pleasure only by their death. An anonymous poet in the *Anthology* has made fun at their expense [XI. 166]: 'All say you are rich, but I say you are poor, Apollophanes, for their use is the proof of riches. If you take your share² of them, they are yours, but if you keep them for your heirs, they are already some one else's.' (P.)

Nor, in my opinion, should we exclude from this type those useless burdens to the earth,³ who, under the guise of religion, labour with no other end than to distend their belly with much fat, and in their sluggishness devour the wealth stored up by the labour of others. On these Zosimus, although a pagan, passed a just sentence, Bk. V [on the year 403, chap. xxiii]:

These monks abstain from lawful wedlock, and fill cities and villages with swarms of unmarried human beings, useful neither for war nor for any other social need in the state. But from that time down to the present they have proceeded to make their own the larger part of the earth, and under the pretence of sharing everything with the poor have just about reduced all men to the level of beggars.

¹ [For *sement* read *semet*.—Tr.]

² [For *ut* are read *utare*.—Tr.]

³ [The phrase is from Homer, *Iliad*, XVIII. 104.—Tr.]

Among such people you may also include the class of beggars among the Chinese, who butt each other around with their heads until¹ they are given something. On them see Neuhoſ, *Legatio*, pp. 267-8. High praise is given by Valerius Maximus, Bk. II, chap. vi, § 7, to a custom of the inhabitants of ancient Massilia, according to which Massilia
 237 'used to shut its gates to all who seek to be maintained in idleness under the guise of religion, feeling that it ought to do away with such a false and specious superstition'. Add a letter of Erasmus to Servatius, found in the account of his life prefixed to the edition of his letters, London, 1642.

On the other hand, the greatest praise should always be accorded those who, by the quickness of their wits, have made useful discoveries for mankind, and have not kept such discoveries for themselves alone, but gladly made them the common property of others. For 'in the tomb, hidden worth differs little from cowardice' (B.), Horace, *Odes*, Bk. IV, ode ix [29-30]. Thus Vergil, *loc. cit.* [vi. 663-4], puts in the Elysian Fields those 'who by wise invention the life of man refined, and those who made their memory sweet and loved by deeds of kindness and of mercy'. (B.) And Servius remarks on these lines [on 663]: 'Those who have refined and adorned life by the invention of the arts. Now he means the philosophers, who have devised anything that serves for the enrichment of life.' Add Lucretius, Bk. V, lines 1 ff. And so the ancients admitted many men to the council of the gods, because they had made the life of man more advanced by useful inventions or beneficent institutions. On the reasons why Isis and Osiris gained divine honours among the Egyptians, see Diodorus Siculus, Bk. I, chaps. 13-15. Add *Idem*, Bk. I, chap. xliii. Cicero, *On Ends*, Bk. III [viii]: 'We are urged by nature to wish to help as many men as we can, especially by instructing them and laying before them rules for wise living.' (E.) Add Pliny, *Natural History*, Bk. XXV, chap. i. Seneca, *Letters*, vi:

I am glad to learn in order that I may teach. Nothing will ever please me, no matter how excellent or beneficial, if I must retain the knowledge of it to myself. And if wisdom were given me under the express condition that it must be kept hidden and not uttered, I should refuse it. (G.)

Sophocles, *Oedipus Tyrannus* [314]:

This is man's highest end,
 To others' service all his powers to lend. (S.)

And so our fullest approbation cannot be given to the epitaph of Similis, who, after retiring from the position of praetorian prefect under Hadrian, spent the last seven years of his life in the country: 'Here lies Similis, who existed through so many years, but lived only seven.' [Xiphilinus, *Epitome of Dio Cassius*, LXIX. xix. 2.]

¹ [For *quod* read *quoad*.—Tr.]

By the means just mentioned, and others like them, the interests of others are furthered in general and indefinitely, that is, we do not undertake to aid this or that person, but we give the products of our hands for the use of every man, as if they were the common property of all. But at this point the question may be raised whether, if, for example, a man has discovered a method of making gold or silver without much effort, and from a cheap and plentiful substance, he should publish his method. The answer must be in the negative, since, if such a secret were made common knowledge, the result would be the hopeless confusion of trade, states, capital, and practically every institution of civil life.

3. A man serves others more definitely if he grants certain men the use of something which could be of some use to him; and this can often be done without loss, trouble, or labour on our part. To have denied such a service, or given it grudgingly, is regarded as a piece of malignity and inhumanity worthy of censure. For a faculty of this sort, whereby we can be the cause of another's gain, without ourselves suffering any loss, is an idle thing, unless used when occasion demands, and turns to the opprobrium of its possessor. And it is entirely proper to compare such men with dogs which lie in hay that they cannot eat, and drive away with their fangs the oxen that would approach it [Aesop, 228]. And so, in the bestowal of such benefits, we base our argument upon nothing other than man or common nature. This is illustrated by the remark of Aristotle in Diogenes Laertius, Bk. V [17 and 21], when certain men reproved him for giving a dole to an unworthy person: 'I did not pity his character, but the man himself'; or, as others report it: 'I gave not to the man, but to humanity.' (Y.) Thus how inhuman it would be of me, if I did not want to keep something any longer, because I had more than I could use, or else its preservation was an inconvenience to me, not to prefer leaving it intact, so that it could be of use to others, rather than to destroy it! Although in war things are often destroyed which cannot 238 be saved, so that the enemy cannot turn them against us.

In like manner we should grant freely to others those things which are said to be of innocent utility (*innocuae utilitatis*). On such matters Cicero, *On Duties*, Bk. I [xvi], has this to say:

All communities of men consist of things which are of that nature which, though placed by Ennius under one head, may be applied to many. 'He (says that author) who kindly shows the bewildered traveller the right road, does, as it were, light his lamp by his own; which affords none the less light to himself after it lighted the other.' By this single example he sufficiently enjoins on us to perform, even to a stranger, all the service we can do without detriment to ourselves. Of which service the following are common illustrations: 'That we are to debar no man from the running stream'; 'That we are to suffer any who desire it to kindle fire at our fire'; 'That we are to give faithful counsel to a person who is in doubt': (In Plato, *Theages* [p. 122 B], 'counsel' is called 'a holy thing') all which

are particulars that are serviceable to the receiver without being detrimental to the bestower. We are, therefore, to practise them, and be constantly contributing somewhat to the common good. As the means, however, of each particular person are very confined, and the numbers of the indigent are boundless, our distributive generosity ought still to be bounded by the principle of Ennius—'it nevertheless gives light to one's self'—that we may still be possessed of the means to be generous to our friends. (E.)

Idem, *On Duties*, Bk. III [xiii]: 'It is forbidden at Athens with public execrations, not to point out the road to one going astray.' (E.) From such things no one should be cut off, unless it happen that some monstrous deeds of his have warranted his being regarded as an abomination. Therefore, Plutarch, *De Invidia et Odio* [vi], tells us:

The Athenians therefore had so utter an abhorrence of those who accused Socrates, that they would neither lend them fire, nor answer any question, nor wash with them in the same water, but commanded the servants to pour it out as polluted; till these sycophants, no longer able to bear up under the pressure of this hatred, put an end to their lives. (G.)

Polybius, *Excerpta Peiresciana*, 142 [XXX. xx], tells the same story about Callicrates and Andronidas. Likewise in Athens no fire was lighted for men condemned because of certain crimes, nor were they allowed to join in banquets, or in the celebration of state worship, as we are informed in Dinarchus, *Orations, Against Aristogeiton* [II. ix]. Add Sophocles, *Oedipus Tyrannus*, lines 244 ff.; Euripides, *Orestes*, lines 46 and 513.

When Seneca, *On Benefits*, Bk. IV, chap. xxix, says, 'Who ever called a hunk of bread a benefit, or a farthing dole tossed to a beggar, or the means of lighting a fire?' (S.), he does not deny that such favours should be willingly granted others, but he maintains that to think of laying a man under obligation by such trifles is impudent and base. For although such things are at times of the greatest value, yet they are so easily rendered that, even when enhanced by circumstances, no entry should be made of them on one's books. So Terence, *Andria* [330 f.], says: 'I don't think it's a gentlemanly thing for a man when he deserves no gratitude to put in a claim for it.' (S.) Nor can one deserve thanks for such gifts as are the object of the jest of Horace, *Epistles*, Bk. I, ep. vii [14 ff.]:

The manner in which the Calabrian host invites a guest to eat his pears; 'Eat some more, pray.' 'I have had enough.' 'But please take away as many as you like.' 'No, thank you.' 'They will be a welcome present for your boys if you will take them.' 'I am as much obliged by your generosity as if you had sent me away laden.' 'Well—as you please—if you leave them, they go into the pig-tub to-day.' The prodigal and fool gives away what he despises and hates. (W.)

4. Illustrations of these acts of common humanity are in a passage of Plutarch, *Symposiasts*, Bk. VII, qu. iv, where there is a discussion of the question, why the ancient Romans always left something on the

table, and never put out their lamps. Among other reasons for this custom the following is advanced:

This custom is an instruction for kindness and good will. For it is not lawful for any one that has taken sufficiently to destroy the remainder of the food; nor for him who has supplied his necessities from the fountain to stop it up; nor for him that has made use of any marks, either by sea or land, to ruin or deface them; but every one ought to leave those things that may be useful to those persons that afterwards may have need of them. Therefore, it is not fit, out of a saving covetous humour, to put out a lamp as soon as we need it not; but we ought to preserve and let it burn for the use of those that perhaps want its light. Thus it would be very generous to lend our ears and eyes, nay, if possible, our reason and fortitude, to others, whilst we are idle or asleep. (G.) 239

Idem, *Roman Questions* [lxxv], on the same custom:

Or does the custom teach us that when we have enough and to spare of any necessary thing, as fire, water, or any other thing, we should not spoil it, but let all use it who need, and leave it for others when we no longer want it ourselves? (R.)

Theocritus, *Idylls*, xxvi [xxv. 5]: 'They say Hermes be the wrathfullest god in Heaven, an you deny a traveller guidance that hath true need of it.' (E.) Thus, in the *Prometheus* of Lucian, the hero accuses the gods of envy, since they were angered at his giving their fire to men, since 'fire becomes no less if one gives of it to another, nor is it extinguished if another takes its flames'. Another illustration is a law of Pythagoras, given in Diogenes Laertius [VIII. 23]: 'Not to destroy or injure a cultivated tree.' (Y.)

To this general class belongs the use of running water for drinking or washing. For although rivers can be either public or private property, yet simple humanity dictates that running water may be drunk or drawn from them by any one not an enemy. We prefer to state it this way, rather than to say with Grotius, Bk. II, chap. ii, § 12: 'Thus a river, viewed as a stream, is the property of the people through whose territory it flows.' (K.) To say that the same thing may be both private and common seems less fitting than that the use of some privately owned thing, on the law of humanity, should be allowed to all men. But to undertake to impute something, which is otherwise wasted and is replenished by a constant flow from the spring, is clearly a most sordid endeavour. Plautus, *Truculentus* [563 f.]: 'It is just as though a person should turn off a stream for himself from a river; if it is not turned off into a channel, still all that water would go into the sea.' (R.) Ovid [*The Art of Love*, III. 93-4]: 'Who would forbid light to be taken from another light presented? Or who, on the deep sea, would hoard up the expanse of waters?' (R.) This is the way to explain the speech of Latona to the Lycian country folk, *Idem*, *Metamorphoses*, Bk. VI [349 ff.]: 'Why do you deny me water? The enjoyment of water is a common right. Nature has not made the sun private to any, nor the air, nor soft water. This common right I seek.' (M.)

Now water and a spring can unquestionably become private property; and so the Israelites offer to purchase water for themselves and their beasts from the Edomites, *Numbers*, xx. 19; compare 2 *Chronicles*, xxxii. 3. Although when there is a copious flow, we should allow any one to use the scattering streams, provided it can be done without prejudice to ourselves. Add *Genesis*, xxvi. 20-2.

A law of Solon's in Plutarch, *Solon* [xxiii], should also be noted here:

Since the country was not supplied with waters by ever-flowing rivers, or lakes, or copious springs, but most of the inhabitants used wells which had been dug, he made a law that where there was a public well within a 'hippikon', a distance of four furlongs, that should be used, but where the distance was greater than this, people must try to get water of their own; if, however, after digging to a depth of ten fathoms on their own land, they could not get water, then they might get it from a neighbour's well, filling a five-gallon jar twice a day; for he thought it his duty to aid the needy, not to provision the idle. (P.)

Idem, *De Vitando Aere Alieno* [i, p. 827 D]:

Plato, in his *Laws* [844 B], permits not any one to go and draw water from his neighbour's well, who has not first digged and sunk a pit in his own ground till he is come to a vein of clay, and has by his soundings experimented that the place will not yield a spring [...]. But it must be lawful for them to take water from another's ground, when there is no way or means for them to find any in their own. (G.)

But it is not unusual for other duties of this kind also to be sanctioned by civil laws. See *Leviticus*, xix. 9-10; xxiii. 22; *Deuteronomy*, xxiv. 19-21; xxiii. 24-5; Josephus, *Antiquities*, Bk. IV, chap. viii; cf. *Matthew*, xii. 1. Plato, *Laws*, Bk. VIII [845 A]: 'And if a stranger is
240 passing along a road, and desires to eat the autumnal fruit, let him, if he will, take of the fresh grape for himself or a single follower without price, as a tribute of hospitality.' (J.) By the laws of Lycurgus, a person at Sparta who was in want could make use of another's servant, animal, or food; Xenophon, *De Republica Lacedaemoniorum* [VI. iii-iv]. Add *Law of the Burgundians*, tit. xxviii, § 1; Selden, Bk. VI, chap. vi. A passage to the point is in Phocylides [24-6]:

Him that is without shelter take into thy house and guide the blind. Pity the shipwrecked, for voyaging is uncertain. Give thy hand to him that has fallen, and save the man who is solitary. [140 f.]: If a beast fall in the way, even though it belong to thine enemy, raise it up. A mortal that is wandering or lost bring thou never to shame.¹

Diphilus [frg. 62 Kock]: 'Do you not know what stands in the curses, if a man will not tell the right road?' Add *Digest*, XLVII. ix. 10. Quintilian, *Declamations*, V [vi]:

It was God's will for us to come to one another's assistance, and for each man, by rendering mutual aid, to protect his neighbour from what he himself was afraid of. This is not yet affection, nor the expression of personal esteem, but a sagacious fear of similar misfortunes, and a religious apprehension of common dangers. When another is starving each one pities himself. Thus, in a siege, a man shares his food; and thus one

¹ [So the better reading. Pufendorf's text had 'turn thou not away'.—Tr.]

man's provisions have frequently met the wants of a whole company of fellow mariners. This also is the source of that affection which makes us cover with earth the corpses of men unknown to us, and however hasty our journey be, we never pass by any unburied body without performing to some degree this pious office.

5. Among these duties are reckoned by Grotius, Bk. II, chap. ii, § 13, also that of allowing innocent passage over our lands, rivers, and such parts of the sea as have become subject to ownership, if any would use them for legitimate reasons; for instance, if a people has been forced to leave its own territories and is seeking a new home, or desires to carry on commerce with a distant people, or is seeking to recover by just war what is owed it, and even when they are established in another place and are hastening to bring succour to their motherland in her hour of danger. But these items require a somewhat extended consideration. It must, of course, be taken for granted that if a band, few in number and unarmed, wish to cross our territory, living at their own expense, a passage should be allowed them, in case they wish to use it for an honourable and necessary reason. But it is not so clear what should be said in the case of great hosts, since their passage may give us good grounds for apprehension, both from the hosts themselves, and from those to whose lands they are crossing. But Grotius, *loc. cit.*, notwithstanding such apprehension, maintains that they should be allowed a passage, and that for this reason: Because it is understood that in the division of things, whereby primitive community was done away with, and distinct dominions of things were introduced, all reserved, as it were, such use of another's property as is required by any in need, and does no injury to its owners. Therefore, those who need a thing can demand by their own right such a use of it.

If this argument displease any one, it may be put more simply: By the law of humanity one man should grant another the innocent use of his property; and this use, under the stress of necessity, may even be claimed by force, since, indeed, its denial is caused by groundless timidity or malignity of mind. Although permission for this use should first be sought in a calm manner, and force should not be used before it is clear that the owner of the place intends to refuse the permission out of mere inhumanity, without any just reason.

According to Plutarch, *Cimon* [xvii. 1], when Cimon had led his army through the territory of the Corinthians, before first appealing to its citizens, Lachartus upbraided him: 'People who knock at doors, do not go in before the owner bids them.' (P.) In the same way Telephus, in Dictys Cretensis, Bk. II [ii], properly upbraids the Greeks, because, although they claimed¹ they came as friends, 'they had not sent ahead a messenger to announce their arrival'. In Livy, Bk. XXXIV, 241 chap. lxii, Masinissa,² 'when going in pursuit of Aphir, a fugitive from

¹ [For *ferreet* read *ferrent*.—Tr.]

² [For *Masanissa* read *Masinissa*.—Tr.]

his kingdom, then hovering about Cyrene, with a party of Numidians, has solicited as a favour a passage through that very district, as being confessedly a part of the Carthaginian dominions.' (E.)

A further point is made that the mere fear of a multitude crossing a region is not reason enough for denying it passage, since the law of nature may be observed as well by many as by a few. And yet the same¹ law allows us to take security, from those who pass through, that they will either do us no damage, or else will compensate us for it. For it is an old saying that opportunity makes a thief, and that a man is short-sighted who admits so many men into his dwelling that they can turn and eject him. And there are not lacking instances of cities passing under the yoke, because they unguardedly admitted many armed men. This is all the more true because there are few generals who deserve the praise which is given Cn. Pompeius by Cicero, *For the Manilian Law* [xiii]: 'His legions arrived in Asia in such order that not only no man's hand in so numerous an army, but not even any man's footstep, did the least injury to any peaceful inhabitant.' (Y.) And so Caesar, *Gallie War*, Bk. I [vii-viii. 4], refuses the Helvetians passage through the Roman province, because

remembering that the consul Lucius Cassius had been slain, and his army routed and sent under the yoke, by the Helvetii, Caesar did not believe [. . .] that men of unfriendly disposition, if granted an opportunity of marching through the Province, would refrain from outrage and mischief. (E.)

Different ways of taking security are proposed, as, for instance, those who request the right of passage are required to pass through without their arms—a thing you may scarcely require of armed forces, since to demand of such that they lay down their arms is almost the same as asking them 'to cut off their hands', as Florus, Bk. III [II], chap. xviii, writes of the inhabitants of Numantia. It would be easier for them to divide their forces and send them through in small bands, or to give hostages. For the precaution whereby the one who allows the passage would hire sufficient guards at the cost of the party crossing would appear to be too expensive, and requires a large amount of time.

Authorities add, furthermore, that passage should not be denied on the ground that it may be found in a more remote place and by a circuitous route, for if others would use the same excuse, it would be equivalent to refusing passage. And so it is enough if a passage is requested without evil intent, where it is shortest and most convenient.

Some, in order to establish a right of free passage, devise the theory that state highways are the common property of all men, and do not belong to the peoples through whose territory they run, as if such roads are parts of the frame of this earth, created by God Himself at

¹ [For *eadem* read *idem*.—Tr.]

the beginning of things—so stupid an invention that it needs no refutation.

But there are not lacking good arguments to prove that, without some sort of agreement or concession, passage is not owed even by mere natural law, especially in case one has decided to cross our territory in order to make war on a neighbour of ours. For surely one neighbour owes it to another, who is his friend, or has done him some good turn, that he should refuse passage through his country to one who is going to attack him; provided he can prevent it without any great inconvenience to himself. And so the Gauls felt that it was a stupid and impudent demand made of them by the Romans,

to propose that the Gauls, rather than suffer the war to pass on to Italy, should turn it upon themselves and expose their own lands to be laid waste instead of those of others. Since they had neither experienced good from the Romans, nor wrong from the Carthaginians, on account of which they should either take up arms on behalf of the Romans or against the Carthaginians. (S.) Livy, Bk. XXI, chap. xx.

Therefore, as a general thing, it is expressly stipulated in treaties that no passage will be granted our enemies. See the treaty of the Romans with Antiochus, in Livy, Bk. XXXVIII, chap. xxxviii, at the beginning; and with the Aetolians, in Polybius, *Selections on Embassies*, xxviii [XXII. xv. 3].

Nor does it meet the difficulty to say that passage should be granted, when the party is attacked in a just war, and should be denied, if threatened by an unjust war. For a decision on this point cannot always be made soon enough, and it is rash voluntarily to thrust oneself as a judge between two armed powers and make oneself a party to so great a quarrel. Besides, if free transit be granted, our own territory may become the seat of war. For what if my neighbour meet his enemy while he is still in my territory, and stop him there? I cannot see on what score that should be held against him, since he is surely not required to await him within his own borders, so that we may be relieved of his army. The safest course, therefore, would be, when it can be done without great inconvenience to ourselves, to deny passage and oppose it. But if we have not the strength to oppose it, or must ourselves, by such a course, be drawn into a serious conflict, it will be easy to excuse our agreement to our neighbour on the plea of necessity. The account of Plutarch, *Lysander* [xxvii. 3], is worthy of our attention. When Athens was in the hands of the Thirty Tyrants, the Thebans passed a law that, 'If any one should carry arms through Boeotia against the tyrants in Athens, no Theban would either see him or hear about it.' (P.)

Ziegler on Grotius, *loc. cit.*, denies, as we do, that any one has a natural right of passage through another's territory, unless he has secured such by an agreement, just as no one can go through a man's farm, unless such a service has been agreed upon for such a farm. And

this is all the more true if there be any plausible ground for fear. To illustrate the right as between individuals, you may have a right to walk through the yard of Titius; but if you pass through frequently carrying fire and faggots, so that there is danger that some damage may come to Titius' estate, Titius' fear does not, of course, take your right from you, but he may prevent your passing through with fire and faggots, and in that way your right of passing through in that particular fashion is taken away. But it should be observed, in this connexion, that a road or passage is not taken in our illustration as a continual service, but only as the temporary use of the property of some one else, which we were forced to take advantage of by some opportunity for profit, or by a necessity such as it would be inhuman on the part of another not to meet.

Illustrations can do little to settle this question. For it has always depended on a man's strength whether he demanded passage modestly or with boldness, or granted or denied it at the demand of another. In Plutarch, *Agésilas* [xvi], when the people of Tralles (called Troades in his *Laconian Apophthegms*) demanded of Agésilas, as a price for his passage, one hundred talents, and as many women, he laughed at them and said,

Why then did they not come at once to get their price. And so he marched forward and, finding them drawn up for battle, routed them and slew many of them. He sent his usual inquiry on to the king of the Macedonians also, who answered that he would deliberate upon it. 'Let him deliberate, then,' he said, 'but we will march on.' In amazement therefore at his boldness, and in fear, the king gave orders to let him pass as a friend. (P.)

But the illustration usually given is that of the people of Israel asking a passage through Edom, on the following terms: That they would pass along the main highway, they would not stray into the vineyards and cultivated fields, and would offer ready money for anything they needed. When the Edomites decided to prevent their passage with arms, they concluded not to attempt to force their way through, and passed by their borders in a more circuitous route. And although they touched some small portions of their territory, they passed through without doing any damage, although not a trace of humanity had been shown in denying them a passage. See *Deuteronomy*, ii. 1-4; *Numbers*, xx. 14. When the same nation sought an innocent passage of Sihon, king of the Amorites, he not merely refused it but came out armed against them, apparently beyond the borders of his own kingdom, and in this unprovoked attack was defeated, not so much because he refused the passage, as by way of punishment for so rashly provoking a war. Were this not the reason, the destruction of his nation would have seemed too great a revenge for merely not meeting a duty of humanity, since the Amorites were situated outside the promised land, the inhabitants of which God had, by a special dispensation, willed to destroy.

Nor is the answer, which some make, sufficient, namely, that 'if the Amorites wished their fear to be justified, they should not have repelled a person who offered fair terms, but should have discussed ways and means of bringing them into effect. But by breaking off relations of peace, as they did, they showed quite clearly that their mind was estranged from law and equity.' For by the law of all mankind a breach against merely the law of humanity does not deserve the severest penalties.

6. Regarding a matter of innocent profit, which is freely to be accorded every man, Grotius, *loc. cit.*, goes on to say that merchandise should be allowed passage through our territory. But Ziegler accuses him of contradicting himself, because in § 13 he said that no man had a right to hinder any nation from trading with any other distant nation; while in the last paragraph of the same chapter he allows a nation to make an agreement with a distant one, to the effect that the latter will sell only to them certain products that are not produced elsewhere. Such an agreement would, of course, hinder others from trading with that nation.

But Grotius can be cleared, if we understand the hindrance in the former passage to be such as is attended with violence. Yet, on the whole, the matter is not entirely clear. For it is certain that the law of humanity does not obligate us to allow passage to any other merchandise than is necessary for the life of others. But I do not see how people who deal in merchandise that goes to furnish luxuries, or is traded in, not so much to meet the necessities of life, as to give great returns and satisfy avarice, can assert any right whereby they can claim that we owe them a passage through our territory. I confess that, in my opinion, it is scarcely possible to find a good excuse for any one desiring to deny a passage through the open sea, that is subject to our jurisdiction, to unarmed vessels, when going to a nation with whom he is at peace. And most of the authorities which are cited in such numbers by writers on our subject are concerned with this point. But there seems to be some reason for merchandise being halted in our territory, on our sea, or upon our rivers. For not to mention the possibility that such a constant passing of strangers may be at times prejudicial to our state, and give rise to suspicion, what is there to prevent citizens of our own state from securing the profit which strangers gather in passing through our borders? For surely we may favour the former rather than the latter. And although we meet with no damage, strictly speaking, if we grant a free passage to such goods, nor is any injury done us if another gets the profit which was also possible to us, yet since the third party has no right to exclude us from that profit, why may we not show our greatest regard for ourselves, and take that profit for our own? This can be done if goods passing between two peoples on our borders are

allowed to go only through the hands of our citizens. And surely, unless this argument is allowed, I do not see how one can excuse the right of 'staple', as it is called, and other rights, whereby merchandise is stopped and brought to a certain mart, and exchange of wares is allowed foreigners not directly between themselves, but through the hands of the citizens of the place.

7. A further question seems to arise from what has been said: whether, namely, the law of humanity allows us to collect toll on merchandise that passes over lands, rivers, or seas, subject to our jurisdiction. For it seems clearly churlish to sell only for a price, a privilege which that law bids us to extend to every one. And yet the reason is perfectly obvious why some toll can be demanded on merchandise which passes over a land route. For damage is sometimes done the fields by the loaded wagons, and there is the expense of keeping
244 up the roads, while the lord of the country guarantees the merchants safety in their travel. Moreover, when bridges have to be built, there is obvious equity in tolls to cover their cost, just as, on the other hand, those who demand the toll are bound to take care of such bridges and to repair them. Thus Grotius, on *1 Kings*, x. 29, observes that the horses which passed through Judaea on their way from Egypt to Syria, or to the Hittite, paid a large toll to Solomon for their passage, just as tolls were also paid for the passage of frankincense.

There is also no objection to tolls, when trouble has been taken to lessen the difficulty of travel by land, just as to-day canals are dug in certain places for the convenience¹ of travellers as well as of merchandise. Thus, if some one had in time past joined the Aegean and Ionian seas by cutting through the Isthmus of Corinth, he could surely have demanded a moderate toll of those who used it, in return for their being permitted a short and safe passage. Although even without such a canal Strabo, Bk. VIII [vi. 20], says:

The Asiatic and the Italic merchants found it most satisfactory to avoid the voyage to Malea, and to turn in at Corinth, discharging their wares there; where also the tolls upon everything exported from the Peloponnesus and imported into it by land, as it so happened, were paid.

Other writers add that the price of food in a country is raised by the passing through of a large number of people.

To such reasons for the equity of toll on land traffic this further one is to be added: That a state can demand at least a slight acknowledgement from the merchandise of foreigners, on the ground that it allows them, by the use of their territory, to secure directly from a third nation merchandise, from which its own citizens could secure a profit by claiming a right of staple.

Regarding the custom of taking tolls on rivers, it can be added

¹ [For *commiditatem* read *commoditatem*.—Tr.]

that since rivers often do no little damage to adjacent fields by cutting away their banks and by floods, and must often be confined within levees, it is not unjust to demand, as a recompense for such damages, some slight contribution from those who, with no trouble to themselves, make a profit by the use of the rivers. It is forbidden, indeed, in *Capitularies of Charles*, III. xii, to 'take toll on rivers, where no assistance is given the travellers'; add *Law of the Lombards*, Bk. III, tit. i, law 21. But this seems to have been drawn up for the citizens of that state, and need not necessarily be extended to aliens as well.

It is more difficult to come to a conclusion about the equity of tolls demanded upon seas. Of course there is no question of their right to be collected, in order to meet the expenses incurred by the sovereign, in setting up marks to point out narrows or rocks, or in maintaining lighthouses to guide the course of ships by night, or in ridding the sea of pirates. But it is not so easy to defend the right to collect tolls upon grounds other than these, since the passage of unarmed ships is clearly a matter of innocent profit. However, the statement does not seem so pointless that a person should not be blamed if he makes a legal use of his own jurisdiction, and seeks a profit from his waters, just as others do from their lands; that since the man who enters another's territory becomes, for the time being, his subject, the ships of foreigners, on passing through our sea, can be compelled to give our citizens the first opportunity to purchase their wares. That if this claim be forgone, some other slight demand can be made in its place. And that although a right of staple cannot be set up in that sea, because the merchants, to whom those ships are bound, cannot sail to the place, nor do our citizens have the opportunity of bringing those people's goods in our ships to the sea, yet we should not incur odium if we are admitted to some little share in the profit, by reason of our not hindering the convenient passage of others through our waters.

But it must be confessed that, since the collection of tolls by sea is for some reason the object of much greater odium than the collection of the same for land passage, the former must be handled with more moderation and without suspicion of avarice, and it is easy¹ for one ruler or another to advance reasons why he may claim exemption from such tolls. For instance, if his lands touch both ends of the sea, or if all his 245 commerce with other nations, and for that reason the prosperity of his state, depend on the use of that sea. In such a case it would be unfair for him to be reduced practically to the condition of a tributary, because of the innocent use of a sea route, nor could he well be blamed if he should attempt, by any means at his disposal, to rid himself of one who is using so odious an excuse to oppress him. Nor can it be urged against him that other nations have agreed to such tolls, since their prosperity

¹ [For *facile* read *facile*.—Tr.]

is not so closely bound up with the use of that sea, and so it is easy for them not to begrudge the sovereign of the sea a small share in the profit gotten by its use. Just as there is a great difference between the case of a man who asks a way through my farm, because without it he would spend a life of solitude, deprived of intercourse with men, and would be unable to market the products of his field, and that of the man who wants only to lay a kind of servitude upon another's land, merely for his own convenience.

These matters can be illustrated, after a fashion, by the story which some tell, of how the king of the Abyssinians once claimed tribute from Egypt on the score of the Nile, which, rising in his territory, is the cause of Egypt's fertility. And how, when the Mohammedans later seized that country and oppressed the Christians, a ruler of the same country tried to divert the course of the Nile into the Red Sea, but without success. We agree with others in feeling that this claim was unfounded.

Nor have such men as feel that the subject before us should be settled by conventions looked fully into the matter. For the question would still remain, what reason there was for entering into such conventions, and whether the sovereign of the sea can refuse passage to others until they make such conventions with him. Yet when a convention which lacks any such flaw as would naturally detract from its strength has been entered into, its terms should be observed, so that the merchants would not be able to refuse to pay tolls to which they agreed, and the sovereign of the sea would not be able to increase them at his pleasure. Add Boecler, on Grotius, Bk. II, chap. ii, § 14. Nicephorus Gregoras, Bk. IV, tells the story of how the Sultan of Egypt agreed with the Emperor of Constantinople, that Egyptian merchants might pass through the Thracian Bosphorus. When this right was first allowed, it seemed of little importance. But when in the course of time its nature and effect were seen, the traffic could not be stopped, since it had been strengthened and established by custom.

But if any nation holds the territory bordering the other shore of a sea, and so the sea is either common to both, or else lies between the borders of the two, even if but one of the nations, by agreement or concession, demands tolls from other traders, the other will under no circumstances be liable to tolls, since it is sailing in its own sea.

8. Under things of innocent profit, which as such should be accorded every man, Grotius, Bk. II, chap. ii, § 15, also includes the right of all vessels to touch on a shore and stop there a while, for recuperation, or to replenish the water supply, or any other just cause. So Vergil, *Aeneid*, Bk. I [543 ff.], says:

What race of human beings is this? or what home of men is so barbarous as to allow this treatment? We are denied the welcome of the beach. They levy war, and forbid us

to set foot on the edge of their land. If you disregard the human race and the arms of men, yet expect the gods, who remember the right and the wrong. (B.)

But in this connexion let it be observed that he had already declared: 'We have not come either to devastate with the sword your Libyan homes, or to carry your goods as plunder to our ships.'

This illustration shows that, if a man seeks admittance to a land, he must make his journey without injury, and in such a way that no peril and reasonable fear will be created for the inhabitants of the coast. And so Dido makes the wise response: 'Hardship and the infancy of my kingdom compel me to take such strict precautions, and to protect my frontiers in their whole extent with armed guards.' (B.)

Now it is well to find out whether the person comes as foe or friend, what appearance the fleet has, and the force which wishes to come to land. No less important is it to know whether the strangers are free from contagious diseases. Add Pliny, *Natural History*, Bk. XXVI, chap. i. When none of these considerations stands in the way, just as it would be the greatest inhumanity to forbid an innocent landing, so, once that has been granted, the next step is to permit the erection of a temporary shelter on the shore, by which, of course, no damage is done to the shore, and our right over it not at all lessened. For there is reason why a man may not build a permanent structure on the shore without the permission of the state authorities, especially if it be to the disadvantage of others. See *Digest*, XLI. i. 50. 246

And simply because certain nations have agreements upon the right to approach shores and harbours, it does not follow that such an office is not an obligation from the law of nature. For it very frequently happens that many things, which are owed by some virtue that gives only an imperfect obligation, are sanctioned by civil laws and conventions. Furthermore, our statement is concerned especially with the case of a person putting in at a foreign shore against his will, by reason of a force too great for him, while the conventions which nations enter into on this point are concerned with regular intercourse. Therefore, in such cases there is nothing to prevent the exaction of some slight tribute. But in the former case it would be most disgraceful to want to charge up the cost of so slight a relief of another's misfortune. Yet according to Polybius, Bk. III [xxii], a treaty between the Romans and the Carthaginians was couched in the following terms:

Neither the Romans nor their allies are to sail beyond the Fair Promontory, unless driven by stress of weather or the fear of enemies. If any one of them be driven ashore he shall not buy or take aught for himself save what is needful for the repair of his ship and the service of the gods, and he shall depart within five days. (S.)

A second treaty [*Ibid.*, xxiv] runs as follows: 'In Sardinia and Libya no Roman shall traffic nor found a city; nor shall he put in there

save to take provisions and refit his ship. If a storm drive him upon those coasts, he shall depart within five days.' (S.)

9. Among the duties of humanity there is included the further one of admitting strangers, as well as of kindly providing travellers with shelter and hospitality. This duty was carried by not a few of the ancients almost to the point of ambitious ostentation, inasmuch as they conceived that from hospitality there arose a very sacred right of relationship and of friendship. Aristotle, *Magna Moralia*, Bk. II, chap. xi: 'But the firmest of friendships would seem to be that with a foreigner; for they have no common aim about which to dispute, as is the case with fellow citizens.' (S.) Homer, *Odyssey*, Bk. XIX [VI. 207-8]: 'For all strangers and beggars are from Zeus.' (L.) *Idem*, *Odyssey*, Bk. VIII [546]: 'In a brother's place stands the stranger and suppliant.' (L.) In Lucian, *De Dea Syria* [xii], among the sins for which mankind was destroyed in Deucalion's flood, there are listed these: 'They did wicked deeds, for they kept not their oaths, nor harboured strangers, nor received fugitives.' (H.*) Add also Plato, *Laws*, Bk. XII, where he lists the duties owed strangers. On the humanity shown strangers by the inhabitants of India, see Diodorus Siculus, Bk. II, chap. xlii. Aelian, *Varia Historia*, Bk. IV, chap. i, gives the following law of the Lucanians: 'If a stranger comes at sunset and asks to be given shelter for the night, the man who does not take him in shall be punished and pay a fine for inhospitality.'¹ Add *Law of the Burgundians*, tit. xxx, § 1. On the ancient Slavs, Helmold, *Chronica Slavorum*, Bk. I, chap. lxxxii: 'If any one be found to have refused lodging to a stranger—and this
247 happens very seldom indeed,—it is permissible to burn down his house and all that he has, and the desires of all men unite to such an end.' Philo Judaeus, *On the Life of Moses* [I. vii], remarks that 'strangers, in my opinion, should be looked upon as refugees'. (Y.)

But if the duty of hospitality is to be an obligation of natural law, it is required that the stranger shall have an honourable or necessary reason for being away from his home. Furthermore, he should be an upright man, and one from whom no danger or disgrace will come to our house. He should also be unable to pay for lodging. And so when there were no public taverns, or they were vile affairs, considered unfit for an honourable man, there was greater reason for this humanity than to-day over the larger part of Europe, where they are found so well appointed both for comfort and display.

Although you may see inhospitality censured in almost every writer, as one of the earmarks of the inhumanity of uncultivated peoples, yet there is some question² whether one is obligated by natural law to entertain such persons in particular as visit other countries out of pure curiosity. The Spartans, indeed, thought this a sufficient

¹ [For *in hospitalitatis* read *inhospitalitatis*.—Tr.]

² [For *du bium* read *dubium*.—Tr.]

reason for keeping foreigners out of their state, wishing to prevent the corruption and debasing of their ancient customs by contact with such sightseers. Practically the same attitude toward foreigners prevails among the Chinese. See Neuhoﬀ, *Generalis Descriptio Sinae*, chap. i.

But the answer of some to this is, that not everything with us is better or worse than the practices of foreign peoples. That if they have found any better thing, it would be foolish to scorn it merely because it is foreign. That it is characteristic of dogs to fawn upon the meanest of the household slaves, and to snarl at strangers, although they be the most eminent of people. That some sort of uncouthness and rusticity attaches to such as never set foot off their native soil. Thus, in Livy, Bk. XLI, chap. xxiv, a decree of the Achaeans, forbidding Macedonians to visit their country, is called 'a cursed neglect of the ties of humanity'. (M.) Periander says, in Plutarch, *Convivium* [vi, p. 151 A]: 'I cannot but commend the civility of those magistrates who give audience first to strangers and afterwards to their own citizens.' (G.)

It seems certain, in this connexion, that if our citizens in their travels are to meet a friendly reception by any nation, we cannot properly deny it a like humanity; while, on the other hand, it is impudent of those who exclude our citizens to demand that we receive theirs. But if any nation has no interest in visiting foreign peoples, there seems to be no law requiring it to admit those who come to it unnecessarily and without good reason. Just as no one holds that a man who has some unusual object in his house or gardens is under any obligation to admit all who wish to see it; but those who have been admitted should, by the rule of custom, regard it as an unowed kindness. And this is especially true, inasmuch as a suspicion may easily arise, which leads us to conclude that over-curious inspectors of our affairs should be kept at a distance.

Therefore, Franciscus a Victoria, *Relectiones de Indis*, Pt. V, § 3, does not win many to his position, when he discusses the adequate grounds on which the Spaniards felt themselves entitled to subdue the Indians. The first ground he makes that of natural society and communication, on which he formulates the following propositions:

I. 'The Spaniards have a right to go to those provinces and live there, provided, of course, that they do the natives no harm, and the natives cannot prevent them.' The answer to this is, that this 'natural communication' cannot prevent a property-holder from having the final decision on the question, whether he wishes to share with others the use of his property. Furthermore, it is crude indeed to try to give others so indefinite a right to journey and live among us, with no thought of the numbers in which they come, their purpose in coming, as well as of the question whether, in passing through without harm

and visiting a foreign land, they propose to stay but a short time, or to settle among us permanently, as if upon some right of theirs. Moreover, whoever wishes to lay upon others such a requirement for hospitality, 248 ought surely be rejected as too severe an arbiter.

II. 'The Spaniards have a right to trade with them, and neither people can be prevented by their rulers from doing so.' On this point, those who feel that they are more moderate¹ and reasonable in their philosophy, are not as yet able to discover such a freedom of trade as rulers cannot limit for their subjects, if the well-being of the state demands it; much less such a one as thrusts foreigners upon us without our permission and against our will.

III. 'If the Indians have any rights common to citizens and foreigners, the Indians may not prohibit the Spaniards from sharing and participating in them, for instance, if other foreigners are allowed to mine gold, so may the Spaniards.' On this matter some feel that the point should be raised, first, whether a thing was allowed others as something owed, or as a free gift. For in matters which I am not under a perfect obligation to render to men, I can be more liberal to one than to another. Secondly, whether the later comers will use the same moderation as the former, who have used something with no detriment to ourselves; and whether they have in their mind no other purpose than had the others. Suppose I had given some one of my neighbours the privilege of entering my garden as often as he wishes, and of sampling my fruit; when later another man bursts in and decides to break down the trees, to expel me, and to make an uninvited stay in my garden, I will surely have the right to close my gate to him. Observe the reply which some Americans [i.e. American Indians] once gave the Spaniards. Michel Montaigne, *Essais*, Bk. III, chap. vi, p. 189. But let others settle this controversy.

Most writers feel that the safest reply to make is this: Every state may reach a decision, according to its own usage, on the admission of foreigners who come to it for other reasons that are necessary and deserving of sympathy. Only no one can question the barbarity of showing an indiscriminate hostility to those who come on a peaceful mission. See Diodorus Siculus, Bk. I, chap. lxxvii. The admission of ambassadors rests upon reasons of a special nature. Add Ziegler, on Grotius, Bk. II, chap. ii, § 23.

But to expel without probable cause guests and strangers, once admitted, surely savours of inhumanity and disdain. See Livy, Bk. II, chaps. xxxvii-xxxviii. And yet Ambrose, *On Duties*, Bk. III, chap. vii, and with him Grotius, *loc. cit.*, § 19, deny that famine in a state is a 'probable cause' for expelling them. This we admit, on condition that there be means, straitened though they be, of preserving them along

¹ [For *moderatus* read *moderatus*.—Tr.]

with the citizens, and that they once were, or may in the future be, of advantage to us. For Ambrose mentions specifically only the latter. But if we are under no obligation to the foreigners, and they must not perish upon being expelled by us, there seems to be no reason why citizens, out of consideration for them, should feel the pangs of hunger. See Suetonius, *Augustus*, chap. xlii; Boecler on Grotius, *loc. cit.*

10. Among this class of duties Grotius, Bk. II, chap. ii, §§ 16-17, also places the granting of permanent settlement to strangers who have been driven from their former home, and seek entrance into another. But such persons must recognize the established government of that country, and so adapt themselves to it that they may be the source of no conspiracies and revolts. Euripides, *Medea* [222]:

The sojourner must learn the city's wont. (W.)

So in Vergil, *Aeneid*, Bk. XII [192 ff.], Aeneas sets down among the terms of peace the following: 'My sire Latinus shall war control, and as a father-in-law shall hold the sceptre as his rightful due.' (B.) It belongs, indeed, to humanity to receive a few strangers, who have not been driven from their homes for some crime, especially if they are industrious or wealthy, and will disturb neither our religious faith nor our institutions. Thus we can observe that many states about us have grown immensely because they received foreigners and aliens with open arms, while others, who have repelled them, have been reduced to 249 second-rate powers.

But no one would be so bold as to assert that a great multitude, armed, and with hostile intent, should be received as if there were an obligation to do so, especially since it is hardly possible that the native inhabitants run no danger from such a host. Therefore, every state may decide after its own custom what privilege should be granted in such a situation. The state should consider well beforehand, whether it is to its advantage for the number of its inhabitants to be greatly increased; whether its soil is fertile enough to support all of them well; whether we will not be too crowded if they are admitted; whether the band that seeks admittance is competent or incompetent; whether the arrivals can be so distributed and settled that no danger to the state will arise from them. But when these people are worthy of our sympathy, and no reasons of state stand in the way, it would certainly be an act of humanity on our part to confer a kindness on them, that will not be too onerous on us, or the cause of later regret. If they are not, our pity should be so restrained that we may not later become an object of pity to others. Furthermore, since whatever is conferred upon such people we can impute to them as a kindness, it follows that they cannot seize for themselves anything they may want or occupy, as if they had a perfect right to it, or any section of our land that may

be unused, but they must be content with what we have assigned them. Add Boecler on Grotius, *loc. cit.*

These principles can be illustrated by the following instances: In Vergil, *Aeneid*, Bk. XI [316 ff.], Latinus makes the following offer to the Trojans:

There belongs to me by ancient right a piece of land close to the Tuscan stream: the Aurunci and the Rutulians till it, and work with the plough the stubborn hills, and the rugged parts for grazing use. Let all this district, with its lofty ridge and pines, be given to Trojan friendship. (B.)

On this passage Servius, drawing from the *Origines* of Cato, observes that that field contained seven hundred jugera. But he remarks that if Latinus is not to appear to have been liberal with another's property, the word *mibi* from the line above must be taken with the phrase 'the Aurunci and Rutuli till it'; for the Aurunci and Rutuli held that territory as tributary, or else their labour for the king consisted in cultivating it.

The same account is given at greater length by Dionysius of Halicarnassus, Bk. I [1vi ff.], according to which the Trojans, after ascertaining from certain¹ omens that fate had appointed this land for their home, began at once to build a city without securing permission, and seized the natives' iron, wood, and tools, much to their indignation. Aroused by this, Latinus moved against the strangers with his army, first expostulating with Aeneas, because, while he might have gotten as a friend whatever he asked for within bounds, since the natives were willing, he had preferred to break the law of nations, and to seize them by force, in a manner more suited to a knave than to an honest man. Aeneas, recognizing that his action was illegal, asks him to pardon what was already done, promises he will make good the damage in many ways, and leads forth his army against their enemies. And so the natives gave the territory to the Trojans, while they were helped in turn by the Trojans in their war against the Rutuli.

In Florus, Bk. III, chap. iii, the Cimbri ask of the Roman senate that 'the people of Mars would allot them some land as a stipend, and use their hands and arms for whatever purpose they pleased'. (W.) Furthermore, who could give away the property of others without injury? While to receive so powerful a nation seemed unsafe to those who had so many possessions that might excite the cupidity of needy men.

In Caesar, *Gallie War*, Bk. IV [vii. 4], the Tencteri and Usipetes claimed that 'they had come against their will, being driven out of their homes: if the Romans would have their goodwill, they might find their friendship useful. Let the Romans either grant them lands, or suffer them to hold the lands their arms had acquired.' (E.) To them Caesar

¹ [For *excertis* read *ex certis*.—Tr.]

replied [IV. viii. 2]: 'It was not just that men who had not been able to defend their territories should seize those of others; on the other hand there was no land in Gaul which could be granted without injustice, especially to so numerous a host.' (E.) Although there was still another hidden reason why Caesar was unwilling to have those peoples as such near neighbours. 250

In Tacitus, *Annals*, Bk. XIII, chap. lv, when the Ansibarii,¹ in want of a home, settled some territory across the Rhine which had been set apart for the use of Romans, they maintained with some reason:

Why leave so much land unoccupied for the flocks and the herds of Roman soldiers to be some day or other driven into it? Reserve by all means, he added, retreats for cattle, while men are starving: only do not prefer wastes and solitudes to a friendly population. . . . The earth has been given to mankind, just as the heavens have been given to the gods: lands not occupied are free to all. (R.*)

This last law Thomas More, *Utopia*, Bk. II, represents the Utopians as observing. To such arguments a softer reply should have been made than that returned by Avitus, which certainly was full of intolerable haughtiness: 'The commands of superiors must be obeyed. The gods whom they invoked had appointed, that to the Romans should appertain the sovereign disposal, what to bestow and what to take away, and not to allow any other judges than themselves.' (O.)

According to Flavius Vopiscus, *Probus* [xviii], the emperor Probus settled one hundred thousand Bastarnians on Roman soil, and these all kept their faith. But when he transferred likewise large numbers from other nations, that is Gepidi, Grauthungi, and Vandals, these all broke their word, and when Probus was busy with the war against the tyrants, they marched or sailed over almost all the empire, and did no slight damage to the glory of Rome.

Likewise, in Ammianus Marcellinus, Bk. XXXI [iv], the Goths, leaving their former places of habitation out of fear of the Huns, ask of Valens that they be given a home across the Danube in Thrace, promising that they will live in quiet and furnish him aid, if the situation requires it. Soon other barbarians as well joined with them in asking the same favour, to whom Valens also gave permission, in the hope that he could get soldiers from them without great expense. But this policy soon ended in his ruin, as the author recounts, *loc. cit.*, in detail. Add Socrates, *Ecclesiastical History*, Bk. IV, chap. xxviii.

II. Under this type of duties Grotius, *loc. cit.*, § 18-19, also includes the obligation of allowing another to secure for himself, by purchase, labour, exchange, or some other form of legal contract, the things which add embellishment and comfort to this life of ours; and of not hindering him either by legislation, or illegal conspiracy, or monopoly. For a great advantage arises for all peoples from commerce,

¹ [For *An sibarii* read *Ansibarii*.—Tr.]

which makes compensation for the niggardliness, as it were, of the soil, which is not equally productive of everything everywhere,¹ and causes the product of one place only to appear to have a habitat in every land. Libanius, *Orations*, iii: 'God has not bestowed His gifts upon every quarter, but has divided them according to regions, so as to incline men to social relations by the need of mutual assistance; and He has disclosed the avenues of trade, with the intent to bring to all mankind the common enjoyment of those things which are produced only among a few.' So it is highly inhuman to wish to deny a native of our world the use of those good things which the common Father of all men has poured forth, provided that by this act the right which we have secured over them for our own personal ends, is not diminished. And so, as Plutarch, *Pericles* [xxix. 4], recounts, when the Athenians excluded the Megarians from all their markets and harbours, the latter complained that this was contrary to the 'common laws of justice'.

Yet such an assertion allows many restrictions. For we do not seem to be bound by any law to share with others, things which are not absolutely essential to human life, or minister only to its pleasures. And if we ourselves are threatened with a lack of such things, we are within our rights in keeping them for our own use. And so, if Joseph had seen that the Egyptians would not have a surplus of grain for their seven years of famine, he would have had a perfect right to forbid its export to other nations. Quintilian, *Declamations*, xii [4]: 'While we were selling to neighbouring states, and profits kept pouring in upon us from every side, we recklessly compromised the safety of the state, and famine laid hold upon us.' Also a law of the Athenians punished with death any of their citizens who transported grain for sale to any
 251 other place than Athens. Lycurgus, *Against Leocrates* [§ 27].

We have a right, furthermore, to prevent other peoples from trading in such articles as are not absolutely necessary for existence, if our country thereby would lose a considerable profit, or in some indirect way suffer any harm. To illustrate, if some nation breeds beautiful horses, there is nothing to prevent it from forbidding the export of such as could reproduce the stock. For that country would lose a special distinction and source of profit, if such horses could be bred in other lands; while such animals minister more to luxury than to necessity. In Livy, Bk. XLIII, chap. v, upon the request of ambassadors from Gaul, 'permission was given to each of them to purchase ten horses, and convey them out of Italy'. (M.) In the same way in *Code*, IV. xli, a man is forbidden on pain of death to export to barbarians wine, oil, and any kind of arms. The reason for forbidding the first two items was the fear that they would be led by their enjoyment of them to attack the Roman Empire. For, as a matter of fact, Livy, Bk. V,

¹ [For *ugique* read *ubique*.—Tr.]

chap. xxxiii, writes that Aruns of Clusium, to draw the Gauls into Italy, 'took wine to them'. Add *Numbers*, xiii. 14; *Judith*, x. 20.

Finally, there is no prohibition against a state favouring its own citizens above foreigners in the matter of exporting merchandise; for example, by taking larger tolls from the latter than the former, or providing that they have the right of purchase before foreigners.

12. But that a man is obligated to purchase the goods of another is not to be found, according to Grotius, *loc. cit.*, § 20, in any law. For every man is by nature free to take or refuse to take a thing, and no man has a probable reason for complaint if some one else does not mind doing without his merchandise. This is the reason why we find in many places, both ancient and modern, a law against the importation of a certain kind of merchandise, either because the state may suffer some loss from its importation, or that our own citizens may be incited to greater industry, and that our wealth may not pass into the hands of foreigners. Plato, *Laws*, Bk. VIII [p. 847 B C]:

As to frankincense and similar perfumes, used in the service of the gods, which come from foreign parts, and purple and other dyes which are not produced in the country, or materials of any art which have to be imported, and which are not necessary—no one should import them; nor, again, should any one export anything which is wanted in the country. (J.)

Caesar, *Gallie War*, Bk. II [xv. 4], relates of the Nervii: 'Traders had no means of access unto them, for they allowed no wine nor any of the other appurtenances of luxury to be imported, because they supposed that their spirit was like to be enfeebled and their courage relaxed thereby.' (E.) And of the Suebi, *Ibid.*, Bk. IV [ii. 2 and 6]: 'They do not import for their use draught-animals [. . .]. They suffer no importation of wine whatever, believing that men are thereby rendered soft and womanish for the endurance of hardships.' (E.)*

For this reason the position of Franciscus a Victoria is certainly false, when he maintains: 'The law of nations allows every man to carry on trade in the provinces of others, by importing merchandise which they lack and exporting gold and silver, as well as other merchandise, in which they abound.' But if I am satisfied with my own products, on what grounds can any one force upon me, against my will, those of another people?

Now the opposite rule, for example, when the head of a house is forced to purchase each year a certain amount of salt, arises from the power over his subjects which belongs to the prince, and such forced purchase takes the place of a tax. In the same way a ruler can command that, if his citizens wish to purchase something, they shall do so from a certain person. Such rules may rightly be sanctioned by punishments, in states where it is to the advantage of the commonwealth. In the same way subjects are very frequently ordered to be beforehand in

252 purchasing grain and other necessary things, even in distant lands, when there is danger of scarcity, as in the expectancy of a siege, or in order that the price of grain may be reduced. But there is certainly no reason to be adduced by which I may undertake to force a man, over whom I have no authority, to purchase my merchandise. For on what right may I claim such authority over the purse of another man, not my subject, that I may prescribe to him how much he should spend, and for what things, as well as how he should look out for his wants and pleasures? Nor can the fact that I am thereby losing some possible profit, be a reason for reducing the liberty of the other man. Or, if I was so intent on his contributing to my advantage, I should merit it by the bestowal of mutual kindnesses. But it would be inhuman and unjust to hinder a man, who wants to distribute among eager customers goods in which he abounds, from securing by exchange for his own use the necessities of which he stands in need. Add Boecler on Grotius.

13. Another duty like this is to permit foreigners, and especially neighbouring nations, to solicit and enter upon marriages among us, when there are not enough women among them. For example, in case a number of men have been expelled from one country and have settled in another, or a band of men undertake to found a new state. For it is not in the nature of most men to live without women, since, when the body's powers are unimpaired, celibacy is agreeable only to lofty souls, and to seek unnatural satisfaction for this desire is base.

Moreover, a nation of men alone is a thing of but one generation. On this ground many undertake to defend, or at least excuse, the rape of the Sabines, directed by Romulus, although the story is given under more than one form. Dionysius of Halicarnassus, Bk. II [xxx], says that Romulus wanted to secure the friendship of the neighbouring tribes by marriage, and, although he began with an injury, he nevertheless believed that from an act of this kind and an evil beginning, a close relationship could result after solicitude and love had atoned for the deed with the women themselves, and their relatives had been shown that it was done not to offend, but to meet the demand of necessity. Yet surely this is an absurd way to gain friendship. See the case of Segestes in Tacitus, *Annals*, Bk. I, chap. lv:

<His quarrel with Arminius remained,> fed by private reasons of his own: for Arminius had carried off his daughter, though already betrothed to another man. Hence Segestes hated his son-in-law; the two fathers-in-law were at open variance; and thus the ties that are wont to draw friendship closer between friends, did but add fresh fuel to their animosity. (R.)

Others have written, that the women were stolen in order to secure an opportunity to go to war with his neighbours—an unlikely conjecture. Still others suppose that there was a lack of women, and so Romulus was under necessity; that nevertheless he first sent around

representatives to ask that they take no offence at mingling their blood and lineage with men like themselves, and that after they had been rejected with words of scorn, he had recourse to force and deceit. Furthermore, that at this time the custom of seizing virgins was generally followed, which Dionysius, *loc. cit.*, for that reason calls 'an ancient Greek custom, and a method of contracting marriages of all others the most illustrious'. (S.) Add *Judges*, xxi. 22. And yet it rarely happens that women are not to be found who are perfectly willing to marry any men except such as should have to be blushed for and disowned.

Now to repulse such as seek our friendship by this means would surely be harsh dealing. For although to deny a woman as a wife is not in itself a cause of war, war often follows if to the refusal has been added insult. Thus the people of Rhegium replied to Dionysius, when he asked the hand of a maiden, that 'they would give him none but the daughter of the hangman'. See Diodorus Siculus, Bk. XIV, chap. cviii [XIV. cvii]; Strabo, Bk. VI [p. 258]. A similar instance is to be found in Paul of Venice, Bk. I, chap. lii. But it seems inhuman to wish to put our women at the service of the state, so that they may marry such as have nothing in themselves which may arouse affection; and especially so if to this there is added some difference of degree. Compare Boecler on Grotius, *loc. cit.*, § 21. The argument in Livy, Bk. IV, chap. iii, of Canuleius, 'We ask the right of intermarriage, which is customarily granted to neighbours and foreigners [. . .] and that we should be accounted men' (F.),¹ does not concern the question before us. For the plebeians were not suffering from any lack of women, but wanted to have the same right as the patricians. 253

But when there are plenty of women it is idle to seek marriages by force and war. 'You will find another Alexis, if this one scorns you' [Vergil, *Eclogues*, II. 73]. Also, civil laws which forbid marriages with foreigners, or between persons of different station, presuppose that every one can find a number of mates in his own station, and in general have as their basis, either that the splendour of certain families may be preserved, or that our own women may more easily find husbands, or that our wealth, or the accomplishments of our citizens, may not pass by marriage to other nations.

14. Finally Grotius, *loc. cit.*, § 22, adds that a right common to all men, and so an obligation to perform some duty to all men, arises from the supposition that something has been actually allowed to all strangers in general; for in this case, if one man is excluded, a wrong is done him. The reason for this seems to be, that it is an insult for a man without a special reason to wish to exclude another from a thing which is open to all in general, since such a person is thereby no longer regarded as the

¹ [The last clause is from IV. iv. 12.—Tr.]

equal of the rest. And so he concludes that, if, in some place, foreigners are allowed to hunt, fish, go fowling, gather pearls, inherit property, carry on trade, and negotiate marriages even when there is no lack of women, such rights cannot be denied any single people, unless they have committed some offence.

But such a claim does not appear entirely clear. For such a concession must be made either expressly or tacitly. A thing is conceded another either precariously, or else by way of an agreement or perfect promise. Now I do not believe that there ever has been or will be a case when a person has conceded a perfect right to every and all peoples, known as well as unknown, with no limitation and abridgement, a right not owed by natural law over something that belongs to himself. For one surely wants to know how much one is giving and to whom. But if a man has made some concession only to his acquaintances and friends, by means of agreement or precariously, a stranger who undertook to claim the same thing as his right would be branded as wicked and bold; while whatever things we grant only tacitly and by disregarding them, are by every rule considered to be under the nature of a precarious right, and can with all justice be recalled, when we change our minds, or the favoured persons improperly use them. Add Boecler on Grotius, *loc. cit.*

15. But a humanity, the lack of which shows a wicked malignity and baseness of mind, is surely of a very crude type. It is found in a much more lofty and splendid degree when a man of his own good will and bent, from his own generosity, or from pity for another man's condition, does something for him without return, at considerable cost or labour to himself, whereby the other is aided in his difficulties, or else some considerable advantage is rendered him. And such things are put in a class by themselves and called benefits, the degree and extent of which are governed only by the states of the giver and the recipient. Such acts afford men an opportunity to secure the greatest praise, if they have been properly meted out by a generous and prudent mind. For, as Pliny, *Panegyric* [xxxviii. 4], says: 'For an act is to be regarded as ambitious and boastful [. . .] and anything but liberal, if a good reason cannot be offered for it.'

Now on the bestowal and proper control of benefits, wise men on every hand give instructions. Cicero, *On Duties*, Bk. I [xiv]:

Beneficence, which is the most agreeable to the nature of man, involves many precautionary considerations. For, in the first place, we are to take care lest our kindness
 254 should hurt both those whom it is meant to assist, and others. In the next place, it ought not to exceed our abilities; and it ought to be rendered to each in proportion to his worth.

And, indeed, our first concern should be with those who merit some help at our hands, and our second for him who especially needs our help. The degree of relationship between men should also be

observed, whereof the common tie of human society is the widest of all; wherefore [xvii]

more confined than this is that which consists of men of the same race, nation, and language. A still more contracted degree of society is that of relatives. The first principle of society consists in the marriage tie, the next in children; then follows the connexion of brotherhood, then that of cousins, in their different degrees, then marriages and alliances. But among all the degrees of society, none is more excellent, none more stable, than when worthy men, through a similarity of manners, are intimately connected together. (*Idem*, *On Ends*, Bk. V [xxiii]: In all honourableness there is nothing so eminent, nor so extensive in its operation, as the union of man with man, and a certain partnership in and communication of advantages, and the affection itself of the human race; which, originating in that first feeling, according to which the offspring is loved by the parent, and the whole house united by the bonds of wedlock and descent, creeps gradually out of doors, first of all to one's relations, then to one's connexions, then to one's friends and neighbours, then to one's fellow-countrymen, and to the public friends and allies of one's country; then it embraces the whole human race. (Y.)) [xviii]: But we are carefully to consider what is most necessary to each, and what every one could or could not attain even without us. Thus the relative claims of relationship and of circumstances will not always be identical. Some duties are owing to some more than to others. For instance, you are sooner to help your neighbour to house his corn, than your brother or your friend; but if a cause be on trial, you are to take part with your kinsman, or your friend, rather than with your neighbour. (E.)

It would be a long task to make excerpts from the chapters of Seneca, *On Benefits*. Notice should be taken of what Plutarch, *Symposiacs*, Bk. VIII, chap. vii, tells about the Pythagoreans urging their members 'not to take off any man's burden from him, but to lay on more'. The reason added is, 'as not countenancing sloth and laziness in any'. (G.) Although a better reason is that given in 2 *Corinthians*, viii. 13: '⟨For I say not this⟩ that others may be eased and yet distressed; but by equality.' Add Ambrose, *On Duties*, Bk. I, chap. xxx, and from him Gratian, *Decretum*, I. lxxxvi. 14 ff. and II. i. 2. 6—7. Socrates in Xenophon, *Memorabilia of Socrates*, Bk. I [iii. 3]: 'In dealing with friends and strangers alike, and in reference to the demands of life in general, there is no better motto for a man than that: "let a man do according to his ability".' (D.)

Also the manner of bestowal adds much to the favour of a benefaction; if we confer it with a happy countenance, promptly, and with some accompanying sign of our good will.¹

16. The counterpart of beneficence is a grateful mind, by which he who is the recipient of the benefit, shows that he received it, is kindly disposed to the giver because of it, and seeks an opportunity to return its equivalent, so far as he can. For it is by no means necessary that a thing of the same amount and value be returned as was given, but often one's zeal and endeavour meet an obligation. Ovid, *From the Pontus*, Bk. III, el. viii [IV. viii 37]: 'But he who gives his utmost is

¹ [This sentence, not contained in the edition of 1688, was added by Barbeyrac from the *De Officio Hominis et Civis*, I. viii, § 5.—17.]

lavishly grateful,¹ and that loyal service has reached its goal.' (W.) It is understood, however, that nothing need be returned to the man who falsely claims that he has conferred a benefaction. See Phaedrus, Bk. I, fab. xxiii. For I owe nothing to a man for pulling me out of a stream, if it was he that threw me into it in the first place.² Although wise men warn us that we should not be over careful in investigating what reasons impelled a person to do us some kindness, because such an inquiry may sometimes furnish the ungrateful with an excuse.

But the more likely benefactions are to win the minds of men, the more forceably the law of nature requires us to show gratitude. Surely we should not suffer a man who, trusting in our good faith, has anticipated us in some kindness, to be in a worse state on that account, nor should we accept a kindness, unless we purpose that the giver shall not
 255 have reason to repent of his gift. For if we are, because of some reason, unwilling to be under a special obligation to some one, it was open to us to refuse the proffered kindness, although this cannot be done without arousing a suspicion of contempt, since the refusal of a kindness regularly carries with it a contempt for the thing voluntarily offered. And surely, if we were relieved of the necessity of returning a kindness, a man would be acting without reason if he strewed his favours about at random, and was the first to do a kindness which he foresaw would go for naught. On this score all beneficence and confidence between men would be destroyed, and with them would cease all benevolence and any voluntary assistance, nor would one undertake to gain the favour of others. Compare Hobbes, *De Cive*, chap. iii, § 8. Aristotle, *Nicomachean Ethics*, Bk. IX, chap. ii:

As a general rule, it is a duty to repay services which have been done to us, rather than to confer favours on our comrades. We must behave as if we had incurred a debt, and must pay our creditors in preference to making a present to our comrades. The general rule then is that the repayment of our debt is a duty, but that if the honour, or urgent need, of making a present outweighs it, we must decide in favour of making the present rather than of repaying the debt. (W.)

Add what Socrates maintains about brotherly love, in Xenophon, *Memorabilia*, Bk. II [iii]. Cicero, *On Duties*, Bk. I [xv]:

No duty is more indispensable than that of returning a kindness. Now if, as Hesiod enjoins, we ought, if it is in our power, to repay what we have received for mere use with interest, how ought we to act when called upon by kindness? Are we not to imitate those fertile fields which yield far more than they have received? For, if we readily oblige those who we are in hopes will serve us, how ought we to behave toward those who have served us already? For as generosity is of two kinds, the one conferring a favour, the other repaying it, whether we confer it or not is at our own option, but the not repaying it is not allowable in a good man, provided he can do it without injury to any. (E.)

¹ [For *gradus* read *gratus*.—Tr.]

² [This sentence, not contained in the edition of 1688, was added by Barbeyrac from the *De Officio Hominis et Civis*, I. viii, § 6.—Tr.]

It should be observed that Cicero relates gratitude to liberality, because it is not bound by such strict laws as justice, which enjoins the exact restitution of what is owed by agreement. Add Ambrose, *On Duties*, Bk. I, chap. xxxi; Gellius, Bk. I, chap. iv. But although there is not lacking some obligation to do a kindness, yet a far greater freedom attaches to the doing of a kindness than to the need of showing gratitude, since a man should strive in every way to approve himself to his benefactor. And yet it often happens that those who confer a kindness have a greater love for those whom they favour, than is returned to them. The causes for this are elaborated in Aristotle, *Nicomachean Ethics*, Bk. IX, chap. vii. Add also Hobbes, *Leviathan*, chap. xi, where he shows the reason why the acceptance of great benefactions from superiors begets love, but not so if they come from equals or inferiors, unless there is some hope of returning them. On this principle is based the statement of Tacitus, *Annals* [IV. xviii], towards the end: 'For benefits are only so far acceptable as they seem capable of being requited; but when they have much exceeded the power of remuneration, they are recompensed with hatred instead of gratitude.' (O.)

17. Now although an ungrateful mind does not of itself constitute an injury, since no right, in the proper sense of the term, is violated, yet the epithet 'ungrateful' is held more shameful and more worthy of censure and loathing than 'unjust', since it is regarded as the mark of an abject and degenerate mind for a person to declare himself unworthy of the opinion which another has of his probity, and to be unable to be moved even by kindness to show a feeling of humanity. Gregory Nazianzen [*De Vita Sua*, ii, p. 16, ed. Colon. 1609]:¹ 'If kindness does not make a man gentle, what other thing, of all that there be, could ever make him such?' Lucian, in *Anthology* [IX. 120]: 'A bad man is like a jar with a hole in it. Pour every kindness into him and you have shed it in vain.' (P.) Add the opinion of Pheraula on the nature of man; Xenophon, *On the Training of Cyrus*, Bk. VIII [iii. 19].

Descartes has an excellent passage on this subject, *Les Passions*, 256 art. 194:

Ingratitude is the vice of brutal and stupidly arrogant men, who think that everything is no more than their due; or else of the stupid, who never reflect upon the benefits which they receive; or else of the feeble and abject, who because they are aware of their infirmity and their need, basely seek the assistance of others, and after they have received it, hate them, because, not having the desire to make a like return, or despairing of being able to do so, and imagining that every one is similarly venal and mercenary, they think that nothing is done except in the hope of reward, and so that they have deceived their benefactors.

Sophocles, *Ajax* [520 ff.]:

Gratitude is due
From man for favours [. .]

¹ [This reference, given by Barbeyrac (except for the correction 1609 for 1690), we have been unable to verify.—Tr.]

Kindness return of kindness e'er begets.
 Who lets the memory of service pass,
 Him will I ne'er with noble spirits rank. (S.)

Learned men argue whether ingratitude is actionable in a court of law. Seneca, *On Benefits*, Bk. III, chaps. vi ff., denies this on the following main grounds: That the best feature of a kindness is lost if it is brought into court, as if it were a sum of money, or something owed by contract or lease, for it thereupon begins to be a loan; that while it is held to be becoming to feel gratitude, it ceases to be becoming, upon its being necessary; and finally, that all the courts in the world would scarcely suffice to meet the needs of such a law. Themistius, *Orations*, iii [xxii, p. 268 D]: 'The Persian law' (referred to in Xenophon, *On the Training of Cyrus*, Bk. I [ii. 7]) 'inflicts penalties for ingratitude, because that is extremely provocative of hatred whenever it appears. But where no law punishes ingratitude, there men hate one another and do not go to court about it, but keep their enmity concealed.' Add M. Antoninus [Aurelius], Bk. IX, § 42, towards the end; Valerius Maximus, Bk. II, chap. vi, §§ 6-7: Bk. V, chap. iii, § 5.

The points advanced by these authors have been answered by others in great detail. See a dissertation by Boecler, entitled *Actio Ingrati*. It seems to us that in this connexion we should note merely that an action, or the equivalent of an action, does not at once take place in a court, as it were, of the law of nature, simply because some deed is contrary to natural law. Punishments, indeed, await the ungrateful after death, to be meted out at the decision of the divine tribunal. And it is right for such men to be hated and scorned by the rest of mankind, and held unworthy of any further kindness. But the reason is perfectly obvious why mere ingratitude, such as forgetting kindnesses received, or neglecting to show gratitude when an opportunity is offered, should not be enough to bring war upon a person or an action in a civil court. For it was this very reason that moved me to do another some favour, that is, I did not require the return of what I did for him, in order that he might have an opportunity to show that he was grateful from a love of uprightness, not from a fear of coercion, and in order that I myself might seem to have favoured him, not from the hope of gain, but from a desire to show humanity, in that I was unwilling to provide that I secure an equal return. A braver philosophy is that of Marcus Antoninus [Aurelius], Bk. IX, § 42:

But when thou findest fault with a man for ingratitude, turn thy thoughts to thyself. For evidently the fault is thine own that thou didst not bestow a kindness absolutely, and as from the very doing of it having at once received the full complete fruit. For when thou hast done a kindness what more wouldst thou have? Is not this enough that thou hast done something in accordance with thy nature? Seekest thou a recompense for it? (H.)

But when a man exhibits mixed ingratitude, or when he not merely

fails to be grateful, but even requites with injuries and evil deeds, then there is a cause for war and an action based on a real injury; and an ungrateful mind, added to this, showing the man's base blemish, gives reason for all the more haste in the prosecution of the injury, and all the more severe punishment of a person whose depravity cannot be lessened even by kindness. But how far the necessity of returning a benefaction is lessened by a subsequent injury, is explained by Seneca, *On Benefits*, Bk. VI, chaps. iv-v; and *Letters*, lxxxi.

ON KEEPING FAITH AND ON THE DIVISIONS OF OBLIGATIONS

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| 1. There must be agreements in human society.
2. Agreements must be kept.
3. Obligations are either congenital or adventitious.
4. Atheism is opposed to congenital obligation. | 5. Natural and civil obligations.
6. The respective efficacy of each.
7. Perpetual and temporary obligations.
8. Obligations not mutual.
9. Obligations perfectly or imperfectly mutual. |
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THE duties thus far set forth derive their force from that common relationship which nature established among all men even before any act was exchanged between them. But it is not enough to confine within such a circuit the duties which men owe each other. For not all men are so constituted that they are willing to do everything, with which they can help others, out of mere humanity and love, and without assuring themselves of some hope of receiving their equivalent; while it is often the case that the things which can come to us from others are of such a nature that we cannot have the boldness to ask that they be done for us gratis. It is often also not fitting for our person or lot that we be indebted to another for such a kindness, and so in many instances another person is unable to do us a kindness, and we are often unwilling to receive one, unless the other person receives its equivalent from us. Moreover, it often happens that other men do not know how they may serve our interests. Finally, in view of the finite power of man being unable to extend itself to all persons at the same time and with the same force, it is surely reasonable that such actions as are not yet covenanted for by former obligations are bound over to those who, by agreements, have secured for themselves a prior right to them. And so, if mutual offices, the real fruit of humanity, are to be practised more frequently between men, and by a kind of set rule, it was necessary for men themselves to agree among themselves on the mutual rendering of such services as a man could not also be certain of for himself on the mere law of humanity. Therefore, it had to be determined beforehand what one should do for another, and what he should in his turn expect from another, and demand on his own right. This is, indeed, accomplished by promises and agreements.¹

From what has been said, it is understood how works of humanity or of love differ from those which are required from a right properly understood, and are, therefore, directed by actual justice. The former

¹ [This sentence, not contained in the edition of 1688, was added by Barbeyrac from the *De Officio Hominis et Civis*, I. i, § 2, in order to complete the proper expression of the thought.—Tr.]

are not owed by reason of agreements, express or implicit, but are laid upon all men by nature herself on the mere grounds of obligation. But whatever things I owed a man from agreement or covenants, I owe because he has secured a new right against me by my own consent. Furthermore, whatever I have done with another man in agreements, I have done not so much for his advantage as for my own, while in the duties of humanity the very opposite is the case. For although the exercise of such duties is in general necessary, that men may be able to live more advantageously with each other, and so their exercise turns to the advantage of him who observes them, in that he can expect their equivalent from others, yet in particular instances a man does a work of humanity not for himself but for the sake of him who receives the kindness. For so soon as a kindness is done for private advantage, it loses forthwith its designation and essence.

And so the law of humanity or charity, and the agreements of men among themselves, mutually supplement each other by way of their duties and guarantees, in that what is not or cannot be secured by charity, is secured by agreements, while in cases where agreements are not possible, charity offers its services. And although the nature and kind of agreements entered into by individual men depend on each man's judgement, yet the law of nature commands, in a general way and indefinitely, that men enter into agreements of some kind or other, since without them social relations and peace between men cannot be preserved. Isocrates, *Against Callimachus* [27 f.]: Treaties and pacts have such effect, that most of the affairs of life among both Greeks and barbarians are transacted through pacts and conventions. Putting our trust in these we come together and secure whatever we want. By means of these we form contracts with one another, and lay aside private enmities as well as general wars. This one thing, as being a universal good, all of us human beings constantly employ.

2. Now whenever men enter into any agreements, the social nature of man requires that they must be faithfully observed. For if an agreement lacks this guarantee, much the largest part of the advantage which accrues to mankind from the mutual interchange of duties would be lost. Aristotle, *Rhetoric*, Bk. I, chap. xv [22]: 'If contracts are invalidated, the intercourse of men is abolished.' (J.) Cicero, *On Duties*, Bk. II [xi]: 'The influence of justice is so great, that without some grains of it, even they who live by malpractices and villainy could not subsist.' (E.) This point he makes plain by the illustration of thieves and pirates. Furthermore, if it were not necessary to keep promises, it would be in no way possible with any confidence to base one's calculations on the assistance of other men. Nay more, from broken faith can arise the most just reasons for recriminations and war. For when I have done something on my side of an agreement, my contribution or labour has been irretrievably lost, if the other person breaks faith. And

even if I have as yet done nothing, yet it is a hardship to have my plans and intentions upset, since I could have arranged my affairs otherwise, had the other man not thrust himself upon me. And it is not right that I should be scoffed at, because I believed another person to be an honourable and upright man. It is, therefore, a most sacred precept of natural law, and one that governs the grace, manner, and reasonableness of all human life, *That every man keep his given word*, that is, carry out his promises and agreements. Add what Dionysius of Halicarnassus, Bk. II [lxxv], says about Numa adding Faith to the number of the gods. Euripides, *The Children of Hercules*, [890-1]: 'The lips that lie not best beseech the noble.' (W.)

3. Now since agreements, especially express agreements, lay upon us an obligation which nature did not otherwise enjoin, at least not so definitely, it seems convenient to consider at this point the most important kinds of obligations. An obligation is either *congenital* or *adventitious*, or, as they are called in Arrian, *Epictetus*, Bk. III, chap. ii, 'relations natural and acquired'. The former kind are such as attach to all men by reason of the fact that they are living beings endowed with reason, that is, such agreements as attend their rational nature as such. Yet in view of the fact that all men, born by the union of others of their kind, come into the world as infants, unable as yet to make a full use of their reason, this obligation lies dormant for a time and is ineffective, only exerting its full force and making men able to contract guilt when they come to the age at which they begin to appreciate its power. From that time on it produces its effects, however much a man through slothfulness has failed properly to measure its force. Therefore, ignorance of natural law excuses no person who is of age, even if he maintains that it had never occurred to him to consider whether a certain matter came under natural law.

Adventitious obligations are such as are laid upon men by reason of some antecedent human deed, with their expressed or presumed consent.

- 259 4. The most important of *congenital* obligations is that which concerns the duty of all men toward God, the final arbiter of this universe; by it we are obligated to venerate Him and to acknowledge His dominion and laws. Whoever wholly denies this obligation brings upon his own head the stigma of atheism. And this takes place whenever any one denies either that God himself exists, or else that He takes an interest in human affairs. For these two statements as regards moral effect are equal, and by each of them all religion is destroyed and reduced to a bit of mummery, wherewith to curb the unlicensed mob. Ambrose, *On Duties*, Bk. I, chap. xxvi: 'There is nothing which is more of a help to a good life than to believe that He will be our judge, whom hidden things do not escape, and unseemly things offend, and good

deeds delight.' (R.) Add Lactantius, *On the Anger of God*, chap. viii. And so quite properly is the opinion of Hobbes, *De Cive*, chap. xiv, § 19; chap. xv, § 2, to be rejected, where he classes atheism among the sins of imprudence or ignorance, as if it were not really a sin, but merely an error, and a bit of folly which cannot rightfully be punished. The argument he uses runs like this: 'The atheist has never submitted his will to God's will, not conceiving Him so much as to have any being [...]. Now no man hath supreme power which is not bestowed on him by our own consent. Therefore, since the atheist has never been under the kingdom of God, he is not obligated by the laws of God's kingdom.'¹

But the statement that all government is based upon the consent of those who are governed is utterly false. For that is true only of human government, where our faculty to resist another, who is by nature our equal, is not taken away, except by our consent and agreement. But who would say that God has no right to command a creature of His, unless that creature had of his own will consented to His sovereignty? And even Hobbes, chap. xv, § 5, derives the right of God to rule and punish in the natural kingdom, from His irresistible power. Yet no one would believe that atheists can resist the power of God. And so atheists are in no proper sense of the term enemies of God (according to Hobbes' definition of enemies as those who are subject neither to a common sovereign nor one to another), but they are His rebellious subjects, and so have involved themselves in the crime of treason against the divine majesty, even as Hobbes himself so ably shows, chap. xv, § 19. Thus, according to the same author, the crime of treason against human majesty arises when some one openly declares by word or deed that he will no longer obey that man or body to which is committed the supreme authority of the state; or, in other words, when some man has broken once and for all the tie of civil obedience. And so it is not so difficult a matter to determine the kind of sin to which atheism should be referred.

But it is also false that atheists can be punished on no other ground than by the right of war, after the manner in which, according to the poets, the gods girded themselves for battle against the giants, who were *θεομάχοι* [striving against God]. We shall show, in another connexion, that the injuries done to enemies in war are not penalties, in the proper sense. Nor can a ruler who brings refractory subjects to submission by war be said for that reason to have used the right of war, for the right of sovereignty implies that those who refuse to obey commands can be made to do so by the use of force. Even less can one who breaks the lawful bond of sovereignty become a just enemy, who may therefore claim a right to resist.²

¹ [The last sentence is simply a summary of Hobbes' argument. The first two occur in chap. xiv, § 19.—Tr.]

² [For *resistere* read *resistere*.—Tr.]

Nor can Hobbes find any support in the fact that, in the *Fourteenth Psalm* [1], atheists who 'say in their heart, there is no God', are called 'fools'. As if, indeed, the words of Sacred Scripture only designate those as fools who live in error, but not those who are guilty of wilful sin. As if it were not the height of folly for one, out of one's own depravity, to seek the most severe punishment in return for a passing pleasure, or none at all. Furthermore, it is not so difficult to find out the nature of God by natural reason, as it is to discover the proportion between a sphere and a cylinder, the example Hobbes uses. Of course not every common man could work out or grasp the scientific and philosophical
 260 argument for the existence of God, but that fact will not form a sufficient reason for any man to feel himself safe in questioning or denying the existence of God. For inasmuch as this faith has been practically a perpetual possession of mankind, whoever would attack it must not simply destroy entirely all the arguments used to prove the existence of God, but must advance reasons even more plausible for his own assertion. And since it is held that the preservation of mankind has thus far been due to that belief, the same person must furthermore demonstrate that the interests of mankind are better advanced by atheism than by continuing the worship of God. But since this is clearly impossible, atheists must be held to offend not only against God, but against all mankind as well. And so they should receive all the less consideration, because they undertake to oppose, in fact, the accepted faith of all peoples and ages, in claiming for themselves, as above others, some special sharpness of wit. It follows that whoever have fallen into atheism are, indeed, involved in an error, detestable in itself, but also such a one as they have conceived, not so much through any lack of foresight or ingenuousness, as from a vain arrogation of wisdom. Compare Jean d'Espagne, *De Erroribus Popularibus*, Sect. I, chap. vi; Bacon, *Essays*, chap. xvi; *The Advancement of Learning*, Bk. III, chap. ii. Add also Plato, *Laws*, Bk. IX, towards the end, where he distinguishes between the kinds of atheists and discusses what punishments should be used in keeping them in check.

It is not so difficult to meet the arguments with which the writer of the work entitled *Theologico-Political Treatise* [Spinoza], chap. xvi, attempts to support the view of Hobbes, premissing his argument with the thesis that 'every one who does not possess the use of reason lives, by the supreme right of nature, in a natural state, according to the laws of his appetite'. To the objection that such a statement denies a revelation of divine law, he replies: 'The natural state is prior both in nature and in time to religion.' Such a statement about natural religion is the falsest possible, as is also the following: 'No man knows by nature that he owes any obedience to God; nay, such obedience cannot be inferred by any process of reason, but is confirmed only by signs upon revelation.'

This can under no circumstances be admitted of natural religion. Therefore, the conclusion of the same writer is false when he says: 'Before revelation no one is bound by a divine law of which he cannot avoid being ignorant,' if he means divine natural, not positive, law; and 'A natural state must be conceived as one without religion and law, and therefore without sin and injury'. He proceeds to say that in a natural state a man is free from religion, not only 'by reason of his ignorance, but because of the liberty with which all men are born. For if men were by nature bound by divine law, that is, if the divine law were the law of nature, there would have been no reason for God to make a covenant with men, and obligate them by an agreement and oath.'

But these arguments between God and men come from revealed religion, and not from natural religion, to which man is obligated because of the fact that he was created by God a rational creature. And so the conclusion of Spinoza is wrong¹: 'Divine law came into effect at the moment when men by an express agreement promised God obedience in all matters, by which promise they left, as it were, their natural liberty and ceded their right to God, as is done in a civil state.' But to maintain this position one must imagine that men in a natural state do not owe their existence to God.

From this obligation, whereby all men are bound to render obedience to God, there arises the further obligation of all men toward their fellow men as such, by which they are obligated to live a mutually social life. How this is to be known has been shown in another place.

5. Another common division of obligations is into *natural* and *civil*, interpreted, however, by different writers in different ways. According to Grotius,² Bk. II, chap. xxiv, § 6, the term natural obligation is sometimes applied to something which nature recommends as worthy to be done, but is not strictly an obligation. He gives, as illustration of this, for an executor to pay all the estate without reserving what is his by the *Lex Falcidia*; for one to return a kindness; for a person to pay a debt which he no longer owed by reason of a court decision against the creditor, or to which he could oppose his right under the Decree of the Senate relating to Macedo. See Suetonius, *Vespasian*, chap. xi. Nicolaus of Damascus, *De Moribus Gentium* [frag. 103b Jacoby], gives a law very similar to this decree: 'If any one is convicted of having lent money to a spendthrift, he loses his loan.' When such things have been paid voluntarily, no formal claim can be entered for their restitution.

Sometimes an obligation which actually binds us is called a natural obligation, whether another receives from it a perfect, or only an imperfect right. In the same way a civil obligation sometimes denotes one which is not based on purely natural law, but arises from civil law, a common example of which is an obligation made in writing;

¹ [For *Inanias* read *Inanis*.—Tr.]

² [For *Gortium* read *Grotium*.—Tr.]

sometimes it denotes one which is based on natural as well¹ as civil law, and which also warrants action in a civil court.

Others make a *threefold* and more simple division of obligation into strictly natural, strictly civil, and mixed. The *first* is based upon natural equity, with the restriction that it allows no action in a civil court. The *second* is based entirely upon the strict letter of civil law, by which every citizen is so restricted that an action is always highly proper against him, although such an action may be dismissed by the judge, whose power constitutes a perpetual exception. The last is that which is sustained by natural equity, with the further confirmation of the authority of the civil law. On these divisions see in general the writers on Roman law.

6. We may well discuss the division of obligations into natural and civil, not so much on the ground that such a division explains the origin of obligations,² as that it suggests³ the basis of their force in common life. And so a natural obligation is that which binds only by the force of natural law; a civil obligation that which is reinforced by civil laws and authority. The efficacy of each is considered, either in him in whom it resides as the subject of the obligation, or in the other person, who is its object. From the point of view of the subject, the efficacy of a natural obligation consists principally in the fact that it binds the conscience of a man, or that a man realizes, when he has not fulfilled it, that he is disobeying the will of God, whose law all men recognize that they should obey, just as they are indebted to Him for their very existence. And although penal sanctions are not to be found so expressly defined in natural law, there is no reason to feel that it lacks every kind of sanction, and that the man who breaks its obligation should expect no greater punishment from the hands of its author than he who fulfils the same. Among other arguments for this fact are those bitings of conscience with which the wicked are seized, even when they have hope of deceiving men and escaping human punishment; and that such a fear springs from no higher principle, from no realization of the divine sovereignty, but can be traced to mere simplicity, habit, or the fear of human punishment, no pious man is convinced. Cicero, *For Roscius the Comic Actor* [xxiv]: 'It is his own dishonesty and the terrors of his own conscience that especially harass each individual: his own wickedness drives each criminal about and affects him with madness; his own evil thoughts,⁴ his own evil conscience terrifies him. These are to the wicked their incessant and domestic furies.' (Y.) Add Selden, *De Jure Naturali et Gentium*, Bk. I, chap. iv, p. 47 ff. Nor can I believe that any man has ever found for himself in the impiety of atheism a final relief from such terrors, but that his fear of God has at times got

¹ [For *eque* read *aeque*.—Tr.]

² [For *inuit* read *innuit*.—Tr.]

³ [For *obligationem* read *obligationum*.—Tr.]

⁴ [For *cogi actiones* read *cogitationes*.—Tr.]

the upper hand,¹ and shaken his impious mind in the end with even greater tumults. And, indeed, those niggardly and infrequent worshippers of the gods, who stray, versed in a wisdom that is folly, are in almost every case with serious misgiving forced at length to turn their sails backward [Horace, *Odes*, I. xxxiv. 1 ff. slightly paraphrased].

Now although the binding of a man's conscience is the most characteristic feature of a natural obligation, the same efficacy is found as well in a civil obligation, provided the latter is concerned with an object not repugnant to the former. And so civil laws also, which are not repugnant to natural law, have an influence on the conscience. Furthermore, both obligations agree in this respect, that a man should do, of his own accord and by an intrinsic motive, the things which they demand of him. This forms the main difference between obligation and compulsion, since in the latter the mind is forced to something by mere external violence contrary to its intrinsic inclination, while whatever we do from an obligation is understood to come from an intrinsic impulse of the mind, and with the full approbation of its own judgement. 262

But when these obligations are viewed from the effect which they produce on the person who is owed something by reason of them, they have this feature in common, namely, that whatever is furnished as a debt on this account may be rightfully received and kept. But when a man neglects or refuses to meet an obligation, there arises a distinction, in the manner of requiring its fulfilment, between natural and civil obligations, according as one lives in natural liberty, or in a civil state.

Among those who live in natural liberty there obtains, from the precepts of natural law, an inequality of obligation. For such² things as natural law commands one man to show another, before any agreement has passed between them, such as the duties of charity and humanity, can be required only by peaceful means, as by persuasion, admonition, request, or entreaty. But it will not be allowable to use force against a person who persists in his refusal, unless it happen that extreme necessity impels us. The reason for this seems to lie in the fact that, without such duties, the intercourse of men cannot be sufficiently peaceful, and so nature is understood to have put them to one side, as a means by which men may bind others to themselves by a special exhibition of good will³; since things which may be extorted by force have no such power to win the hearts of others, as those which may be denied without fear. But if what is owed by an agreement is not forthcoming, force may be used to extort it. In the same way we may defend any of our possessions by force, when another man inflicts injury upon them.

Now civil obligations, or such as secure authority from civil law, open the way for action in a civil court, by the authority of which I can

¹ [For *exulans* read *exultans*.—Tr.]

² [For *benevolentia* read *benevolentia*.—Tr.]

² [For *Que* read *Quae*.—Tr.]

drag the defaulter before magistrates, who may by virtue of their jurisdiction compel him to meet¹ his obligation. But natural obligations, because they lack the sanction of civil law, depend for their power in states only upon the honour² of the debtor and his reverence for God, and citizens may not use force to secure their fulfilment.

Legislators determine the kind of obligations to which the civil law should extend its power, bearing in mind the usefulness of such in securing the internal peace of the state. And just as they would see that the judges shall not be troubled by mere trifles, so they would scarcely heed those who would like to imitate the Chinese, of whom Strabo, Bk. XV [i. 34], writes: 'Among them there are actions only for murder and insolence. For it is not in a man's power to avoid these, whereas any person may take due precautions not to be deceived in the matter of a contract, by considering carefully who it is in whom he is trusting.' A similar account is given by the same author, Bk. XV [i. 53], about the Hindus: 'They have no actions for mandate or deposit, nor do they use witnesses or seals, but simply trust one another.' Compare Aelian, *Varia Historia*, Bk. IV, chap. i. Add Seneca, *On Benefits*, Bk. III, chap. xv.

7. Obligations can also be divided into *perpetual* and *temporary*. The former is one which cannot be annulled, so long as that person exists in whom it inheres. Such is the congenital obligation toward God, the exercise of which cannot be suspended at any time. Such is
 263 also the obligation of all men toward other men as such, from which also no man can free himself, so long as any part of mankind exists, although it may at times be suspended in part, so far as its exercise is concerned. This takes place when I pass into a state of war with another. For this is a reciprocal obligation, so that when it is broken by one of the parties, and hostilities take the place of duties of humanity, the second party is no longer obligated to live on friendly terms with the first, but is free to maintain his safety and his rights even to the other's hurt. Yet that obligation remains perpetual to this extent, that so soon as the consideration of our own safety permits, we must be ready again to exercise the duties of humanity toward the other party, and live at peace with him. Of the adventitious obligations men usually call perpetual the obligation of children towards parents, and that which passes between husband and wife, which is discussed more fully in another connexion [VI. i and ii].

Temporary obligations are such as can be annulled, while those in whom they inhere are still alive.

8. Furthermore, since it is very frequently the case that obligations exactly correspond one with another, they can also be divided

¹ [For *obligatione* *xplendam* read *obligationem* *explendam*.—Tr.]

² [For *puderi* read *pudori*.—Tr.]

into *mutual* and *non-mutual*. A non-mutual obligation is when one man is bound to render something to a second, and yet the latter, to whom something is owed, is under no corresponding obligation that also binds him to return the equivalent. Such is the obligation of men toward God, by which they owe Him absolute obedience, while He is on no account bound, by any force arising from an external obligation, to make them any return for this obedience.

Of the obligations which are concerned on both sides with men, there are apparently none of this kind, if you except a few so-called *μονόπλευροι* [unilateral] contracts. And this is so because it is repugnant to the natural equality of men, that one man should be obligated to another, and yet the latter should in no way be likewise bound to the former. Those men, indeed, cannot be reckoned social creatures who are not united by some common bond, and between whom there is no exchange of mutual aid, but one of them exists only for the sake of another, from whom in turn nothing need be forthcoming to the former. Nor, indeed, when men introduced a difference in stations, were they able to confer upon any of their number so eminent a right that he could be freed from every obligation, and from meeting any duty to other men.

9. Mutual obligations are such as correspond one with another in such a way that the man, to whom something is owed by an obligation, lies under another obligation, which enjoins him, in view of the thing owed him, to do something in his turn for the other party. These are again divided into *imperfectly mutual*, and *perfectly mutual*. The former are such as match each other unequally, so that to one obligation there is opposed another, which is of a different kind, or not so efficacious. This usually seems to come about for two reasons: either because there is such an inequality, between persons¹ who are mutually obligated, that to the one belongs a right to command, and upon the other rests a necessity to obey; or else because some men, otherwise equal, were unwilling to bind themselves by an equal kind of obligation. For obligations vary in their efficacy, in that some produce, in the person to whom they are directed, a perfect right, wherefrom an action arises against us in human cognizance, to be prosecuted either by war or before a tribunal, according to whether one lives in natural liberty, or in a commonwealth. But the rest give only an imperfect right, which cannot be used to force another to render something.

Now from the first of the reasons mentioned above, imperfectly mutual obligations are those between princes and subjects, between states and citizens, masters and slaves, fathers and children, each of which will be treated in its proper place. An obligation becomes imperfectly mutual from the second reason, chiefly in the case of gratui-

¹ [For *personas* read *personas*.—Tr.]

264 tous promises and their fulfilment. For in promising another something gratis, I obligate myself perfectly to do it, so that he may on his own right demand it of me. But since I did not agree with him for its equivalent, he is bound to me only by the law¹ of gratitude, wherein the necessity to pay is much more loose and free than in the case of something that is owed by an agreement. For we cannot by any means base our hopes on an unlimited obligation of that kind, and so, no matter however ungrateful the other may turn out to be, we conclude that we have suffered no hurt. For they are wrong who maintain that nature has given a perfect right to demand gratitude from an ungrateful person, even though most nations have refused any actions in their courts on that score. Certainly, it does not follow that there is a greater necessity to return a kindness than to do one, and therefore the latter is an imperfect right, while the former is a perfect one; since there can be different degrees in obligations of the same kind, especially when duties that devolve upon us at the same time are to be compared with each other. Compare Boecler on Grotius, Bk. I, chap. i, § 4.

¹ [For *elige* read *lege*.—*Tr.*]

CHAPTER V

ON THE NATURE OF PROMISES AND PACTS IN GENERAL

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| <ol style="list-style-type: none"> 1. The source of adventitious obligations. 2. The meaning of Hobbes' 'transfer of right'. 3. Hobbes' 'right to all things' does not exist. 4. The real limitation of transfer of right. 5. A mere assertion does not obligate. | <ol style="list-style-type: none"> 6. An imperfect promise obligates a person, but gives no right to another. 7. A perfect promise. 8. Promises in the future tense do not transfer a right. 9-11. Whether there be in mere agreements a power to impose obligation. |
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WE must now consider further, how obligations, which are not congenital with a man, may arise for him from some act of his, while by the same means others acquire some right which they did not have before. For these two obligations follow each other in such a way that when an obligation arises for one person, there springs up in another its corresponding right, since it is inconceivable that I should be obligated for something, unless there be some one who may require it of me, or at least properly receive it from me. Although the opposite of the case does not always hold: that is, when one man has a right, there is at once an obligation in another; for instance, sovereigns have a right to exact punishment, but the criminal is under no obligation to undergo it. We may prefer to say, however, that if right be taken in a strict sense, as a faculty or competency to have something, there must always be some obligation in another corresponding to this, but not always, if right is taken in the sense of a faculty to do something. It is clear, therefore, that adventitious obligations arise from an act, either *μονόπλευρος* [unilateral] or *δίπλευρος* [bilateral], of which the former is a gratuitous promise, the latter a pact.

2. Now since it is generally agreed among all men, that promises and pacts transfer a right to others, we shall examine first of all the position of Hobbes, *De Cive*, chap. ii, §§ 3 ff., on the transfer of right. After he has concluded from his thesis of a natural state, that every man has a right to everything, and has gone on to show that from the assertion of this right there will follow a war of all men against all others, a state of affairs the worst possible for the preservation of men, he concludes: Since reason commands men to pass from that status into one of peace, and since this peace is inconsistent with the right of all men to all things, it likewise commands men to part with a portion of that right to all things. He says that a man parts with his right if he either absolutely *renounces* it, that is, if he declares by sufficient signs that he is willing that it shall never be lawful for him to do that again, which before by right he might have done, or if he *conveys* the same right to

another. The latter method is followed, if he declares by sufficient signs to that other, who is ready to receive that right from him, that he is willing it should be unlawful for him to resist the other, in going about to do somewhat, in the performance whereof he might before with right have resisted him. He concludes from this that 'the conveyance of right consists merely in not resisting'; that is, if any man in a natural state transfers a right upon another, he does not give the other a new right which he did not have¹ before, but he merely renounces his right to resist the other, when the latter wishes to exert his own right.

This he proves on the basis of his hypothesis in the following way: Before the conveyance of the right the man to whom the right is said to be conveyed had already a right to all things; therefore, he could not be given a new right. But the just right of resistance of the conveying party, by reason of which the other could not freely enjoy his right, is utterly abolished. Therefore, whosoever acquires some right in the natural state of men, only procures himself security and freedom from just molestation in the enjoyment of his primitive right. As, for example, if any man should sell or give away a farm, he utterly deprives himself only from all right to this farm, but he does not so to others also; that is, he announces that he will not resist or hinder another who wishes to enjoy that field. Yet by this act he does no prejudice to all other men, who still keep their primitive right to that field.

3. But just as we have shown before, that this state of Hobbes is by no means natural to man, who has been designed for a social life, so we do not acknowledge the consequence of this state, namely, such a right which a man has or may have to everything, and which has an effect in turn on other men. That this may be understood more thoroughly, it must be recognized that not every natural faculty to do something is properly a right, but only that which concerns some moral effect, in the case of those who have the same nature as I. Thus, as in the fables [*Aesop*, 175], the horse had a natural faculty to graze in the meadow, and so had the stag as well, yet neither of them had a right to this, because their respective faculties did not concern the other. In the same way, when a man takes inanimate objects or animals for his use, he exercises only a purely natural faculty, if it is considered simply with regard to the objects and animals which he uses, without respect to other men. But this faculty takes on the nature of a real right, at the moment when this moral effect is produced in the rest of mankind, that other men may not hinder him, or compete with him, against his will, in using such objects or animals. Of course it is absurd to try to designate as a right that faculty which all other men have an equal right to prevent one from exercising.

Now we admit that man has by nature a faculty to take for his use

¹ [For *habuerit* read *habuerit*.—*Tr.*]

all inanimate objects and animals. But that faculty, thus exactly defined, cannot properly be called a right, both because such things are under no obligation to present themselves for man's use, and because, by virtue of the natural equality of all men, one man cannot rightfully exclude the rest from such things, unless their consent, expressed or presumed, has let him have them as his very own. Only when this has been done, can he say that he has a proper right to the thing. To state it more concisely: A right to all things, previous to every human deed, must be understood not exclusively, but only indefinitely, that is, not that one man may claim everything for himself to the exclusion of the rest of mankind, but that nature does not define what particular things belong to one man, and what to another, before they agree among themselves on their division and allocation. And even less does the same equality of men allow one man to claim that he has by nature 266 a right over every other man. Nay rather, no man would ever have a right to rule over another, had he not acquired it in some special way from the other's consent, or from some other antecedent act of his, as is shown at greater length in its proper place.

4. The real nature of the transfer and acquisition of a right will become more clear, if it is understood at the outset, that certain rights concern men and certain others concern things, and that the right over things is either original or derivative. A right is acquired over men when a man agrees, either expressly or tacitly, that I may prescribe for him what he should do, allow, or avoid, whereby he at once obligates himself to endeavour of his own accord to do my will, and I on my part acquire the power to compel him, when in default, by the fear of misfortune. A man acquires an original right over things, when all other men expressly or tacitly renounce their faculty to use a thing, which they had held before on equal terms with him. But when once this right has been established, through which the primitive faculty over things has been taken away, by the transfer of the right, something which I myself had is taken away and given to another who before did not have it. This is why it is incongruous to say that a transfer of right consists only in non-resistance, since this negative word in no way expresses the power of the obligation that arises from a transfer of right, which obligation properly implies an intrinsic inclination to do what was agreed upon. Although non-resistance on the part of him who obeys the obligation is a consequence of the transfer.

Now the illustration used by Hobbes does not square with the matter before us. For not only is it an absurdity to call it a sale,¹ when I alone forswear my claim to a thing which all other men still keep as their own, but the ownership of things, on his own confession, comes from civil power, and after the discontinuance of a natural state. And

¹ [For *venditioem* read *venditionem*.—Tr.]

so, in a natural state, no man could call a field his own, and therefore could not sell it. What should have been said was this: Since in a mere natural state things belong to one man¹ no more than to another, it follows that if one man wished to have the sole enjoyment of something, the others had to renounce the use of it. If they did this gratis, he would have the thing as a gift, but if they accompanied that act with some burden or other, it would be called a contract. But if he alone renounced his faculty to the thing, no prejudice would have been done the others, and so he alone, who had renounced it, could be excluded from its use, and not the rest.

5. Let us see, further, how a man, by his own free promise, may contract an obligation, and confer a right upon another. If the nature and effect of this is to be understood properly, it should be observed, at the outset, that we can speak in different ways of doing something for another, which is now, or, it is thought, may come to be in our power. One way is by our merely expressing our feeling, as it now stands, on something in the future, in such a way as lays us under no necessity of persevering in that desire. An illustration is in the message of Tiberius to Sejanus in Tacitus, *Annals*, Bk. IV [xi. 40]: 'What projects I have turned over in my own mind, by what further ties I am preparing to bind you to myself, I will forbear for the present to disclose.' (R.) From a statement of this kind there arises no obligation for myself, nor any right for another. See *Digest*, XLV. i. 108, § 1. And all that is required to make such a statement blameless is that our thought be true for the moment, that is, that my intention was actually such as we profess it to have been, and that we do not mock the other with a falsehood. But we are not bound to persevere in that purpose, since the mind of man has not merely a natural power to change its will, but a right as well, so that it may rightfully do this, when no obligation lays upon it the necessity of standing by an opinion once declared. Although
267 such changes of the will are to be censured, if the former purpose which was abandoned was better than the second, or if it has been the cause of unmerited mockery of others. A case in point is given by Valerius Maximus, Bk. VII, chap. viii, n. 5-6, concerning Q. Caecilius and T. Marius Urbinas. Although the impudence of gaping crows often merits such mockery. See Pliny, *Letters*, Bk. II, ep. xx. Compare Grotius, Bk. II, chap. xi, § 2.

6. We can call it an imperfect promise when a man declares his will to do a favour for another at a later time by some sign sufficient to show the necessity of his persevering in his declaration, that is, he clearly declares² his willingness to be obligated, yet in such a way that no right is given the other man to require the thing of him. This is like what happens in the return of a favour, when the man who receives

¹ [For *adhunc* read *ad hunc*.—Tr.]

² [For *delcaret* read *declaret*.—Tr.]

a kindness is obligated to show a grateful attitude, which, however, his benefactor cannot demand by his own right.

Some maintain that it is not so easy to find an example of this kind of promise, so far as it arises from the law of nature. As instances are advanced the promise of an absolute ruler to his subject, of a master to his slave, of a father to a son under his authority, which promises the former are obliged to fulfil, while the latter apparently have no right to demand it, because there is no court where they can bring action against these superiors. The fact that such promises seem defective is due, not to their intrinsic weakness, but to the circumstance that a quality is found in those who make the promises which prevents the effect of the obligation from taking its full course. Others advance the instance of an imperfect stipulation, where, according to civil laws, promises must be made in certain stipulating formulae, and when these are not used, no action can be brought that is based upon the promise. They judge that if it was the intention of the promissors to make a perfect obligation, and it was only through error or carelessness that the exact words of the law were omitted, the promisor is still bound by natural equity to fulfil his promise, although the other party has no action in a civil court to require it. And yet, in this instance as well, the imperfection¹ of the promise comes about not by reason of natural law, but of positive law, which, quite contrary to the custom of natural law, orders the effect of the promise in set formulae. The following seems the best instance of an imperfect promise, if I couch it in this way: 'I have made up my mind in all seriousness to do this or that for you, and I hope that you will take my word for it.' Under such terms the promisor apparently is obligated to do something, more by the law of veracity than the law of justice, for he was willing to have some obligation laid upon himself, yet he was unwilling to be compelled by the other person to do it. For the spirit of men is so generous that they would rather appear to be brought to perform some duty by the impulse of their own virtue, than by some right of another.

Under this head should also fall the assurances of men in authority or of high regard, whereby they promise another person their recommendation, intercession, help, or support, not in words involving a pledge of honour,² and yet in all seriousness, which assistance they are unwilling to have demanded of them on any right, but want it imputed entirely to their humanity and truthfulness.³ And not even natural law seems able to force a man to perform such a promise when he has silently made the reservation against any such compulsion, so that an added grace might gather around his deed the freer it was from coercion.

¹ [For *imperfecto* read *imperfectio*.—Tr.]

³ [For *veracitate* read *veracitati*.—Tr.]

² [See § 10 below.—Tr.]

7. It is a perfect promise when a man not only declares his will for a future time to perform something for another, but also shows that he gives him a right, whereby the other is fully entitled to demand of
 268 him the thing promised. Now when we promise to give something or to do something, such a promise either leads to the alienation of our property, or is an alienation of some slight portion of our liberty, so that in what we were able before to do, or omit to do, or to handle at our discretion, we must now follow the directions of our promise. Yet it must be noted that such considerations apply only to promises between men. For although it is impossible for the divine promises to fail, yet it is surely a venturesome thing to say that man acquires a right against God from His promise. Add Grotius, *loc. cit.*, §§ 3-4.

8. Some attention should be given at this time to the opinion of Hobbes, *De Cive*, chap. ii, §§ 6 ff.: 'But if there be no other tokens extant of our will either to quit or convey our right, but only words, those words must either relate to the present or time past'; that is, a right to a thing promised is transferred to another only by words of present or past time, not by words of future time. For the man, for instance, who says of the future, 'To-morrow I will give, to-morrow I will make a settlement,' shows openly that he has not yet given the thing. And so for the whole of to-day his right over the thing remains undisturbed, and so also for the next day and the day after that, unless he has transferred the right by some new promise, or given it over meanwhile by some act. But if, besides words, other signs are used, capable of declaring the will to transfer a right in the present time, words will not hinder the effect, even though grammatically they belong to the future tense. When, however, such signs are lacking, verbs in the future tense should not be given so free an interpretation as to allow them to effect a present transfer of right. For since we are, as a rule, not in the habit of transferring our goods to others, except to acquire thereby some advantage, which advantage is not clearly visible in a gratuitous donation; therefore, no easy presumption should be made about an act which accords only slightly with the general inclination of mankind, except in so far as it can be gathered by express signs of the will. Especially since words of this nature usually show but a mere attitude of mind,¹ and have, for the present at least, no efficacy. So long, therefore, as a man speaks of the future, he is supposed to be still weighing the matter, and before that time both his own attitude, and the merit of the other party may change, or some other situation arise, whereby he will be unable conveniently to do without his possession. This is just like a man making his will, who under no circumstance transfers by his will to an heir a present right, but is always held to have made some such mental reservation as: 'This man shall be my heir,

¹ [Supplying here the word *affectum*, as suggested by Barbeyrac.—Tr.]

unless I change my mind before I die.' And yet a man will not escape the stricture of fickleness, if he seriously deceives others with empty hopes.

The matter is very different, if I say, 'I am giving or I have given you something for you to have to-morrow.' For this is giving to-day a right to have something to-morrow, or, in other words, transferring to-day to another a right over something, the actual delivery of which should take place to-morrow. Nor are such promises as these affected by the fact that most promises are by custom expressed in words denoting future time. For although we usually say, even when we promise something by a formal acknowledgement or oath, 'You will have this of me', or 'I will give you this', &c., it has been the practice for such words to be used, because the actual transfer of the thing promised usually comes after some interval. Nay, it can scarcely be called a promise when the thing is done immediately upon the declaration of one's intention, since in such a case there apparently never was any obligation, or it expired as soon as it was contracted. In general, people say they have something when they have the actual possession of it. And so the real meaning of the words commonly occurring in a perfect promise, such as 'In six days I will give you one hundred units of value', is merely this: 'At this time I give you the right to have and require of me one hundred units of value, and at the same time I obligate myself to give it to you within the specified time.'

The case can be presented more briefly thus: Words of the future tense in promises, especially a word meaning to give, imply either the assumption of an obligation, whereby neither the thing itself nor any right to it is transferred, or else the transfer of a thing to be made hereafter, the right to which is now or has been already transferred, in which case the words in no way detract from the perfect character of the promise.

9. At this point we must discuss also that most vexed question, whether, namely, natural law invests with any power of obligation mere promises as well as mere pacts, so long as they are only set forth in terms of simple agreement and do not contain any undertaking (*negotium*) or *συνάλλαγμα* [contract]. This is denied, particularly by François Connan, *Commentaria Juris Civilis*, Bk. V, chap. i, whose arguments Grotius, Bk. II, chap. xi, § 1, and others have undertaken to refute. And certainly all the savants hitherto have agreed that a verbal pledge must be kept, and that a man by his statement alone can lay himself under a necessity to do something, even if no further transaction has taken place. Cicero, *On Duties*, Bk. I [vii]: 'Now the foundation of justice is faithfulness, which is a perseverance and truth in all our declarations and in all our promises, and for that reason it has been said that the word *fides* is no other than a performance of what we have

promised.' (E.) Ulpian in *Digest*, II. xiv. 1: 'What, indeed, can be so much in accordance with mutual trust among men as the principle of abiding by what persons have agreed to?' (M.) That was a poor and wicked jest on the part of a petty prince of Java, when reproved for not keeping his promises, to say that 'his tongue was not so rigid as a bone'. It will appear from a discussion of the arguments of Connan, whether his attempted attack is anything but a crude effort.

His first point is: 'He who rashly trusts a man who makes a promise without cause is no less at fault than he who makes the vain promise.' Here it must be carefully explained what a promise 'without cause' is. For if he means that such things are promised which will produce no harm or inconvenience to him to whom they are promised, if they are not fulfilled, and which will bring some loss or trouble to the one who fulfils them, then surely it can be granted that promises made 'without cause' carry no obligation. For why may any man wish to claim on the basis of some right of his that I should be put to some trouble or expense if he is not going to receive thereby any advantage for himself? While for my part it is against all reason to undertake something from which no good and only evil will result. Thus, for example, if you had required of me that I should go without food for four days,¹ there is no reason why I am obligated to keep the promise if such a fast must injure my health and bring you no advantage. And, in a case of this kind, as much folly must be charged to him who promises such a thing as to him who thinks that from such a promise he has secured a right which may be claimed in all seriousness. Furthermore, since promises are gratuitous, and lay a responsibility on but one of the parties, it is always to be understood that they carry² this proviso: They will be fulfilled in so far as it can be done without any great inconvenience to me. Nor, indeed, will the man to whom the promise is made be so bold as to claim that my kindness shall involve me in some loss, or that he may desire to be enriched at considerable cost to me.

The matter is treated by Cicero, *On Duties*, Bk. I [x]:

Occasions frequently happen with the result that it is not just to keep a promise; for it is proper to have recourse to the foundations of justice: in the first place, that of injuring no person, and secondly, that of being subservient to the public good. When these conditions are altered by circumstances, the moral obligation, not being invariably identical, is similarly altered. A promise, as a paction, may happen to be made, the performance of which may be prejudicial either to the party promising, or to the party to whom the promise is made. For (as we see in the play), had not Neptune performed his promise to Theseus, the latter would not have been bereaved of his son Hippolytus; for it is recorded that of the three wishes to be granted him, the third, which he made in a passion, was the death of Hippolytus. Therefore, you are not to perform those promises which may be prejudicial to the party to whom you promised, nor if they may be more hurtful to you than they can be serviceable to him. It is inconsistent with our duty that the greater injury should

¹ [For *quatriiduum* read *quadriduum*.—Tr.]

² [For *innesse* read *inesse*.—Tr.]

be put before the less. For instance, suppose you should promise to appear as the advocate of another person while his cause is pending: now, if your son was to be seized violently ill, in the meantime, it would be no breach of duty in you not to perform what you promise; the other person would rather depart from his duty, if he should complain that he had been abandoned. (E.*)

Add Seneca, *On Benefits*, Bk. IV, chaps. xxxv and xxxix. Another passage from Cicero, *On Duties*, Bk. III [xxiv], bears on the case before us:

If any one should give some person a cure for dropsy, and should covenant with him that he should never afterwards use that cure—if by that cure he became well, and in some years afterwards fell into the same disease, and could not obtain from him with whom he had covenanted, leave to use it again—what ought he to do? Since he is an inhuman person, who would not give him leave, and no injury would be done to that person by using it, he ought to consult for his life and health. (E.)

But, if Connan means by a promise 'without cause' a gratuitous promise, then it is clear that his position would destroy all possibility of kindness and liberality, and that all the duties of humanity would become mercenary. For if a man, knowing his own resources, has ordered me to expect some free gift from him, that I may thereafter have some reason to love and cultivate him, why should I not trust him? And since he could make or withhold the promise at will, why did he command me to base my plans upon his word, if he was not ready to be fully obligated thereby? For the denial of a kindness is without injury, only so long as a man is bound to its performance merely by the law of humanity, but not if the other person has secured by the promise a right to its fulfilment.

10. Connan goes on to maintain: Since such promises arise more from a desire for display than from real intent, or, even if they are to be taken in all good faith and not jestingly, since they are thrown out hastily, and with little consideration, the fortunes of all men would be seriously endangered, if they are to be bound by any chance word or promise. Perhaps the reason why the ancients held that the vows of lovers were not binding, and that the gods overlooked those who broke them, was because they were made by a mind blinded with love, Plato, *Convivium* [p. 183]; and the poets, *passim*.¹ But in fact such a danger need arouse no fear, for we attribute the power of obligating only to serious promises, and such as are made upon deliberation. Only a dolt would take some jocular word in all seriousness. On the other hand, rashly to promise more than you can conveniently fulfil certainly merits reproof, but surely it would be inhuman to try to exact such promises. Flavius Vopiscus [xxxv] tells how Aurelian once promised the people crowns of two pounds weight if he returned a victor, and while they expected them to be of gold, he made them of bread.

In the next place words of honour, and such as are used to express

¹ [For *possim* read *passim*.—Tr.]

in a general way our esteem for another, must be distinguished from promises by which we are bound in a special way to some particular undertaking. For men of good breeding often express their good-will in very full terms, for instance, by saying that they are all yours and offering their persons and their possessions to another's assistance. So Aeolus in Vergil, *Aeneid*, Bk. I [76], says: 'Tis your part, O queen, to examine well what you would have done: it is my duty to execute your commands.' (B.) In this case it would have been highly uncivil to have taken such words in their strict sense. See 1 *Kings*, xx. 3 ff., although a different interpretation is given the passage by Josephus, *Antiquities*, Bk. VIII, chap. viii. Grotius, on the passage in question, says that Ahab understood the words in this sense: 'I give myself and my possessions into your protection'; but that Benhadad understood them as of actual possession. Add Polybius, *Selections on Embassies*, XIII [XX. ix]; Livy, Bk. XXXVI [xxviii], on the case of Phaeneas, the ambassador of the Aetolians. Such words, therefore, although uttered in all seriousness, obligate one to no special thing, but only bespeak a kindly mind and attitude towards another person. Add Fernando Vazquez, *Controversiarum Illustrum*, Bk. I, chap. x, §§ 20 ff.

But just as those promises which bid a person to expect some certain and definite thing from us must necessarily be fulfilled, because the man has put faith in us, and made his plans according to our word,
 271 so the obligation to keep promises should not be taken from the relations of men, just because some few men of muddled wits, who ought to be turned over to the care of their family or friends, would ruin themselves and their fortunes by making too many promises. In the same way the practice of giving surety for a person is not condemned merely because it entails not a few people in losses. And so in view of the fact that a promise becomes a debt, men should be cautious about promising more than they can conveniently fulfil. Nor can it be other than a mark of weakness for one to be so tender-hearted that he cannot say no to a man, however impudent his request. Terence, *Andria*, Act IV, sc. i [629-38], has a passage to the point:

It's the worse class of men who at the moment haven't the courage to say no, and afterwards, when the time comes for fulfilling their promises, then under the strain of necessity show their true character, and are fearful.¹ Then with brazen assurance they talk in this style. 'Who are you? What are you to me? Why should I give up my bride to you? Look here, charity begins at home.' Suppose you ask 'What becomes of your promise?' They're shameless when shame is wanted; when it's not wanted, then they have scruples. (S.)

Plutarch, *Brutus* [vi. 5], turns it in this way: 'That inability to withstand shameless importunity, which some call timidity, he regarded as most disgraceful in a great man, and he was wont to say that those

¹ [This clause does not belong in the text of Terence. It is scarcely necessary to add that in both Plautus and Terence, Pufendorf's punctuation and readings differ a good deal from the authentic text.—Tr.]

who were unable to refuse anything, in his opinion, must have been corrupted in their youth.' (P.)

11. The other arguments which Connan advances give less difficulty. He says that it is entirely right to leave something to a man's honesty and liberality, and not to claim and demand everything with the strictness of an obligation. That our zeal for honourable behaviour and constancy is increased when an opportunity is left for those virtues to shine forth, which would scarcely be possible, were all men under compulsion to do everything they had promised. That to fulfil what you had once promised or shown by some other sign that you would do, is a noble and laudable thing, but all the more worthy of approbation, the less it is made compulsory.

But surely there is enough opportunity for liberality in offering a man the right to demand of you what you could perfectly well deny him. And since so many promises pass between men from their standing in need of each other's assistance, it is more to the interest of human affairs that men keep their word with less attendant praise than that a great number of men be deceived by the inconstancy of their fellows. Thus the law of nature commands a man to do a favour to another in so far as he can do it without great loss to himself. But the obligation is made more binding if a man gives his own free consent to what nature had commanded only indefinitely, and bids another person expect it from him without fail. Hence the conclusion cannot be drawn, that even though I had made no promise, it was the part of a good and just man to come to the aid of others, and therefore it is praiseworthy to stand by my word, only because another is in need, not because I have made a promise.

But the same writer concedes that if a man has suffered any damage from the non-fulfilment of a promise (suppose a man has trusted another's word, and has in some way or other neglected to look to his own necessities), the promissor is bound by natural law to make good the matter; and from this it is right to conclude that a promise can be exacted, and a person must perform it, lest another suffer loss thereby. But it is a dangerous thing to admit the following conclusion: When you are no worse off from my non-fulfilment of my promise than you would have been had I made no promise at all, therefore I shall have the right to recall it, if it has so far had no effect; and that it will be more contrary to nature to require such promises against the will of the promissors, when you are seeking therefrom some gain to yourself, than for them to recall their promises when you receive no hurt therefrom. For your duty of humanity is not met merely by your avoiding any injury to another, but, so far as in you lies, you should even advance his interests. Therefore, if you have bound yourself in a special way to such an act, to repent of it for the sole reason that the other person will

receive no harm therefrom, would make it seem that the bettering of our neighbour's condition is beneath our notice. On the same principle, no one would admit that a person could rightfully withdraw from such pacts as include *συνάλλαγμα* [exchange of services], when such a withdrawal would mean, not that the other party's condition would be worse, but only no better.

And Grotius also shows very well that, as a result of accepting Connan's view in this crude form, it would follow that pacts between kings and different nations would have no force so long as nothing had yet been done on their terms, especially in places where no special form has been found for treaties and covenants. Nothing could contribute more to arousing mistrust among men, since under such circumstances everything would have to be done with eyes on the tips of your fingers.¹ But the condition of men who have business relations with one another scarcely ever permits such intimate transactions.

Finally, the reason why the Romans allowed an action only on those promises which were made by stipulation or agreement was not because the law of nature did not hold serious promises binding, but with the object that, by the use of set formulae, men would be made carefully to consider whether it was to their advantage to promise what could not later be recalled. And also that what was promised might be expressed more clearly, for fear some obscurity in their terms might open the way to disagreements. Add *Digest*, XIX. v. 15.

¹ [That is, nobody could be trusted out of your sight.—Tr.]

CHAPTER VI

ON THE CONSENT REQUIRED IN PROMISES AND PACTS

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| 1. Consent is required in promises and pacts. | 9. Whether a suspicion of deception makes pacts invalid. |
| 2. Consent is given expressly or tacitly. | 10-13. Fear makes promises and pacts invalid. |
| 3. Consent presupposes the use of reason. | 14. How invalid promises may become valid. |
| 4. This is hampered by great drunkenness. | 15. On the consent of the acceptor of a promise. |
| 5. On minors. | 16. On the signs and tokens of consent. |
| 6. On error in promises. | |
| 7. On error in pacts and contracts. | |
| 8. On fraud. | |

SINCE promises and pacts regularly limit our liberty and lay upon us some burden in that we must now of necessity do something, the performance or omission of which lay before entirely within our own decision, no more pertinent reason can be advanced, whereby a man can be prevented from complaining hereafter of having to carry such a burden than that he agreed to it¹ of his own accord, and sought on his own judgement what he had full power to refuse.

2. Now although consent is usually expressed by signs, such as speaking, writing, and nodding, it sometimes happens that it is inferred, without such signs, from the nature of the business and other circumstances. Just as sometimes the absence of signs, or silence, when viewed in certain circumstances, is equivalent to a sign of consent. Euripides, *Iphigenia in Aulis* [1142]: 'Thy very silence is thy confession.' (W.) But it is necessary, in such a case, for the present condition of affairs to be such, that they agree from every point of view in presuming consent, and that there be no probable conjecture that would lead to a different conclusion. For otherwise it would surely work a hardship to lay an obligation upon a man merely from any kind of token. 273

From this one can understand what goes to form the real nature of a *tacit pact*: when, namely, consent is not shown by the signs which men regularly make use of in their transactions, but when it is clearly to be gathered from the nature of the business and other circumstances. But it often happens that when² the principal pact has been made with express consent, a tacit pact is understood from the nature of the business to be added to it, and to flow from it. Just as it has long been recognized that some tacit exceptions and conditions are to be understood in pacts. And yet these should not be allowed more freely than the general character of human transactions will bear, lest they render pacts too slippery and uncertain.

¹ [For *illnd* read *illud*.—Tr.]

² [For *quanbo* read *quando*.—Tr.]

The following can be taken as examples of a tacit pact: A stranger who, in the guise of a friend, enters a state whose policy has been the friendly reception of foreigners, even without giving any expression of his fealty, is understood to have expressed tacitly, by his act of entering the country, his willingness to conduct himself by the laws of that state, in accordance with his station, so soon as he has found out that such a general law was promulgated for all who desire to sojourn within the limits of that state. And, on the same ground, he has tacitly stipulated from the state for a temporary defence of his person and the securing of justice.

When in a man's absence some business of his is done without his express orders a tacit pact is understood, whereby the man is bound to compensate any person for the labour and expense to which he was put in managing the business to good advantage. For it is presumed that, if the absentee had known about the matter, he would have expressly agreed to its dispatch.

Likewise, when a man sits down at a table in an inn, it is understood that by this act he has agreed to pay the price asked for his food, although he may not have exchanged a word about it with the keeper, for it is well known that no one gets food in such a place gratis. In the same way the obligation that exists between a guardian and his ward, finds its source in a tacit agreement. Add Grotius, Bk. III, chap. xxiv.

The following are instances of accessory pacts: If a man shall bargain with another about safe entrance to a certain place, it is understood that an agreement has been made for his return also, although there may have been no express mention of it, since otherwise the first pact would be of no avail. Likewise, if a ruler has made a pact whereby foreigners may use a market of his state, it is supposed that he has also agreed that they may take from his territory the goods which they purchase there. Just as it would be absurd, for example, to sell a man a field and not be willing to allow him to possess it where it lies, but to demand that he take it off to another place. Again, it is understood that when a man lets out a room in his dwelling, he has allowed the renter the use of such parts of the house that he cannot do without, such as the doors, and passage-ways which lead to the room, so far, at least, that he may have entrance and exit.

Instances of tacit conditions and exceptions are to be met on every hand. But in general it is to be observed that they should all be strictly¹ interpreted, and that they should have no greater force than that given by a clear understanding of the agreement. Add *Digest*, XXII. iii. 24. For otherwise an onerous obligation might be laid upon a man against his will; and when too great indulgence is allowed tacit exceptions and conditions, most pacts can be rendered null or evaded. The Roman

¹ [For *strictum* read *strictam*.—Tr.]

Jurisconsults give the following example of a tacit pact in *Digest*, II. xiv. 2: 'If I return to my debtor a written undertaking which he gave me, it is held that there is a "tacit" convention between us that I shall not sue him.' (M.*) But here, because of the simplicity of natural law, it does not seem necessary to adduce a tacit pact in this case, since 274 a plainer statement would be that the return of the security is understood to remit the debt, and so to do away with any cause for action. But the Roman law preferred to invent this devious way of proceeding, and to invent a pact not to call for a loan, merely in order that an obligation for a thing really contracted should not appear to be removed by mere consent. So also in *Digest*, XIX. ii. 51, it seems unnecessary to stipulate that 'it was silently agreed that the owner need not make good the difference to the renter, if the farm was rented later at a higher sum'. For without the understanding of a tacit pact the simplest way to state the case is that the given law for such a contract can by no means be so extended as to benefit the renter, since he is unworthy of such a favour, who has not cultivated the field according to the agreement. Add also *Code*, II. iii. 2; *Digest*, XVII. i. 6, § 2; *Ibid.*, 18; *Ibid.*, 53; *Digest*, XIX. ii. 13, towards the end; *Ibid.*, 14.

3. But that a man may be able to give his full and clear consent, the first thing required is enough use of his reason to let him understand whether the business at hand suits him, and falls within his ability to fulfil; and then, after weighing all this, to be able to show his consent by sufficient signs. It follows from this that the promise of a child as well as of an idiot and lunatic is invalid. Although it should be observed about an idiot that his actions have no moral force merely during the time of his derangement. But when his madness leaves him intervals of sanity there is nothing to prevent his being able validly to obligate himself, but only for so long a time as the disease allows him the use of his reason, for when the insanity recurs, it suspends all obligation to transact any business on his own part until such actions can again be considered truly his own. And so the common saying of the lawyers: 'The coming on of madness does not nullify any business that has already been properly transacted,' must be understood of matters that are concluded at once. Such is the nature of a will, which, when once properly drawn up, stands until it has been abrogated by a clear declaration of a contrary will, such as cannot be done by a demented person.

But when an obligation must be fulfilled by different acts requiring the use of reason, it is clearly suspended by an intervening fit of insanity. If a man has undertaken some work for me at a definite time, and meanwhile goes insane, his obligation will cease, since he can no longer fulfil it. Yet in the hope that a person will recover his sanity an obligation, as well as power and right, are often understood to continue

to reside in him, in so far as the initiation of an act is concerned,¹ the exercise of which is for a time vested in others. But if a man is incurably insane, civil law properly considers him dead. See *Digest*, I. vi. 8; *Ibid.*, I. xviii. 14; *Ibid.*, III. iii. 2; *Ibid.*, IX. ii. 5, § 2.

4. Furthermore, since drunkenness seriously affects the use of the reason, or at times completely subverts it, the question arises whether a drunken man is able to obligate himself by a promise or agreement. This can apparently be answered in the negative if the drunkenness is so deep that the wine has completely destroyed the power of reason. For it surely cannot be regarded as a real and deliberate consent, even if a man agrees to something on a passing and ill-advised impulse, or makes signs that would otherwise show consent, all at a time when his mind has been deranged by a kind of stupefying drug. It would be bold indeed to want to exact such a promise, especially if its fulfilment carries with it a considerable burden. And if a man has taken advantage of a drunken person, and on noting his condition has cunningly extracted a promise from him, he will not escape punishment for deceit and fraud. But if, after his drunkenness is over, a man has recalled what he said and confirmed it, he shall be obligated, not for what he did when drunk, but when in his right mind.

275 Yet a fairly generous indulgence, which does not destroy the reason so much as it contributes to a jovial occasion, does not destroy the power of incurring an obligation, especially if it be renewed when both parties are sober. This is illustrated by the well-known passage of Tacitus, *Germany* [xxii]:

In their feasts they generally deliberate on the reconciliation of enemies, on family alliances, on the appointment of chiefs, and finally on peace and war; conceiving that at no time the soul is more opened to sincerity or warmed to heroism. These people, naturally devoid of artifice or disguise, disclose the most secret emotions of their hearts in the freedom of festivity. The minds of all being thus displayed without reserve, the subjects of their deliberation are again canvassed the next day; and each time has its advantage. They consult when unable to dissemble; they determine when not liable to mistake. (O.)

A similar story is told of the Persians, by Herodotus, Bk. I [cxxxiii]; Athenaeus, Bk. IV, chap. x; Curtius, Bk. VII, chap. iv [1]. Add Plutarch, *Symposiacs*, Bk. VII, chaps. ix-x.

But it is clear that crimes are by no means to be overlooked, merely because they were due to drunkenness. Aristotle, *Nicomachean Ethics*, Bk. III, chap. vii:

Legislators punish a person for mere ignorance, if it seems that he is responsible for it. Thus the punishments inflicted on drunken people who commit a crime are double, as the origin of the crime lies in the person himself, for it was in his power not to get drunk, and the drunkenness was the cause of his ignorance. (W.)

¹ [The precise meaning of the phrase *quod actum primum* is not quite clear to us, nor do Barbeyrac and Kennet seem to give much help.—Tr.]

It was a law of Solon: 'If an archon be found drunk, he shall be punished with death.' And by a law of Pittacus the punishment was twofold for a crime committed in a state of drunkenness. Diogenes Laertius, Bk. I [57]. Although a drunken man may not know what he is doing, yet surely, when of his own accord he took what he knew would cloud his senses, it is assumed that he consented to all the consequences.

But it does not follow from this that drunken men are obligated by their promises, since there is a great difference between committing crimes and contracting obligations. For since the commission of a crime is strictly forbidden, a man should shun all occasions which seem likely to lead him to commit them; and a man can scarcely avoid knowing what drunkenness may mean for him. Furthermore, since drunkenness is called a sin, primarily for the reason that it leads men to other sins, that which is in itself a sin cannot be excluded from the number of sins merely because it is due to a sin. And yet, since it lies within our own power whether or not we are willing to incur new obligations, we are not bound to avoid occasions which might interfere with our clear consent. So, of course, we are not supposed to avoid sleep, merely because a man might in jest take our nodding as an agreement to something he wants of us. A grim jest of this nature on the part of Caligula is given by Suetonius, *Caligula*, chap. xxxviii:

A well-known¹ incident (he is writing of an auction held by the emperor) is that of Aponius Saturninus; he fell asleep on one of the benches, and as the auctioneer was warned by Gaius not to overlook the praetorian gentleman who kept nodding to him, the bidding was not stopped until thirteen gladiators were knocked down to the unconscious sleeper at nine million sesterces. (R.)

From this it may be concluded that, if drunkenness were responsible for no other misfortune than that it allows to be elicited from imprudent or ignorant person signs, which otherwise show consent, this alone would not be reason enough to make it unlawful. And since, in order to contract an obligation from a promise or pact, there is required the consent of the contracting party who understands at the time the business at hand, a man's consent cannot be presumed from the fact that he had consented to a thing which was going to prevent the use of his reason. Especially since most men indulge in wine, not in order to lose the use of their reason, but only for the pleasure to be secured; and the former effect steals upon them for the most part unintentionally, while with no thought for the consequences they are seeking this latter diversion. A further consideration is that, since a crime causes a person some damage, while a promise confers a benefit which was before unowed, and since it is more odious to suffer an injury than to fail to secure some benefit, drunkenness can more easily render null a promise than excuse a crime.

¹ [For *Notares* read *Nota res*.—Tr.]

Finally, that a man is bound to pay for, say, some wine which in his drunkenness he pours down into an already sated stomach, and which he would not have consumed had he been himself, appears from the contract made at the beginning of his drinking bout, by which he agreed to pay for as much wine as his throat could swallow, even though it would have to be ejected later by the same passage. If in his intoxication he pours out some of it, breaks the glasses, or to cap the evening smashes the windows, he is held responsible on the general law of compensating for the damage which his mischief has caused another.

5. Now how long children continue in a weakness of reason which prevents their contracting an obligation cannot be definitely stated in general terms, since with some the judgement matures more rapidly, with others more slowly. In determining this question regard should be had to the daily actions of each individual, or to what positive laws have been passed in states, which have usually set a certain time for coming of age, according as they have observed that their inhabitants develop more rapidly or more slowly. Thus among the Hebrews a promise was valid if made by a youth after his thirteenth year, by a maiden after her twelfth year. But since a tender age, even when able to understand the conduct of business, is carried away by quick and usually ill-considered impulses and makes promises lightly, is credulous, eager to have a reputation for liberality, inclined to cultivate influential friendships, and ignorant of whom to trust, many states have safeguarded it by the law, that, in contracting obligations, younger persons must follow the authority of others who are more prudent, until it is felt that their hasty impulses have abated. And so in some countries whatever is done by such persons on their own initiative is held null; in other countries they are accorded full restitution, in case they have suffered from sharp practices. See *Digest*, IV. iv. 11, §§ 3 ff.; *Ibid.*, 24, § 1; *Ibid.*, 44.

Natural law in no uncertain terms called for a decision on such matters by positive law, especially since a man can scarcely be cleared of deceit who takes advantage of that easy age and wishes to enrich himself by involving others in expenses which their weakness of judgement prevented them knowing how to foresee or estimate. The Attic law in this respect put women on a par with minors, not allowing them to make a contract for anything above a peck of barley, 'because of that weakness of their judgement,' as it is put by Dio Chrysostom, *Orations*, xxv (*De Incredulitate*) [lxxiv. 638 M]; Isaeus, *Orations*, ix.

But the same natural law goes on to enjoin that, when states have statutes of this kind, they are to be observed in the transactions of citizens not only with one another but also with foreigners. This is not so much because, whenever a man makes a contract, he is under the laws of that state for a time as a temporary subject, as because a state

usually refuses any action on matters which do not conform with its laws; unless the state has expressly made known that, in executing the law for strangers, it will follow mere natural law. And the same rule must be observed, if a written contract has been entered into between citizens of different states, whereby an action is to be brought in the court of the one who is in default. For although the contracting party 277 may never have put himself, even for a time, under the government of the other, yet if he wants to avail himself of the help of the other's court, the transaction will have to be decided in accordance with the laws of the latter's state. So also if two men, who are subjects of the same state, draw up a pact in a place which recognizes no sovereignty, such as on the ocean or a desert's isle, they will put themselves in agreement with the laws of their country, if they wish to secure a perfect right from them, or to an action in a court of their state. We shall note in another place what rule is to be applied to the acts of those who are superior to civil laws.

6. Consent, again, which is necessary in order to validate promises and pacts, is entirely nullified by *error*, because of which it happens that the mind wanders from the true object of a promise or pact, and as a consequence the will does not in fact agree to it. But a careful distinction must be made, as to whether error is concerned with a promise or with a pact. Regarding promises the definite statement can be made that, if a promise was based on the presumption of some fact, which was not as stated, or if I made my promise on the supposition of some fact or quality and would not have bound myself had I not supposed it to be there, the promise will naturally have no force; provided the very nature of the business and the circumstances clearly show that I based and conditioned my consent entirely upon that fact or quality. The ground for this is, that the promissor did not give his absolute consent to the promise, but made as a condition the presumption of this fact or quality. But since, now, the condition is not present, whatever had been based upon it falls to the ground and vanishes. *Digest*, II. 1. 15.

For instance, should I have been informed by a messenger that you had conducted my business well, and I had promised you something on that account, I shall not be bound by my promise, when I have found that the report was false. The same rule may be used to settle the question put by Cicero, *On the Orator*, Bk. I [xxxviii]:

A false report of a soldier's death having been brought home from the army, and the father, through giving credit to that report, having altered his will, and appointed another person, and having then died himself, the affair, when the soldier returned home, and instituted suit for his paternal inheritance, came on to be heard before the centumviri. (W.*)

Add Valerius Maximus, Bk. VII, chap. vii, § 1. The argument advanced for the soldier was based on the civil law, which stated that

those wills of a parent are void in which a son has been neither designated as heir nor disinherited by name, something that was not done in this case. But the designated heir might have replied that the law in question supposed that the father knew his son to be still alive, which in the case before them the father did not know. But it is possible to make a simpler reply on the basis of natural law, to wit: The father's will was based upon the belief that his son was dead, and since this is clearly false, the purpose of the father is null, because his son's death is plainly the sole reason for his changing his will, and otherwise he would not have changed it.

It is clear from these facts what reply should be given the over-nice question proposed by Thomas Browne, *Religio Medici*, § 20, whether the man, whom Lazarus had designated as his heir, could keep the latter's estate, or whether Lazarus, upon being brought to life, could rightfully lay claim to his property. The latter position is unquestionably to be maintained. For the property of dead men passes to others because they are taken out of human affairs, and for that reason have no longer any need of their estate. This is the reason why in some countries a portion of the dead man's estate is set apart to be given to the priests or the poor; or in other countries some things are buried or burned with him for his use in the other world.

But if the promissor was careless in examining the matter on which
278 he based his consent, he is bound to make good any damage which the other person suffered because of his ill-judged engagement.

If a promise is not based upon the presence or absence of some quality as a condition, then, no matter how the quality was when the promissor agreed to it, the promise will still be valid. But if a promise was only partly built upon error it will hold good for the rest, unless one of the parts of a promise is related to the other as a condition, or unless the matter can be accomplished only if all the parts are fulfilled. For in such a case an error in part will destroy the whole.

7. Touching error arising in pacts, the distinction must be drawn as to whether a man was induced by error to enter a pact, or whether the error is concerned with the matter about which the pact was made. In the former case I feel that the next thing to observe is, whether or not there have been proceedings under that pact. If I have been led through error to enter a pact or agreement, and I discover the error while the matter is still hanging and nothing has yet been done, it will certainly be fair to allow me to repent of my agreement, especially if I plainly declared, on entering the agreement, what reasons led me to do so. But if the error appears after steps have been taken towards fulfilment, when the pact is already fulfilled entirely or in part, the man who made the mistake will not be able to urge the rescinding of the contract. Unless, indeed, the other party may be willing to show

some feeling for him, as in such a case as that of a man¹ away from his estate who receives a false report that his horses have all died. For this reason he contracts to purchase others, but before the sale is completed he discovers that the message was untrue. It is my opinion that he cannot be made to carry out his side of the contract, since the dealer knows that he took the false message as a condition of his purchase. Yet equity obliges him to make some amends, or at least to make good any damage the dealer may have suffered. But if the money has been paid and the horses handed over, it will not be possible to compel the dealer to return the money and take back his horses, even though the man has no further use for them, unless this was expressly stated in the contract.

But when error concerns the thing about which the agreement is being made the pact is rendered void, not because of the error, but because the laws of the pact are not satisfied. For pacts require that the thing itself, about which the agreement is being made, and its qualities, should be understood, and unless there is this understanding no clear consent can be recognized. And so when a defect has been detected, the man who would have been wronged may either withdraw from the contract, or force the other party to make good the defect, and even to meet his loss, in case any fraud or guilt has slipped in. And this is possible, not merely if the defect is discovered at once, but even after an interval of time has elapsed. In case the civil laws do not fix this interval, its duration must be set by some honest arbiter, so that too much indulgence in examining the matter may not be granted either to the deceit of the one or to the negligence of the other. And a greater interval is to be allowed if the defect does not lie on the face of the thing, but can be detected only after close and expert examination.

The common saying that a pact is made void by an error in essentials, but not by one in accidentals (*Digest*, XLIV. vii. 57), is to be interpreted as meaning that by the essentials of a pact are understood not only such things as enter into the physical essence of the matter over which the pact is made, but also those qualities which the maker of the pact had especially before his eyes. For it often happens that in a pact the quality of the thing is considered of first importance, while its physical substance is regarded only as a necessary accessory. See *Digest*, XVIII. i. 34 pr. Cicero, *For Roscius the Comic Actor* [x], has this to say on the slave Panurgus:

For how much of him belonged to Fannius? His body. How much to Roscius? His education. His person was of no value; his skill was valuable. As far as he belongs to Fannius he was not worth fifty thousand sesterces; as far as he belonged to Roscius he was worth more than a hundred thousand. For no one looked at him because of his person; but people estimated him as a comic actor. For those limbs could not earn by themselves more than twelve sesterces; owing to the education which was given him by Roscius, he let himself out for not less than a hundred thousand. (Y.)

¹ [For *patrifamilias* read *patrifamilias*.—Tr.]

And so my contract will be void, not only when I have bartered with another for Davus, and he has sent me Syrus, but also when I have said that I wanted a slave that was a skilled cook, and one has been sent me who knows nothing of that art. Add *Digest*, XVIII. i. 9, 10, 11, 14, 41, § 1.

8. All the more is a promise or pact nullified, if the error which led a man to make it was produced in him by the other party's malicious fraud and deceit. It is our feeling that the disputes concerning the effect of fraud can be easily cleared up, if a distinction is made at the outset about the author of the fraud, whether it be the one with whom we are dealing, or a third party. And then, whether the fraud was the cause of the promise or pact, and we would not have entered the contract but for it, or whether it was only incidental to the business, which we would have undertaken anyway, and we were deceived only in the object and its qualities as well as in the value of the latter.

When the fraud was perpetrated by a third party, without the connivance of the man with whom we are directly doing business, and no shortcoming is to be observed in the transaction itself, the agreement will stand; yet from the man who played the trick we will be able to recover what loss we suffered by being deceived. But if a man practised fraud in order to lead me into some agreement with him, my act puts me under no obligation to him. See Diodorus Siculus, Bk. II, chap. xxviii.

If the fraud were such as touches a quality of the thing, or the thing itself with which the negotiations are concerned, the pact will be vitiated to such an extent that it will rest entirely with the deceived party, whether to break it off entirely, or to demand compensation for his injury. Matters not concerning the real nature of the business and not expressly mentioned do not nullify an act, even though one of the parties may have had them in mind while the pact was being drawn up. What the law says, if excessive deception has been used about the price of a thing, will be explained below.

9. We must next observe how far fear prevents the acts of men from giving rise to an obligation. There are two kinds of fear which must be carefully differentiated. The one arises from a vice of some characteristic in the person to whom a man is going to obligate himself, or possibly from some malign intent of his, already made sufficiently clear, which makes it more than likely that he will practise some deception. The other denotes the wild terror of the mind, which arises from the threat of a great injury, if we are not willing to make a promise or pact.

Regarding the first kind of fear it seems certain, that if I see a man who has absolutely no scruples about deceiving every person he meets, and who 'finds his pleasure in a broken oath', or if I observe that in the

business at hand he is setting a trap for me, I shall be playing the fool if I put any trust in his given word, and lay myself open to his scorn and fraud. For he who rushes into snares with his eyes wide open has sacrificed even pity. Who would give his word to men of such a type as is described by Plautus, *Curculio* [705 f.]:

CH. I, promised? How? ¹

PH. With your tongue.

CH. With that same tongue I now gainsay it. That was given me by nature for the purpose of speaking, not of losing my property. (R.)

And in his *Rudens* [1371-4]:

GRIP. 'What mode of proceeding is this? Don't you owe it me? Didn't you promise it me upon your oath?

LENO. I did take oath, and now I'll take an oath, if it is in any way my own pleasure. Oaths were invented for preserving property, not for losing it. [1355] It's according to my own intention what my tongue speaks. (R.)

Or to such men as Polybius, Bk. VI [lvi], describes his fellow Greeks? 'Greek statesmen, if entrusted with a single talent, though 280 protected by ten checking-clerks, as many seals, and twice as many witnesses, yet cannot be induced to keep faith.' (S.)

But whether such a fear or suspicion of deceit renders invalid a pact already made, and frees the person who entertains it from the necessity of fulfilling his part, will appear when we have examined the position of Hobbes, *De Cive*, chap. ii, § 11. In this passage he says: 'But the covenants which are made in contract of mutual trust, neither party performing out of hand, if there arise a just suspicion in either of them, are in a state of nature invalid.' This statement cannot be accepted unless, after the pact has been concluded, one of the parties has a just fear that, when he has fulfilled the pact, the other will not do the same. And we mean by a just fear one which is based on clear proofs and arguments; for it is nothing other than a great injury to doubt a man's word without cause, when we have found it trustworthy before. And so even Hobbes himself adds in his notes:

For, except there appear some new cause of fear, either from somewhat done, or some other token of the will not to perform from the other part, it cannot be judged to be a just fear; for the cause which was not sufficient to keep him from making compact must not suffice to authorize the breach of it being made.

In other words, although a man may have a suspicion before entering a pact that the other would deceive him in its fulfilment, yet his entering the pact with such a person shows that he turns his back upon this fear, and announces that it is not enough to prevent his being able to trust the other. For were this not so nothing would have passed between them.

But at first it seems to have been Hobbes' opinion that even

¹ [Following the original which Pufendorf condenses slightly.—Tr.]

without such a fear a pact once entered into may be void. This appears in the first place in his work, *On the Body Politic*, written in French,¹ where there is no trace of his restriction of fear to that arising after the pact has been made, and then from the following reasons of his [*De Corpore Politico*, I. ii. 10]:

Because he that performeth first, considering the disposition of men to take advantage of every thing for their benefit, doth but betray himself to the covetousness, or other passion of him with whom he contracteth. [. . .] There is no reason why the one should perform first, if the other be likely not to perform afterwards.

It appears from this that he finds the reason for suspicion in the depravity of all men. On this reasoning the great majority of mankind will be declared unfit for one to enter pacts with; further, all trust will be done away between such as are not subject to the same jurisdiction. For since there can be no absolute certainty of any man's constancy, because most men are markedly prone to wickedness, while in a natural state any man may dispose his affairs² as he sees fit, and since the subject of the fear is the only judge of its force, even an empty suspicion will be enough to break a pact, and so they will be of no advantage outside the boundaries of a state.

It is also too harsh to lay a charge of such wickedness against all men that we find in them, upon the removal of civil law, practically no effective reverence for God, respect for their plighted word, or power of sound reason. For, as a matter of fact, an indelible sense of one's integrity, clearly inherent in the minds of all men, is adducible from the fact that there can scarcely be found a man who would openly acknowledge that he does not stand by his word, and that no one wishes to have it felt that he broke his agreements for other than grave reasons. Nay, when one nation breaks faith with another, it at once throws itself upon the faith of still another nation, and tries to join this other to itself by a treaty and promise of faith, striving to repel by the aid of faith the evil which threatened it because it had broken faith. And so it is fair to presume that a man will do what is just until his evil deeds prove the contrary. Here one can apply the remark of Lucian, *The Lover of Lies* [xv]: 'You act ridiculously to doubt everything.' (H.)

From all this the following conclusion may be drawn: The fear that men will break faith, based only on the general depravity of man's nature, is not enough to justify refusal to fulfil a pact. And so it was 281^a a silly excuse that the people of Mytilene offered for their having broken their treaty with the Athenians, as given in Thucydides, Bk. III [xii]:

They courted us in time of war only because they were afraid of us, while we acted in

¹ [Originally, of course, in English (1650). Pufendorf was probably thinking of the French translation of 1652 and 1653.—Tr.]

² [For *de ne negotiis* read *de negotiis*.—Tr.]

³ [For 481 read 281.—Tr.]

the same manner towards them in time of peace; and good faith, which in most cases is made steadfast by good will, was in our case made secure by fear, and it was fear rather than friendship that held us both to the alliance; and whichever of us should soonest gain boldness through a feeling of security was bound to be the first to commit some act of transgression also. (S.)

Even if some vices are discovered in a person that alone should not be a reason, without further ado, for not keeping faith with him. For many vices have no relation to the matter of faith. Thus, although a man may go to great excesses in unchastity, drunkenness, and cruelty, this does not of itself alter his ability to observe all diligence in keeping faith. Suppose, indeed, a man is addicted to such vices as tend to destroy the stability of faith, for instance, there is seen in him a desultory lightness of mind; or a burning desire for riches, a mighty force in the breasts of men; or a lust for power, which is for most men more violent than any other passion; such vices nevertheless form no sufficient reason for any one else refusing to keep his given word with such a person. For it may often happen that a man from some special inclination may injure some other person, and yet live on friendly terms with me. Furthermore, by the very act of making an agreement with a man whose mind I know, I declare that his vices are not enough to prevent me from placing faith in him; and therefore I renounce any exception to him which might have been taken from his character, regarding a refusal to fulfil a pact. For otherwise nothing would have been done, if one of the parties had desired at the outset to make some reservation whereby he could at will render the transaction void. Although it is surely imprudent for a person to make an agreement a second time with a man by whom he has once been deceived without exacting a special security. This is the reason for the proverb current among some peoples: 'Whoever has once deceived me, may the gods destroy him; if he deceive me again, may they destroy me.' Add Seneca, *On Benefits*, Bk. IV, chap. xxvii, towards the end. Nay, even when, after the signing of the pact, there appears reliable evidence that the man is taking steps to deceive me, it would be the height of folly for me knowingly to expose myself to his knavery. Cicero, *On Invention*, Bk. I [xxxix]: 'It is the utmost folly to hope for good faith among those whose dishonesty has so often deceived you. And so Menelaus says, in Homer, *Iliad*, Bk. III [105-6]: 'And call hither great Priam, that he may pledge the oath himself, seeing his sons are overweening and faithless.' (L.) Add Polybius, Bk. VIII, chaps. i-ii; Bk. X, chap. xxxiv. A passage to the point is in Cicero, *Against Verres*, Bk. I [II. xv]: 'He is the common enemy of all men who has once been the enemy of his own connexions. No wise man ever thought that a traitor was to be trusted.' (Y.) *Idem*, *For Rabirius Postumus* [xiii]: 'When any one has once perjured himself he cannot be believed afterwards, not even if he

swears by more gods than he did before.' (Y.) Add Seneca, *On Benefits*, Bk. IV, chap. xxvii, towards the end.

But in this much we do agree: If a man openly confesses that he places no value upon the sacredness of an oath, or if he professes beliefs which necessarily mean the same thing, no confidence should be put in his promises or pacts, except in so far as we can bring force to bear upon him in case he tries to get out of them, or else his own obvious advantage leads him to abide by his agreements. To this class belong atheists, who deny either the existence of God or his divine providence, and to whom those persons who deny the immortality of the soul are closely related. For the only justice these last know is that which is based on advantage, measured by their own judgement. With them you may also class those whose manner of life is an open profession of their villainy, such as pirates, thieves, murderers, pimps, courtesans, and others of their kind who take a pleasure in perjury. Tacitus, *Annals*, Bk. XI [xix]: 'The plot [. . .] was not dishonourable against a deserter, and one who had broken his allegiance.' (R.)

282 But it must be admitted that, although the argument of Hobbes presented above does not destroy all the force of pacts in a natural state, it can still suggest the following rules of prudence: A person should not place great confidence in a covenant unless he sees that the advantage of the other party, no less than his own, depends on its fulfilment, and that, unless the other stands by his agreement, a certain ill and misfortune will befall him, more grievous than any that attends the fulfilment. Likewise, that in making a contract with a superior, he so draw up the terms that not he but the superior be the first to meet them. For if the inferior does his part first, it may happen that he will be deceived, or that he will find himself dependent on the mere good will of the other. And so Socrates the Achaean replied to the demands of Artaxerxes, in Diodorus Siculus, Bk. XIV, chap. xxiv [XIV. xxv]: 'The king deals with us without sense or reason; for that which would have to be taken from us, he demands forthwith to be delivered to him, and that which we are to expect in return, we must seek for as suppliants.' (B.*) Consequently, as Quintilian, *Declamations* cccxii, says: 'More faith can be put in the word of an equal.'

Likewise, prudence will recognize that a man jeopardizes his own safety if in fulfilling a pact he weakens himself and strengthens the other party in the hope that he will later be aided, according to the terms of the promise, by the latter's strength. For it would be folly to exchange an actual possession for words, writings, and seals, where there is nothing more than the religious regard for one's word to oppose to the avarice and greed of a superior. Andr. Maurocenus, *Historia Veneta*, Bk. V [p.193]:

I should not dare to place the final security of my property in a league, since such is the nature of confederacies that they can be disturbed and embarrassed by any number of

different circumstances. The different ends of the allies too frequently draw their minds and resources in different directions, and the common good is neglected, while each member looks to his own interests. They do not furnish their allotted assistance, nor at the time agreed upon; hence there arise suspicions, enmities, and finally, as a result of these, withdrawals. By withdrawals, finally, the laws of leagues are overturned and cast aside, and in the end those states which can make less resistance than the others have become a prey not only to their foes but even to their allies.

10. Our next task is to examine that fear which follows a direct threat of serious harm, for it seems to require a little more discussion. Now we lay down the general statement, that our will naturally inclines to what appears good to it. And it seems to the will no less good and desirable to avoid a threatened evil than to secure an absent good, and those means are chosen which lead to either end, however undesirable they may otherwise seem in themselves. For means irksome and distasteful in themselves are used no less to secure some good than avoid an evil, although the hope of attaining a good may be more potent than the solicitude to avoid an evil, in lessening the annoyance occasioned by that means. And for this reason Aristotle, *Nicomachean Ethics*, Bk. III, chap. i, calls those actions mixed, which are undertaken to avoid an evil, an example of which is the old one of throwing goods overboard when shipwreck is threatened. Although no less hardships have been undergone, for instance, by athletes who were in training to win a crown in contests. See Epictetus, *Enchiridion*, chap. xxxv.

Now although actions undertaken from fear of a greater evil should be classed as voluntary, and the less evil which we choose under such circumstances may really, in our present condition, be the thing we wish, such actions still cannot be the source of any obligation on our part towards another. For since an obligation looks to some person for whom something must be done, and so it implies in him a corresponding right, by reason of which he may compel the fulfilment of the obligation, the creation of such an obligation requires that, in the one, there be such principles as would produce an obligation, and in the other such as warrant his securing a right. Indeed, an obligation is inconceivable without its corresponding right; and I owe nothing, if no one has a right to demand something of me. Therefore, that fear which causes a defect in the other party prevents the rise of an obligation, since the defect makes him incapable of acquiring a right. Such a defect is an injury and an injury can by no means be the cause for the production of something to which it is unalterably opposed. For since the law of nature commands the doing of something to which another person has a right, it seems absurd that an injury, that is, a deed 283 contrary to natural law, can produce something to the firmness of which natural law itself contributes, and so it would work to its own destruction. Surely a law forbidding theft cannot include theft among the proper ways of securing property.

11. But the first point of all to be considered is: Who caused the fear? The man with whom we are transacting our business, or some one else? The next point is, whether or not he had power to use intimidation. For there can be no question about my being obligated, when I bound myself in order to be freed from a fear inspired by a third person without the instigation or collusion of the man to whom the promise was made. For there is no defect in the latter which prevents his acquiring a right against me, and he can properly claim some return for what he did for me, because I used his aid in avoiding a present danger. Thus, if I should agree with a man that he give me his aid against robbers while on a journey, the agreement would surely have to be kept. Nay, a man is guilty of ingratitude as well as perfidy if he entices others to his aid with large promises, when he is in a tight place, and then devises every kind of delay once the danger has been averted by their aid.

But a promise made to a third party is valid if a man was led to make it by the authority and threat of punishment vested in him who had power to command such a promise. For no defect attaches to the person receiving the promise, while the man who preferred to be driven by fear to do what he should have undertaken of his own accord, has only himself to blame. Thus, if some ruler, in order to defend another's realm, wishes to lend his troops to a foreign prince, and for greater security compels them to take an oath to the latter, the soldiers will not be able to break their vow, in the excuse that they did so through fear, since it came from a person who had the right to demand such obedience by whatever means he desired. Likewise, if we assume that a father can give a husband to his daughter even against her will, in case she has given her promise to the hated suitor out of fear of her father's authority, she can by no means later break it. For no defect attaches to the suitor, whereby he cannot secure a right from the promise, while the daughter should have obeyed her father's orders of her own accord.

Up to this point the question concerns the person who occasioned the fear. But in other cases the Roman laws are justified in stating that it is of no concern who caused the fear, provided no one had a right to do so, and the fear was the cause and not the mere occasion of the promise or pact. See *Digest*, IV. ii. 14, § 3. Seneca, *Controversies*, Bk. IV, cont. xxvii [IX. iii. 9]:

The question is whether, if there be force and necessity in a matter, everything that is done under compulsion of force and necessity be invalid, if the force and necessity be applied by the contracting party. 'It makes no difference to me', says one party, 'whether you were compelled or not, so long as you are not compelled by me; for me to be punished, the fault must be mine.' 'Not so,' says the other, 'the law is not angry at the one who employs force, but assists the one upon whom force is employed; and it appears unfair in the eyes of the law for that to be legally binding which a man agreed to, not because he so

wished, but because he was so compelled. Now it makes no difference who it was that made the agreement necessary. That which renders unjust the contract which is being rescinded is not the person of the agent but the fortune of the recipient.'

Idem, Excerpta Controversiarum, Bk. IV, chap. viii: "The violence did not come from me", he claims, "but from some one else." Yet he who exercises the violence and he who employs for his own advantage the violence exercised by another are equally guilty.'

Now we adjudge those promises and pacts to be invalid which a man is compelled to make by unjust force on the part of the one to whom he makes the promise, or with whom he enters the pact. For since whoever extorts something from another by unjust fear is bound by natural law to restore it, and so must make good whatever loss the other party met through the pact, it is understood that the compensation destroys the obligation, if that is not yet paid which should have been restored at once. See *Digest*, XLIV. iv. 8. Just as it would be foolish, when a man had got into a safe place, to pay what was promised 284 under duress, and then to want to get back damages for his loss. Martial, Bk. XI, ep. lix [XI. lviii]:

Suppose my barber, steel in hand,
Should liberty and wealth demand;
I yield, of course, for he is then
No barber, but a highwayman.
But when his razor's in its case,
I'd have him flogged till black in the face.

Especially since the man shows quite clearly by his exacting or accepting a promise from me that he had no intention to pay me damages of his own accord.

Furthermore it is idle to seek a right for yourself on the ground that you did not do something for a person which the laws forbade you to do; and equally absurd to claim some return from a man because you did not do something which would have been a heinous sin. And so Cicero, *Philippics*, II [5], denies that he is indebted to Antony because the latter did not kill him at Brundisium: 'But what sort of kindness is it to have abstained from committing nefarious wickedness? [. . .] Is not this such a kindness as is done by banditti, who are contented with being able to boast that they have granted their lives to all those whose lives they have not taken.' (Y.)¹ Horace, *Epistles*, Bk. I, ep. xv [I. xvi. 46 ff.]: 'If a slave were to say to me "I never stole or ran away": "You have your reward." I should answer: "You are not flogged." "I never committed murder." "You shall not hang on a cross for the crows to eat." "I am a good and useful servant." One of us Sabellians shakes his head and says, "No, no!"' (W.) *Idem, Art of Poetry* [267-8]: 'After all I have saved myself from blame, I have not

¹ [In the original this sentence precedes the other.—Tr.]

earned praise.' (W.) *Digest*, II. xiv. 7, § 3. Seneca, *Controversies*, Bk. II, cont. xiii [V. xii]: 'To refrain from committing a crime is not a benefit.' Quintilian, *Declamations*, cccxxx: 'I do not count it as a benefaction when a man ceases to do an injury.'

Nor is a man any longer bound who goes surety for another in a case of this kind, even though he does not obligate himself because of his own fear. For since the going of surety is only a kind of additional guarantee of the principal business it would be absurd, at least by natural law, for more efficacy to lie in an accessory than in the principal business, or that the principal debtor should be more loosely obligated than he who promised that he would take up the former's obligation for his assistance. But a different statement must be made, if a third party personally contracts with a robber an obligation, which does not depend upon the obligation of his captive, or takes its place; for instance, when he in pity promises something to the robber, on condition that the latter in return let some prisoner go free. For he is not subjected to unjust fear, nor can he put forward the objections allowed the captive, since he obligated himself not for the captive, but on his own account, and did not base his obligation upon that of the captive, since the latter was under none. Furthermore, it was a noble act, worthy of some sacrifice, to have saved the life of an innocent person, and to have gained for himself so noble a reputation for humanity.

But if a captive has given hostages, or left some of his companions in the power of the robber until his promises are made good, he is obligated not because of his pact with the bandits, but because of his understanding with the hostages. This is the reason for the fact that, in Morocco and other parts of Africa, the Christian captives as a body give their word that no one of them will try to escape, and on this guarantee they are allowed to go about the cities without chains. But if one of them escapes, the rest are constrained to pay the amount of his value. We shall discuss in another place whether such a promise is strengthened by an oath.

In general we agree with the words of Cicero, *On Duties*, Bk. III [xxix]:

If you should not pay a price for your life, agreed on with robbers, it is no fraud. For a pirate is not comprehended in the number of lawful enemies, but is the common foe of all men. With such a man, neither should faith nor an oath be in common. (E.)

Certainly promises made to such persons need not be fulfilled. But many have no liking for the reason given by Cicero, especially if it be extended also to such promises and pacts as we enter into with such persons although under no compulsion. Now it is true that, by the laws of nations, a lawful enemy is treated in one way, a robber and pirate in another, as may be gathered from the passage of Heliodorus,

Ethiopica, Bk. I [29]: 'A war with pirates never ends with articles of peace, nor terminates with libations.' And yet such a person does not for this reason lose at once all the rights of a man, especially when he still treats with some persons after the way of men. For when he makes an agreement with me and does not introduce the consideration of fear, he acts not like a robber but like any other man. 285

Now a robber is called a common enemy because he does not declare war upon any particular person as other enemies do, but threatens with violence any and every person who falls into his hands. For this reason there is no need for a declaration of war, the formation of an army, or a call to arms, to put down such a person, but nature herself allows every man the right to take up arms against him. And yet it can be said that just as enemy status does not save one from having to keep one's word given to an enemy, as Cicero confesses, so this common hostility of a robber does not prevent the necessary fulfilment of pacts once entered into with him, especially when he does not perform any hostile acts upon entering the pact.

Grotius, Bk. III, chap. xix, § 3, advances his objection in this way: 'Such as are notorious malefactors and are members of no state can, if we consider only the law of nature, be punished by any man' (K.) (which theory we shall examine in another connexion). But they who can be punished even with death can likewise be deprived both of their property and of their rights. But among their rights is also to be reckoned that secured by a promise; therefore this also can be taken from them¹ as punishment.

And yet he who voluntarily enters a pact with a robber, whom he knew to be such, is understood to have renounced, for that very reason, such an exception as he might have based upon the person of the robber, and so have opposed the validity of his promise, because otherwise nothing would have passed between them. Therefore, if a robber, upon my being lost, brings me back upon my path for a promised reward, I have no doubt but I should pay it. In the same way, *Digest*, XVI. iii. 31, § 1, lays it down that a deposit must be returned to a thief, provided the man from whom the thief took it does not put in an appearance, and the holder had no knowledge of the evil calling of his depositor. For if a man knew both that the fellow was a thief, and that the things had been stolen from some one else, I do not see how he could receive such things and yet not be implicated in the crime.

12. But there are still many who contend that a power to obligate lies in promises and pacts which have been extorted by force. Some turn to the authority of the Roman law, which, although it comes to the aid of persons injured by such pacts, in giving them the benefit of a full restoration of their loss, still seems to lay down the principle that,

¹ [For *ei* read *eis*.—Tr.]

by the letter of the law, there is in such engagements a power to obligate, but that the rigor of the law should be tempered by the equity of the judge. However, the reason for this lies in the Roman laws. For since it is not presumed that violence has been offered to a person living in a commonwealth, and some uncertainty may arise on an exception to this, it was simpler that a pact of this nature be upheld until the allegation of fear could be examined by the judge. Yet it does not follow from this that an intrinsic power of obligating can reside in a pact of this nature as well as in other transactions which can be annulled by a peremptory exception, since such devious exceptions suit the usage of a civil court better than the simplicity of natural law, at least when the matter concerns those who do not recognize a common judge.

Grotius, Bk. II, chap. xi, § 7, lays it down that 'therefore, by the law of nature, whoever has made a promise in fear is obligated by it, because of the presence of consent and, indeed, absolute consent, in view of the present state of affairs'. (K.) (Since, indeed, 'the dearest thing of all to a man is his soul.' Heliodorus, *Ethiopica*, Bk. V[26]), even though he would never have given his consent to such a thing had not that evil threatened him. Yet just as every obligation derived from a pact supposes its corresponding right in another, so it is not enough
 286 that I have in me the requisites necessary to give rise to an obligation, but there must be no defects in the other person which may interfere with his acquisition of a right. And so the fact that I have the faculty to give something does not mean that at once the other person has the faculty to accept it. Therefore, since an obligation to which there is no corresponding right is void, it is not to be believed that an obligation arises from my mere consent when the law of nature forbids the other party to accept it. And that is absolutely true in this case. For the same law which forbids one to strike fear into another, also prohibits his acquiring a right or making a profit from that fear.

But what Grotius adds does not suit the case:

If the person to whom the promise is made has inspired a fear, even though slight, and the promise has resulted therefrom, he is bound to release the promissor, if the latter so wishes, not because the promise was without force, but on account of the damage wrongfully caused. (K.)

Yet if I can be freed from an obligation at my pleasure, without the performance of anything, I am already actually free. What, then, is the use of such a nicety as, 'You should free me from an obligation, if I myself ask it'? We may the rather say: 'Because you forced me to make a promise, I owe you nothing, and it is idle for you to exact something from me which you are bound to restore just as soon as I have complied with the demand.' Add Seneca, *Controversies*, Bk. IV, chap. xxvi.

13. Hobbes, *De Cive*, chap. ii, § 16, defends this position with different arguments. He says:

Compacts extorted through fear are not of none effect because they proceed from fear. For then it would follow that those promises which reduced men to a civil life, and by which laws were made, might likewise be of none effect (for it proceeds from fear of mutual slaughter that one man submits himself to the dominion of another); and he should play the fool finely who should trust his captive covenanting with the price of his redemption.

But in the first point there is an ambiguity in the word 'fear'. For the fear which causes men to band together into states is clearly different from the one we are now discussing. The former is a safeguard against some evil which can befall one at any time, while the latter is terror that arises from some serious present and threatened evil, and one which I have not strength enough myself to repel. Therefore, there is a great difference between pacts which we make in order to secure mutual help, so that we may not be overcome singly by a common enemy, and those in which we promise something in order that we may escape an evil, with which another man unjustly threatens us.

Regarding the second point, we fully agree that a thief would act like a fool if he extorted a promise by an injury, and then took a man's word as if the matter had been done legally. For nothing prevents the same man being both a villain and a fool, as Menander says, in Stobaeus, *Anthology* [III. ii. 6]: 'Wickedness is an unreasonable thing.' Nay, I should, on the contrary, say that the man who had escaped from some danger unjustly brought upon him, and had then of his own accord handed over to the robber the reward of his villainy, would surely be acting without a show of reason. A case in point is given by Dionysius of Halicarnassus, Bk. VIII [xxxvii]: 'Since all treaties, both public and private, that are entered into through necessity [. . .] are soon dissolved when the [. . .] necessity ceases.' (S.)

Hobbes continues: 'It holds universally true that promises do oblige, when there is some benefit received, and when the promise, and the thing promised, be lawful. But it is lawful, for the redemption of my life, both to promise and to give what I will of mine own to any man, even to a thief.' But surely what a robber does for a traveller in not injuring him by taking his life cannot be called a good. It is absurd to treat non-performance of an injury to a man as a good, for we can only be said to have conferred a good upon a man, when we have given him a good which he did not have before, or preserved a present one, or when we have repelled an evil which threatened him through no fault of ours. Thus it was a foolish excuse advanced by Polycrates for his preying upon friends and foes alike, in Herodotus, Bk. III [xxxix]: 'A friend was better pleased if you gave him back what you had taken from him, than if you spared him at the first.' (R.)

In the next place Hobbes' conclusion is not justified, to wit: It is

287 lawful for me to promise and give something to a thief; therefore, he has the right to require it, or therefore, I am bound by some inner compulsion to perform it. We can do many things lawfully to which no obligation binds us. I can throw away my property lawfully, but I am not obligated by another to do so. And so the rule which the same writer lays down in his *Leviathan*, chap. xiv, is false: 'Whatsoever I may lawfully do without obligation, the same I may lawfully covenant to do through fear: and what I lawfully covenant, I cannot lawfully break.' For he should have added: 'provided the other can fairly require it.'

14. One further question must be raised in this connexion: Since promises occasioned by error or fear are invalid, how may those promises regain their force, in case a man wishes to stand by his words after the error or fear have been removed? For what was at first invalid may later regain its force, if some new cause is added which has the power of itself to generate a right which, in the present case, is a clear and voluntary consent. Therefore, some say that in order to confirm such a promise all that is required is an internal act of the mind, or a clear and free consent to that promise, even if it is not expressed by any sign, inasmuch as the external sign of agreement has already been given. That therefore, since the intrinsic determination is now clearly and willingly given, every requirement for the production of an obligation has been met. Others do not agree with this, on the ground that the internal consent and the external act should coincide in time, and that therefore a previous external act cannot be the sign of a subsequent internal act, which perhaps had not been considered beforehand. Therefore, for such a promise to be binding, they require the verbal pronouncement of a new promise and its acceptance.

Grotius, Bk. II, chap. xi, § 20, takes a middle position, that signs are absolutely necessary to show subsequent internal consent, because otherwise the other party could not be certain of his right. But they do not need to be shown by words, because other signs can be sufficient in such a case. Thus a promisor, after recognizing his error and putting away his fear, may willingly perform his part, or may raise no objection¹ about what he has already done, when he might easily have done so, or he may afterwards treat with the other party about the matter, as if the latter rightfully had it. To this opinion we also give our assent.

15. But the further point should be made that, for a promise to be valid, there is required the consent, not only of the one who makes the promise, but of him to whom it is made (*Digest*, XXXIX. v. 19, § 2), and that it be expressed by sufficient signs, in which case a nod may be enough, if something is offered voluntarily, or has been requested beforehand. For when the other party has not given his consent, or has refused to receive the offered promise, the thing so

¹ [For *recontrouersiam* read *re controuersiam*.—Tr.]

promised remains in the power of the promissor, even if the agreement has been fortified with an oath, for an oath does not transfer a right before acceptance, but has the sole effect that I cannot withdraw an offer before his refusal is established. Now whoever offers his property to another wishes neither to thrust it upon him against his will, nor to throw it away recklessly. Therefore, if the other has refused acceptance, the promissor has lost none of his right over the thing offered. But if a request passed between them beforehand, it will be understood to stand until it has been expressly recalled, and in this case the acceptance is understood to have been made beforehand, provided the thing offered corresponds to the request. For if a man returns a smaller sum than the other party requests, an express acceptance is required, since in giving a smaller sum his interest has not been consulted; at any rate he will be responsible only for the sum which passes between them. In this connexion the remark of Plutarch, *Symposiacs*, Bk. IX, chap. xiii, should be noted: 'The challenger's word is decisive, for the challenger proposed the conditions, and when they were accepted, the other party had no power to make additions.' (G.) 288
The reason is that only so much right can be acquired by the receiver of a promise, as the promissor agreed to. But if the promissor merely gives his nod to the request of the others, it will be understood that the request has been tacitly repeated in making the promise. Add Grotius, Bk. II, chap. xvi, § 32.

To the passage, *Digest*, L. xii. 3, from which some have concluded that the mere act of the promissor is enough to make a promise valid, Grotius, Bk. II, chap. xi, § 14, replies that the promise once made is not to be recalled, so that it may always be accepted, but not that the obligation is contracted before the acceptance. But it appears to those who examine the passage more closely that Ulpian teaches that a pact is an agreement or convention of two parties, that is, a reciprocal promise, while a promise is an act only of the person who makes it, although this does not deny that the latter may finally become binding by acceptance. And, indeed, the state has already signified its acceptance in advance, if the promise were made for honours sought or accepted, but has refused what was proffered without reason. See *Digest*, XXXIX. v. 1, § 1; *Ibid.*, 19. But in *Digest*, XXXIX. v. 3, § 1, it is not allowed to claim things given without cause, because a gift could not be made without acceptance, and so because the actual possession of the thing had already been transferred to the community.

Now since any and all obligations require in the person whom they concern, or who secures a right by them, his consent to accept the obligation of the other party, and to the right thereby transferred, which consent may be given either personally or through a representative, and is expressed by signs that show his mind, it is clear what view

is to be held on the firmness of vows or obligations voluntarily undertaken with regard to God. Certainly they cannot be undertaken with any force, unless either God Himself has shown by revelation that He will accept them, or else there is some one to stand in His place among men and judge of their force. For otherwise a man cannot know whether or not God wishes to be obligated, or whether or not it is His pleasure that the vow be kept. Especially is this true since vows should be made about matters which God has not demanded before of us, at least definitely, through some commandment. Were this not so, it means that you would impute an act to a person as voluntary, which was in fact necessary and required, and we cannot know, except by divine revelation, whether an act not prescribed by God will be pleasing to Him. Surely it is useless to undertake vows when it is not known whether they will be pleasing to God.

But will it not be possible to assume God's consent and approval? We feel that this is possible only in such things as agree indefinitely with natural law and so with the divine will, while their application to persons, place and time, and their limitation in degree, have been left to the judgement and decision of men. And so we hold that those vows should be kept whereby a man obligates himself to give a certain amount of money to the poor, or for pious causes, provided that by such a gift other necessary duties are not interfered with; whereby he sets for himself certain days of fasting, or abstinence from a particular food or drink, at least within certain limits; whereby he forbids himself the wearing of certain unnecessary ornaments, such as pearls, precious stones, and gold. These and similar abnegations carry some virtue, although their exact determination is not laid down in any precept. But we feel that those vows are foolish which give only trouble to the one who makes them, and are of no advantage to other men, and all the more so if they interfere with other duties.

Another question in this connexion is, whether an obligation commences for the promissor at the very moment when the acceptance has been made, or only when he receives word that it has been made. It appears certain that a promise can be conceived in two ways: either, 289 I wish the promise to be binding, if it is accepted; or, I wish it to be binding, if I understand that it has been accepted. In case of doubt it must be gathered from the nature of the undertaking, which sense the promissor had in mind. The former sense is more to be presumed in a generally liberal and pure promise, because in such the promissor seems, as it were, to hasten to obligate himself; the latter in a promise to which has been added an arbitrary or mixed condition. Cf. Grotius, Bk. II, chap. xi, § 15.

16. It remains for us to make some concluding remarks on the signs by which consent is expressed; which, indeed, are necessary in

order to make an obligation, since acts of the will, so long as they are not manifested by signs, can have no effect among men. The more imperfect signs are gestures which must be used in business between men who do not know the other's language¹; the more perfect are words, understood by both parties. See I *Corinthians*, xiv. 11. I say 'understood by both parties'. This is probably the reason why the Turks do not hold themselves bound by pacts and treaties which are couched in any other language and characters than their own. See Marselaer, *Legatus*, Bk. I, chap. xxx.

That words may show the will more clearly and firmly it has been a common practice, first, that for more important pacts witnessess be called in, to whose memory and conscience appeal might be made, in case the pact be denied by either of the parties, or in case some question arises as to its terms; second, and most frequently, that the terms of the pact be put down in writing, for which written agreements the Greeks sometimes used tallies or σύμβολα. For the memory even of a number of men may be treacherous, or their faith corruptible, while what is written is not so open to forgetfulness or perfidy. Moreover, mere words are often gainsaid by the plea that they were spoken in haste, or before the matter was rightly understood. But written documents preclude such a claim, for while they are being drawn up, they present the matter clearly enough to the mind of the signer, allowing him as well some time, so that if he has approved it, he must be held to have given so complete an agreement to the matter that he may afterwards offer no plea based upon passion or haste. Nor can writings be so easily twisted by subtle interpretations as can words of the mouth, in which a single phrase, dexterously inserted and unnoticed in rapid pronunciation, can change the whole thought; to this shortcoming written documents are by no means so much exposed. And so it is proper that more trust be put in authentic documents, not vitiated with any defect, than in the evidence of witnesses, since a man's testimony against himself is more strong than that of another person, and the gravest evidence is brought against the man who cannot deny his very own authority. Yet the fullest hearing should be given the more important witnesses if they can show probability that the document is forged, supposititious, or corrupted.

Although the firmness of pacts does not depend entirely on writings or instruments of this sort, since² they are legally contracted even without such (*Digest*, XXII. iv. 5), and may hold good so far as the law of nature is concerned, although the documents themselves may by some chance have perished (*Digest*, XXII. iv. 1, 4, 5, 7, 8, 10; *Code*, IV. xix. 20, 21); yet before a civil judge, where cognizance is given only to most clear signs, these instruments are accorded the

¹ [For *lingui invicem* read *linguae invicem*.—Tr.]

² [For *quippe* read *quippe*.—Tr.]

greatest consideration. And where they cannot be produced, the plaintiff as a rule loses his case, unless he has adduced sufficient proof that it was by some accident he had lost them. Therefore, it becomes a careful man to conduct his business with written agreements rather than on mere faith. Thus, according to Plutarch, *On False Modesty* [x, p. 533 B], when Persaeus once made a loan to a friend, he required that he be protected by the form customary in court. His friend remarked upon his care and inquired the reason for the legal form. 'That I may get it back', replied Persaeus, 'as from a friend, and not demand it in legal form.' Juvenal, *Satires*, XIII [75-6]: 'So easy and so natural is it to despise the gods above, that witness all, if no mortal man attest the same!' (E.)

According to Appian of Alexandria, *Mithridatic Wars* [ix. 64], when Murena made war upon Mithridates and the ambassadors of the king appealed to their treaty, he said that he had never seen any treaty: 'For Sulla had not written it out, but had gone away after the terms had been fulfilled by acts.' (W.) But, by way of contrast, Christophe Richerius relates of the custom of the Turks: 'They show such steadfastness in their spoken word, and place such confidence in the faith of their countrymen, that in their agreements they never use any document, seal, or signature, but all their business stands upon the word of the promissor, or upon the mere mention of the name of the party to the agreement.' A similar account is given of the Peruvians by Garcilaso de la Vega, *Comentarios Reales*, Bk. VIII, chap. xvi.

It follows also from the value of a written agreement that if a creditor knowingly destroys it with the knowledge of the debtor, he is understood to have cancelled the debt. But the debtor will not be freed from his obligation if, in some way or other, he gets his hand on the contract, whether by stealing it or securing it in some other way. From this it is clear that Seneca, *On Benefits*, Bk. VII, chap. x, is far from right in calling 'promissory notes [. . .] empty phantoms of property'. (S.)

CHAPTER VII

ON THE SUBJECT-MATTER OF PROMISES AND PACTS

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| <ol style="list-style-type: none"> 1. We are obligated only to such things as are possible. 2. Promises about impossible things are void. 3. Impossibility arising in pacts. 4. Whether utmost endeavour is always enough. 5. Whether one is obligated to undergo sufferings beyond the power of man to bear. 6. There is no obligation to do things illegal. | <ol style="list-style-type: none"> 7. Dishonourable pacts, as yet unperformed, have no obligation; 8. Nor such as are performed only by some base deed. 9. Whether things dishonestly given can be withdrawn. 10. A man cannot promise things belonging to another; 11. Nor his own, if they are already obligated to another. |
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WE must now examine the subject-matter of promises and pacts, that is, things to which our promises and pacts can obligate us. Now to obligate ourselves it is required that we have the moral and physical faculty to perform some thing or action, in other words, that the performance is not beyond our strength and no law forbids it. For when a thing is placed within my strength, and the faculty is left me of reaching a decision about it, there is nothing to prevent my voluntarily laying a necessity upon myself of doing it, when it is called for by the needs and uses of human life. On the other hand, it is useless to contract an obligation about matters which exceed our strength, or cannot be met by reason of a stronger obligation, since it would be without any direct and legitimate effect.

2. It follows from the foregoing that there can be no obligation to impossible things—a statement bandied about often enough, but requiring a more accurate examination. At the outset a distinction should be drawn between obligations which we undertake of our own accord, and those which are laid upon us by the authority of another. When a man is willing to obligate himself to something impossible, and knows that it is such, he is unquestionably lacking in wit. For he wishes to do something which he realizes beforehand he cannot do.

Yet a man who undertakes by a promise or pact what is impossible is not always clear of all necessity of fulfilment, even though he cannot do the thing agreed upon. Indeed, if I have promised¹ another something, which I thought would be² within my ability, but, for some reason which I cannot control, I am unaware that it is now beyond my strength, or will be before the time of fulfilment, it appears that I am

¹ [For *promiserim* read *promiserim*.—Tr.]

² [For *foro* read *fore*.—Tr.]

not bound to the matter promised, nor to make good the loss of the other party, especially when this difficulty has been expressly mentioned, or this condition is tacitly understood by both parties. See *Digest*, II. xi. 2, § 3 ff. For instance, if I promised to lend a man a horse which is in another place, and it dies on the road, I am not bound to produce the horse or to make good the man's loss. For it is understood that I tacitly based my promise on the condition: 'Provided the horse comes safely home.' Since this condition failed, due to no fault of mine, the force of my promise is entirely lost. But if both the promissor and the man promised knew that the thing was impossible, and each knew that the other knew, it must be concluded that they were only jesting, and that nothing really passed between them. But if only the promissor knew that the thing was impossible, while the other did not, the former will have to make good the latter's loss in being thus made sport of. But when the promissor has been too careless in measuring his own strength, and has promised something now impossible for him to perform, which he might have known was such, had he used due foresight, the obligation will be void, because the promissor supposed the possibility as a tacit condition. Yet because of his carelessness and responsibility, he will have to compensate the other party for the loss caused him by his empty promise, although the hope of profit and gain based on the empty promise is not to be reckoned in the loss. The same principle applies also to pacts. In case a man through negligence has agreed to an impossible thing, he may be freed from his obligation by making good the consequent loss suffered by the other party, while the latter shall be freed from that to which he obligated himself, or, if he has already performed it, he shall have restored to him what he gave, or else be given its equivalent.

3. When the thing was possible of fulfilment at the time when the promise or pact was undertaken, but later became impossible, it must be decided¹ whether this is due to mere chance and no one's fault, or to some one's fault and bad faith. In the former case the pact is void, when the matter is not as yet undertaken. But when something has been done by one of the parties, it must be restored or its equivalent rendered. If not even this can be done, the utmost endeavour must be made to keep the other party from suffering any loss. For in pacts we rivet our attention on what has been expressly agreed upon; when we cannot obtain this, it is sufficient to give its equivalent; but in any case every precaution must be taken not to experience any loss. But when a man himself in bad faith takes away his own power of fulfilment, he is bound to use his utmost endeavour, and may also be punished by way of supplement, as it were.

By these principles the questions that concern insolvent debtors

¹ [For *dispiendum* read *dispiendum*.—Tr.]

are to be settled. When they cannot meet their debts by mere chance, and for no fault of their own, they should show the utmost endeavour to pay. But equity and humanity require some amount of time to be allowed them to explore and prepare means of meeting their debts. See *Matthew*, xviii. 25-6. Surely it would be criminal to strip such persons of all their property and to reduce them to beggary. The Roman law, indeed, so favoured such persons in general that it allowed them to be fined 'only what they can pay'. See *Digest*, XXIV. iii. 12; *Digest*, XLII. i. 6, 16-21; *Ibid.*, 49, 50; *Digest*, XLII. iii. 4, 6, 7. Yet unless the creditor has cancelled whatever exceeds their present ability to pay, they will be required to pay the balance when they get in better circumstances. But anybody who has turned bankrupt through trickery or through his own fault can be restrained by some punishment, and in his case the old rule still holds good: 'Let him who cannot pay in money pay in his person.' See Gellius, Bk. XX, chap. i, towards the end; also the remarks attributed to Appian in Dionysius of Halicarnassus, Bk. V [lxvi]; add, however, Livy, Bk. VIII, chap. xxviii. 292

The further point must be considered, in this connexion, as to what cause or necessity made the man contract the debt, for the favour and pity accorded an insolvent debtor is increased or decreased, according as his necessity was greater or less. So harder terms are rightly laid upon merchants, even though they have become insolvent by mere chance than upon others who were forced to go into debt because of some special necessity. For it was a desire for profit that induced the former to contract debts. And since they openly profess the art of growing rich, they are scarcely to be exonerated if they did not guard against ill fortune; if, for instance, they put all their fortune in a single venture. This is opposed to the advice of Pliny, *Letters*, Bk. III, ep. xix: 'To distribute one's possessions about seems a safer way of meeting the caprices of fortune.' (B.) And Justin, Bk. IX, chap. i, tells us that while Philip was conducting his unsuccessful siege of Byzantium, he sent a predatory expedition into Thrace, following his rule of meeting the expenses of one war by another. Livy, Bk. [XL], chap. xxi:

Antigonus tossed about by a violent storm, when he had all his family in the same ship with him, was said to have advised his sons to remember, and hand down to their children this maxim: 'Never to have the hardihood to rush into danger themselves and their whole family together.' (M.)

Yet it appears that the early settlers of Rome gave little attention to these distinctions. For Seneca, *On Benefits*, Bk. VII, chap. xvi, says:

Do you suppose that our ancestors were so foolish as not to understand that it is most unjust that the man who has wasted the money which he received from his creditor on debauchery, or gambling, should be classed with one who has lost his own property, as well as that of others in a fire, by robbery, or some sadder mischance? They would take no excuse, that men might understand that they were always bound to keep their word; it

was thought better that even a good excuse should not be accepted from a few persons than that all men should be led to try to make excuses. (S.)

Thus, among the Muscovites, insolvent debtors are first given no mere perfunctory flogging, and then are forced to become slaves of their creditors.

4. At this point we must examine the assertion of Hobbes, *De Cive*, chap. ii, § 14—too sweeping a one, obviously: 'Covenants oblige us not to perform just the thing itself covenanted for, but our utmost endeavour.' That is, since we are not obligated to the impossible, and nothing beyond our utmost endeavour is within our power, what we cannot achieve is impossible for us, and therefore beyond any obligation on our part. But he should have added, 'provided we have not by our own fault or trickery reduced our power of fulfilment.' For if we have done so, our obligation is not met by utmost endeavour, but at the point where our fulfilment ceases we are made liable to receive punishment for the deficit.

The statement of Hobbes apparently is proper only in those pacts where we promise some future service of ours, in exchange for something already received, or some present service, since the obligation of such pacts is met by utmost endeavour. For since future eventualities are so far beyond the power of man to perceive, that either our strength may be weakened by some chance happening, or else events may so shape themselves that the opportunity to do them may be lost entirely or rendered more difficult; and since, furthermore, the judgement of men is often apt to err in the estimation of their own strength and of a difficulty, those who enter such pacts are understood to be mindful of human limitations, and therefore, in agreeing to future actions or services, to have added the tacit condition: 'Provided my strength and the opportunity remain the same, or provided I have not rated too highly my present strength.' In such cases it is proper to say that a man who has done the best he could has met his duty, especially when in the act of fulfilment something not dependent on our strength interposes to prevent or distort the effect.

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That the assertion of Hobbes holds good only for this kind of pacts is clear from the arguments which he himself adds. He says:

But yet, though we often covenant to do such things as then seemed possible when we promised them, which yet afterwards appeared to be impossible; (it is supposed, of course, that we had had no opportunity to try our strength on them) are we not therefore freed from all obligation. The reason whereof is, that he who promiseth a future, in certainty receives a present benefit, on condition that he return another for it. For his will, who performs the present benefit, hath simply before it for its object a certain good, equally valuable with the thing promised; but the thing itself not simply, but with condition if it could be done.

But I would rather say that he who bestows a present good upon

a person has as his direct purpose the securing of the future good which was expressed in the pact, and that this applies in an agreement of giving as well as in one of doing. For the distinction which some allege is apparently not founded on natural law, namely, that by agreements of giving a man is obligated precisely to giving, but by agreements of doing he is obligated not precisely to doing, but may be freed by some substitution. When the thing agreed upon cannot be done, to avoid loss he is willing that its equivalent be forthcoming. But if even this cannot be done, and the matter which is already furnished does not admit of substitution, a man will satisfy his obligation if he does as much as his strength permits.

But in contracts of loan and others of the same nature, it is not true that a debtor can be cleared of an obligation by utmost endeavour. For when a loan is secured, and especially under stress of no extreme necessity, the creditor naturally supposes that the debtor is willing and able to pay, the debtor pretends as much, and the contract is entered into on that assumption. But if at the time for settlement the full amount is not to be found in the estate of the debtor it is, of course, impossible to wring any more out of him, but the obligation to make up the balance in the future still holds. See *Matthew*, xviii [25 ff.].

But in simple promises whereby we engage to do something, the fulfilment of which is not entirely within our power, the following restrictions should always be understood: 'If fortune smiles upon me'; 'Provided some opposing force does not intervene'; or, what better befits pious Christians, 'If it be God's will.' See *James*, iv. 15. Yet to take a firm oath on such uncertain matters in the future is a thing of great boldness and wicked presumption. An instance of such an oath is that of Labienus and the other followers of Pompey, given by Caesar, *Civil Wars*, Bk. III [lxxxvii. 6], who had sworn that 'they would not return to camp except as victors'. Add *Acts*, xxiii. 21; Selden, *De Jure Naturali et Gentium*, Bk. IV, chap. vii.

5. There is another thorny question to be decided in this connexion which Hobbes, *De Cive*, chap. ii, § 18, raises. It is, Whether a man can obligate himself by a pact to undergo ills which surpass the general endurance of mankind; for example, 'Can a man obligate himself by a pact not to resist him who shall offer to kill or wound him?'¹ It is clear to one who examines the matter with some attention, with what purpose in view the question is answered in the negative; to show, namely, that the security of men is not sufficiently safeguarded by pacts alone, and that it is not enough for a man to obligate himself by a pact that he will voluntarily undergo punishment, if he has done an injury; but that in order to preserve peace between men, it is necessary to have authorities established which may bring the guilty to punishment

[¹ These words are not a quotation from Hobbes, but are Pufendorf's own.—*Tr.*]

even against their will. This is certainly true, and will be discussed at length in another place.

But it may be worth while to consider Hobbes' arguments a little more closely. He says:

294 No man is obliged by any contracts whatsoever not to resist him who shall offer to kill, wound, or in any other way hurt his body. For there is in every man a certain high degree of fear, through which he apprehends that evil which is done to him to be the greatest; and therefore by natural necessity he shuns it all he can, and it is supposed that he can do no otherwise. When a man is arrived to this degree of fear, we cannot expect but he will provide for himself by flight or fight. Since therefore no man is tied to impossibilities they who are threatened either with death [. . .] or wounds, or some other bodily hurts, and are not stout enough to bear them, are not obliged to endure them.

On these words the observation may be made, that it does not seem to be a thing beyond the endurance of man to meet death steadfastly. Therefore, if God commands that a man die rather than do some particular thing, there is no doubt but he is obligated to do so. Yet we readily grant this much, that since such a thing is beyond the endurance of most¹ men, it is not presumed that a man wished to bind himself, by a pact of his own, to any such thing. Since, of course, human laws should be framed, and pacts entered into, with the same due appreciation of human weakness.

Yet this conclusion should by no means be carried so far as to destroy the force of military discipline, so that a soldier could be justified in deserting his post, upon seeing some present danger threaten his life, on the plea that he is not bound to face death, that being an impossible thing. For we deny that to face a probable risk of death, especially when joined with the power of resisting to the last, is beyond man's endurance, at least such as is found in soldiers. And I believe that there is scarcely an instance in war when men are forced to put themselves at the mercy of the enemy, without the power to resist and to combine craft and courage. And so it appears from the end of preserving states, and from the usage of all nations, that if the situation requires it a commander has a full right to order a soldier to take a certain position and oppose the enemy to his last breath, even though it happens that he must die in his tracks, while the cowardice of those who desert their posts may as rightfully be punished with death. For whoever enlists for military service lays aside the excuse of natural timidity, and obligates himself not only to enter the battle, but also not to retreat without orders from his commander. Nor, indeed, is it an illogical kind of punishment 'to kill you because you were unwilling to be killed'. For it is worse to be slain ignominiously by an executioner than to perish at the hands of the foe with glory, like a hero. Add *Digest*, XXIX. v. 1, § 28. It should be added, that if a man is by

¹ [For *vulgare* read *vulgarem*.—*Tr.*]

temperament so feeble in spirit that he faints under those things which are within the endurance of men in general, the defect of his spirit does by no means release him from his obligation.

Hobbes continues: 'Since he that is tied by contract is trusted [. . .] but they who are brought to punishment [. . .] are fettered or strongly guarded, that is a most certain sign that they seemed not sufficiently bound from non-resistance by their contracts.' In the case given that is true, although at times even those who are bound by actual pacts are so far from being trusted entirely that armed guards also are placed about them as a precaution to restrain their perfidy. The lines of Seneca, *Thyestes* [643 f.], are to the point:

The citadel sways the town and holds in check
The common rabble when it scorns the throne. (M.*)

He adds: 'A pact of this kind would be useless. Although contracts are frequently entered into to this effect: if I do it not at the day appointed, kill me'; that is, you will have the right to inflict capital punishment upon me, if I do not do it. 'But such a promise as this: if I do it not, though you should offer to kill me, I will not resist, is unusual and not needful.'¹ This he proves in the following manner. Such an agreement is entered into between a state and a citizen, or between citizens of the same state, or between two men living in natural liberty. For a state to make such an agreement with a citizen is useless; since it is enough for it to have the power to punish wrongdoers, if the individual citizens pledge their faith that they will not undertake to defend any man on whom punishment should be inflicted. Citizens are unable to make such an agreement with one another, since the right of capital punishment cannot, in states, be accorded a private citizen. Useless also, for those who live in natural liberty, is such a pact; for if the parties agreed that one of them would be killed upon non-performance, it is understood that another pact preceded this one, to the effect that he would not be killed before an appointed day. For, 295 according to Hobbes' own hypothesis, every man in a state of nature has the right, before the making of a pact, to kill any other. Therefore, on that day, upon non-performance, there returns the right of war or of a hostile status when any man may do any thing to another, and in this way there will also return the right of resistance.

But I should prefer to state the case thus: The utmost force of pacts amounts to this, that they not only adduce an intrinsic necessity of fulfilling the agreements, but they also give to each party the right to compel the other by force, in case he refuses, with the threat of some evil. That therefore pacts are resolved into these terms: 'I agree that I will do this for you; if I do it not, you shall have the power to compel

¹ [This is scarcely more than a paraphrase of Hobbes.—T.]

me by force and threat of evil.' That it is useless and absurd to add to this pact another about not resisting a man when he threatens that evil, for this again would have to be sanctioned by another pact specifying the punishment, such as: 'If I resist your proceeding to force, then you will have the power to punish me with some evil.' So it is obvious that nothing has been added to the first pact by the second, for the first already gave permission to punish the violator of the pact, and the second pact is as easily broken as the first. What need is there, then, of securing one pact by a second, when it is no more difficult to break ten than it is to break one?

Hobbes adds by way of conclusion:

Lastly, by the contract of not resisting, we are obliged, of two evils, to make choice of that which seems the greater. For certain death is a greater evil than fighting. But of two evils it is impossible not to choose the least. By such a compact, therefore, we should be tied to impossibilities; which is contrary to the very nature of compacts.

Now, truly, his rule about choosing the lesser evil needs a careful explanation. For it properly applies only in the comparison of two unprofitable evils as such, that is, such as cause a loss, in which case there appears some advantage in being able to come off with only a part of an unavoidable loss. But the rule should on no account be extended to a comparison of two wicked evils, or of two evils of which the one is wicked and the other unprofitable. For of two evils of commission neither should be chosen.

But it sometimes happens that two affirmative commands¹ cannot be satisfied, the non-performance of which, considered separately, is connected with a sin, but when taken together the non-performance of one of which is held lawful. In this case, then, of two evils of omission the less is to be chosen, or rather the concurrence with the other more noble precept shows that in such a case the omission of the baser precept is not a sin. And this, because subordinate laws are always understood to contain this limitation: In so far as they can be met without prejudice to the higher law. For example, disobedience to God and disobedience to the civil power are each, considered separately, a sin. But in case it is impossible to satisfy both, if, for instance, the civil power commands something contrary to the divine law, disobedience to the civil law ceases to be an evil, because the law about showing obedience to a civil power is understood to carry this limitation, provided nothing is commanded contrary to divine law. In the same way it is possible to choose to carry into execution what is another's sin, or to co-operate in it as the instrument, in preference to some great evil which may bring loss or injury, as will be shown more fully in another connexion.

¹ [For *præcertis* read *præceptis*.—Tr.]

Nor is it possible to compare a troublesome or loss-producing evil with a sin, and to choose the latter instead of the former, as that a man may prefer to commit a sin rather than lose some profit or sustain a loss, however much his judgement, corrupted by wicked desire, may feel that the former is a lesser evil than the latter. For, if this were possible, the efficacy of obligations would depend upon each man's judgement, and would, as a result, completely vanish, if I were not obligated to perform a thing, the non-fulfilment of which is by some external regard made to seem more desirable than its fulfilment. Thus it would be no excuse for a thief if he should say that his judgement had decided it was a greater evil to make his living by labour than by laying his hands on the property of others. Nay, in such cases, obligations exert their greatest force, in that because of them there arises an intrinsic necessity to do something from which our inclinations and desires alone would shrink. 296

6. That an obligation may arise from a promise or pact it is further required that there lie within us a moral faculty to fulfil the matter which is the object of the agreement. In the defect of this faculty it is not within our power to obligate ourselves to a thing illegal in itself. For every promise draws its strength from the power of the promissor, and extends no farther; that is, no man can validly bind himself beyond his power. Now, when the law forbids an action, it takes away the power of undertaking it and of assuming an obligation to perform it. For the complication arises, that something should necessarily be done on an obligation arising from laws which, by the same laws, should be avoided. And our will, subject itself to laws, cannot escape their¹ power by its own act. Therefore, a man sins who promises what is unlawful; but that man sins twice who proceeds to its performance. Add *Digest*, XXVIII. vii. 15; *Ibid.*, XLV. i. 35, § 1; *Ibid.*, XLV. i. 123.

From this the further point follows, that promises which will prove hurtful for the person to whom they are made should not be kept, for a general precept of natural law forbids a man willingly and consciously to do another an evil, even though in his stupidity he desires it. Moreover, from the fact that a valid obligation cannot be contracted regarding unlawful things, it follows that acts which are undertaken contrary to laws are regularly invalid by that very law, or have been declared to be so on the previous declaration of the magistrate. *Law of the Visigoths*, Bk. II, tit. v, chap. 7. Although sometimes, when an act is undertaken against the laws, a fine is placed on those who undertake it, but the act itself is not rendered null, since a greater misconduct is to be seen in the act than in its effects, and often the inconveniences which attend the disannulment are greater than those of the act itself, if it is left valid. Thus in Apollonius Rhodius, *Argonautic Expedition*, Bk. IV [1106-9],

¹ [For *earnudem* read *earundem*.—Tr.]

Alcinous, on being chosen arbiter between the Colchians and the Argonauts, gives as his decision: If Jason has not taken Medea to wife, she should be restored to her father; if he has, she should remain in the hands of Jason. The same story is told in Hyginus, *Fables*, xxiii; Apollodorus, *Library*, Bk. I [25]; Orpheus, *Argonautica* [1321 ff.].

7. But it is possible in this connexion to inquire a little more closely as to whether, in the first place, an obligation to do something wrong is valid, while the matter is still untouched, and nothing has been performed. On this point it is certain that an obligation from such a wicked agreement does not exist on either side, but that each party should withdraw from it. Seneca, *Hercules Oetaeus* [480-1]:

I can give pledge of faith, if it be free
From sin; for sometimes faith itself is sin. (M.)

Add *Digest*, XLV. i. 26, 27. And so, in case a man hire an assassin to commit some murder, and the assassin repent and refuse to undertake the task, he cannot be compelled by his employer to fulfil the pact. On the other hand, if the hirer repents and tells the assassin not to commit the murder, the latter cannot force the former to carry out the arrangement, so that he may have an opportunity to secure the price of his bargain. Nor will he be able to demand his reward of his hirer on the ground that the latter is to blame for the nefarious deed not being carried out. Furthermore, if, after the arrangement has been recalled, the murderer still persists in committing the murder, the hirer will not be held for the deed, but will be condemned only to the extent that he agreed to the murder, and then repented before it was executed.

297 Grotius, Bk. II, chap. xi, § 9, decides that a promise or reward offered, for example, for committing a murder is void, because it is done to incite a man to an evil deed. An example of the breaking of such a pact is in Philostratus, *Life of Apollonius of Tyana*, Bk. III [xxiv], where Apollonius promised some pirates that he would deliver into their hands a richly laden merchant vessel, and then tricked them by taking it over another course.

8. The second inquiry is whether after a man has committed a crime in accordance with an obligation, the other party is bound to pay the price agreed upon. Grotius, *loc. cit.*, asserts that he is, on the ground that, although before the commission of the crime the reward has a blemish, because it is an incentive to the wrong, yet after the crime has been accomplished, the blemish is removed, because it has ceased to be an incentive to the wrong. But we take a different view of the matter. For instead of such a pact ceasing to be wrong upon the accomplishment of the villainy, it has rather attained a higher degree of baseness when it has achieved its end. Unless, perchance, it be less evil to steal than to plan a robbery, to receive the reward for

a crime than to hope for its accomplishment, to pay the reward than to promise it. Nay, if a promise is wicked, because it is an incentive to evil, the fulfilment of a promise will also be wicked, because it is the payment for a piece of villainy and an invitation to undertake more. Therefore, some blemish is also judged to attach to such a payment, even when it passes by just title into the hands of a third party, since it was earned by a crime. Thus the divine law forbids that money secured by prostitution be brought into the house of God. *Deuteronomy*, xxiii. 18; Josephus, *Antiquities*, Bk. IV, chap. viii. And religious scruples made the priests consider the reward offered for the betrayal by Judas, tainted money, and prevented them from turning it into the sacred treasury. It is also a well-known saying that the third generation gets no enjoyment from ill-gotten wealth.

Therefore we cannot give our approval to the following statement of Grotius, *loc. cit.*: 'Up to the time of the fulfilment of a crime the effectiveness of a base promise is in suspense, as is the case with the effectiveness of conditional promises,' during the time the condition exists, or as in the case of the promise of a thing, which is impossible for the moment, but, it is hoped, will be possible after a while, when it shall have come within our power. 'But when the crime has been committed, the force of the obligation which from the beginning was not intrinsically lacking (for the consent was mutual), but was restrained by the accompanying wrong, is revealed,' (K.*) namely, that it contributed in a way to the performance of the wrong. But if this be allowed, the prohibition of natural law upon entering pacts that have to do with illegal matters would be of no avail, should natural law require that the pact be kept when once the villainy had been perpetrated. Of what advantage is it to forbid robbery if, after a thing has been stolen, it can be kept without blame? And it is untrue that an intrinsic force to obligate is not lacking in an evil pact, but it was only held in suspense because of the attending blemish, until it ceased to be the incentive to the crime. For the presence of consent on both sides is not enough to create in a pact an intrinsic power to obligate, but it should concern a matter which each party has free power to dispose of. Otherwise, if mutual consent were enough to produce an obligation, it would be easy to overturn all laws, by making a pact to do so; and so the law of nature itself would minister to its own destruction.

It is our conclusion, therefore, that by the law of nature neither can the doer of a crime claim the agreed-upon reward, as if on any right properly so called, nor is the man who hired him bound by an intrinsic and conscientious obligation to pay him the reward. And so it is no concern of the law of nature that a man should not have committed a crime gratis. Indeed, if a man, for instance, who has hired an assassin, and then, after the murder, refused to pay him the reward, is

the victim of the latter's revenge, there is no one who may say that he has been done an injury. But we should observe here that, although evil pacts lack any intrinsic power to obligate, and cannot lead to an
 298 action in court, they are not lacking in some effect in the case of the man who first freely agreed to them and then refused to stand by them. This effect is that no right of his allows him to complain if the other person uses force upon him to fulfil them, and visits him with some evil if he does not do so. The law of nature, indeed, forbids one man to force another to a thing he does not owe, or to do him some hurt if he does not produce it. But the man who agrees to an evil pact renounces even the favour of this law, in that, so far as he was concerned, he created in the other a power to demand a thing not owed in itself. And so the evil which a man has brought upon himself, from his own fault, is held to be what he deserves. For instance, the law of nature forbids a man to ravish a virgin against her will. But if she gives her consent, she has, of course, caused herself an irreparable loss, but she cannot complain that an injury has been done her. Although, in such a case, the lines of Ovid, *Heroides*, ep. V [VI. 137-8], have their place: 'She has won her husband with the very crime she brought him as her dower.' (S.) Thus in states where duels are forbidden, the man who has been challenged is not required to enter the arena, if he has promised to do so. But if he has met his challenger and received some wounds, he cannot complain that an injury has been done him, or demand of his assailant that he meet the costs of his cure.

On the illustration in *Genesis*, xxxvii, where Judah was anxious to pay the price for his lying with Tamar the harlot, Selden, *De Jure Naturali et Gentium*, Bk. V, chap. iv, has this to remark:

It was believed at that time that a woman who was unmarried¹ and independent could bestow the use of her body upon a man without any agreement upon living together, and this either gratis or for a price. And so a valid obligation could have been contracted by such an agreement, since it concerned a thing which was lawful, so far as the civil laws were concerned.

Although it may be observed that many men make a willing payment in such cases, when they have not satisfied their desire gratis. Perhaps also Judah was concerned about recovering his pledge.

A case to the point is in *Digest*, XII. v. 4, § 3:

Money given a harlot cannot be recovered at law [. . .]. This, however, is on a different principle, as the point is not that there is immoral behaviour on both sides, but on the part of the giver only; the woman acts immorally in being a harlot, but, being one, she does not act immorally in taking money. (M.)

Here, although in Rome public prostitution and the acknowledgement of that disgraceful calling before the aediles did not fall under the penalties of the civil laws, yet honest men quite properly considered

¹ [For *inuptae* read *innuptae*.—Tr.]

such a life most disgraceful. But when it had once been entered into, it was no further disgrace for a courtesan to receive a fee for her services, and 'ever stretch out her hollowed palm for pay', Tibullus, *Elegies*, Bk. II [iv. 14]. It is as if I should say: 'It is disgraceful in an honest man to take up the occupation of hangman; but if he has once overcome his shame at it, it is no disgrace for him to receive wages for it.' You may put it more concisely thus: Since at Rome the status of courtesan was tolerated, all pacts concerning that status were by their courts held valid. Although, on another head, such pacts are accused of iniquity by Ovid, *Amores*, Bk. II, el. x [I. x. 29 ff.]:

'Tis only woman glories in the spoil she takes from man, she only hires out her favours, she only comes to be hired, and makes a sale of what is delight to both and what both wished, and sets the price by the measure of her delight. The love that is to be of equal joy to both—why should the one make sale of it, and the other purchase? (S.)

But it is clear that a man cannot complain of a wrong which was undertaken for his own advantage and with his own consent. Medea says to Jason in Ovid, *Heroides*, ep. XII [131-2]: 'I may be blamed by others, but you perforce must praise me—you, for whom so many times I have been driven to crime.' (S.) Nisa to Minos, *Idem*, *Metamorphoses*, Bk. VIII [130-1]: 'Let this act which was a crime against my country and my father be but a service in your eyes.' (M.) Seneca, *Medea* [500, 503]:

Who by sin advantage gains,
Commits the sin [. . .]
Let her be guiltless in thine eyes who for thy gain
Has sinned. (M.)

Yet it is common, especially among princes, to secure the advantage of another's villainy, although they punish the crime itself, so that by example the thing may not spread to their hurt. Thus in Paulus Orosius, Bk. V, chap. xviii, the consuls decreed that the servant who had betrayed his master Sulpicius, declared a public enemy by the Senate, should first be manumitted, because he had discovered an enemy, and then cast from the Tarpeian rock, because he had betrayed his master. Add Zonaras, Bk. III, *On Theophilus*, at the beginning.

9. A third and last inquiry is whether the reward given for a wicked deed can be recovered. Now the law of nature appears to furnish no excuse for this recovery, if there has been no attendant deceit or great damage. For the reward was handed over to the other with the consent of the owner, and with the intention of transferring ownership, and furthermore as if it were a debt for a service, which he valued at that amount. And of course, when a thing is given gratis, there is no recovery. Nor does it make any difference whether the thing was acquired by unjust title, or by a method and means forbidden by the laws. For this fact cannot be alleged by the giver as a reason to recover

what he gave, since he agreed of his own accord to the wickedness, and upon its accomplishment he reckoned he would receive some return equivalent to his outlay; nor can he remonstrate about some knavery for which he himself was responsible. But the illegitimate method of securing the reward brings it about, that a superior may either take away as a penalty what was given, or restore it to the original giver. But if, for example, some enticing courtesan should have fleeced an unsuspecting youth out of a large sum of money, it can rightly be recovered, since even among those who band together for wickedness, a certain kind of justice, and therefore the laws of contract, are observed after a fashion.

But since it is also considered wicked to be unwilling to do without a reward something which you owed gratis, the further question arises, whether what has been promised or given for a thing already owed can be recovered. Some reply quite readily that such a promise is valid, if we regard natural law, since even that promise is valid which has been made without regard for any reason; but that a loss occasioned by violent extortion must be made good. The matter will be settled more clearly, if a distinction is drawn as to whether the thing was owed by an imperfect or by a perfect obligation. If a thing is owed only by an imperfect obligation, what was promised for its accomplishment will have to be done, and there is no ground for recovery. For example, even though the law of humanity orders that one point out the way to a wanderer, if I agree to do this for a price, however little trouble it may be, I shall have the right to require it, and the wanderer will not be able to recover it. Unless, perhaps, I lead him by trickery and vain terrors to make some ridiculously large promises.

Those promises are also valid, wherewith I undertake to stir a man up to meeting his duty more quickly and exactly, for it is held that they are made of one's own liberality. But when something was owed perfectly, and the man who owes it is unwilling to pay it unless some new thing is promised, I should judge that the same should be said of it as of those promises which are secured through fear or guile. For if any one in a state of natural liberty refuses to fulfil his obligation, it is proof that he acts that way from trust in his own strength, because he believes that I have not the power to force him to perform his obligation. Therefore, when a man refuses to fulfil some former pact legally entered into, without a new supplement or condition, I acquire at once a just cause for making war upon him. But if my affairs will not allow me at this time to take the field against him, but urge me to agree with him on hard terms, I shall have the right afterwards to seek reimbursement for my loss, unless I forgive it of my own accord. But it is another matter if he wishes to withdraw the former pact, because he can show that it works him an enormous injury. But whoever in states refuses to

meet a pact without a new addition to it can easily be brought before a judge and forced to pay.

To what has been said should be added the remarks of the commentators on the Roman law, on *Digest*, XII. v, where they make a distinction as to whether the fault lay only with the receiver, or only with the giver, or with both. In the first case they allow a claim of restitution, but not in the other two cases. Libanius, *Orations*, v:

I receive merely those advantages which the laws allow me; how is there any favour here? Assuredly,¹ he who receives a favour ought to make some return to the giver. Yet favour is not due the judge who is bound by the laws; for he has done merely what he was compelled to.

10. We have also no moral faculty to perform something, or to obligate ourselves to perform something, about the possessions or actions of other men, since they are subject not to our disposal but to that of another. A consequence of this is that we can make no promises or pacts on such things, whereby another may acquire by our act a right over them and be able to demand them of a third person on his own right. Therefore, the Roman Jurisconsults, on *Institutes*, III. xix, § 3, show that he who promises that another will give or do something is neither himself obligated, nor does he obligate the other whose service he promised. This is true if we are willing to stick strictly to the words of such a promise. But because it is not fitting that no effect should follow an act seriously made, it is easy to interpret such a promise to mean that the man will make it his business to see that the other person gives or does something. But if the promise has been couched in these express terms, that I will use my efforts to see that a third person performs some thing or action, I am then obliged to strive, by every means morally possible, to induce the person to perform it. We say 'morally possible', meaning thereby 'in so far as it can honourably be demanded of me, and is allowed by the nature of civil life'. Therefore, if I omit nothing on my part, and the third person still refuses to do it, I shall not be held for any loss incurred, unless I expressly agreed to do so, or am understood from the nature of the undertaking to have agreed. Livy, Bk. II, chap. xxxi: 'As though he had kept his pledge, for it had not been his fault that it was not being carried out.' (F.)

But if I make my promise in this way: 'If the third person will not perform, I will give something,' it is clear that upon the failure of the third party my promise is to be carried out. This is like a provision of the Roman laws, that, if a man bequeathed a thing belonging to another, and knew it was another's, his heir was required to secure it and make good the legacy, or if he could not secure it, to give its equivalent value. But it is certain that a third person is not obligated² by any kind of

¹ [For *Certi* read *Certe*.—Tr.]

² [For *obligare* read *obligari*.—Tr.]

a promise which I may make, and that the other party does not acquire a right to demand it directly of him.

But the actions and possessions of those men over whom we have authority are not considered their own, in so far as our authority extends. For on such things I can make an efficacious promise, as if they were my own, so that not only am I obligated to carry out my promise, but the person whose services I pledge is obligated by reason of the power belonging to me over him to fulfil the promise when my will has been made known to him. And although it is usual to require of the principal promissor that he force his subject to comply, yet, if the latter persist in refusing, the action will have to be brought not against him but directly against his superior, unless the latter has given up all his right over his subject.

11. Finally, I can make no valid promise to a third person for possessions or actions of mine over which another person has already secured a right, unless it happens that he be willing to forgo his right. For he, who by prior promises or pacts has already transferred his right to another, has himself no further right left which he may confer upon a third party. And it would be no trouble for all promises and pacts on
301 this score to be rendered void by entering another, the terms of which either were directly contrary to, or could not be fulfilled together with, the former. Therefore, in such a case the later pact is made void by the former, or rather, the former shows that the latter has no force; while for the same reason all pacts are void which have been made by subjects among themselves, or with others, in contravention of the oath and loyalty which they gave their lawful sovereigns. Gramondus, *Historiarum Galliae*, Bk. V:

He who is born under a sovereign owes allegiance first of all to his sovereign, and if any one else claims that for himself against the sovereign, he is a bold robber of another's¹ property; nor should any pact be kept which is opposed to the laws and rights of the kingdom. He who gave a promise against his sovereign is freed from it.

To the same point also is the old saying: 'The prior in time has the better right.' Not because the priority in time gives of itself any right, but because the first in time has already acquired a right over a thing which prevents a man who comes later from securing a right over the same thing. This is the reason why a servant cannot give his services to another, because they already belong to his master. But that by the laws of Rome a servant could not be obligated to his own master (beyond that general obligation which attends his state), is because his master already had a preceding right over all his possessions and useful services. Yet if one man has deceived another by promising him something that is another's, or his own, but already contracted to some one else, and has thus played him false, he shall be liable for the other's damage, and often is liable to an action for *stellionate*.

¹ [For *aliena* read *alienae*.—Tr.]

CHAPTER VIII

ON THE CONDITIONS OF PROMISES

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| <ul style="list-style-type: none">1. The different ways of making a promise.2. The nature of a condition.3. Whether a condition refers to present or past time.4. A condition is casual, arbitrary, or mixed. | <ul style="list-style-type: none">5. An impossible and wicked condition.6. The addition of place.7. The addition of time.8. The difference between pacts and conditional promises. |
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It should be noted, regarding the making of promises, that some are made *purely* and some *conditionally*; that is, that sometimes we obligate ourselves absolutely to perform something, and sometimes we make an obligation dependent on some form of condition.

2. A condition is a kind of supplement to such acts as give rise to rights or obligations, whereby their force and efficacy are bestowed upon some event which depends upon chance or the choice of man. Therefore, there are two requirements for a condition: first, that it may postpone or destroy the force of an obligation; second, that the event, or what is supposed upon the condition, does not yet exist, or is still uncertain so far as our knowledge goes.

3. These considerations lead to the conclusion that those additions, which are concerned with present or past time, are not properly speaking conditions, although they may appear to be such from the grammatical form of the words. For only the future is unknown to mortals, while their knowledge of present and past events is considered to be clear, and, as a consequence, they can have no power to suspend consent. Therefore, in *Institutes*, III. xv, § 6, it is laid down that conditions which concern the present or past (such as, 'I will give, if Titius has been consul,' or 'if Maevius is still alive'), either immediately invalidate or make void the obligation, or do not defer it at all, but rather make it pure. For if the things attached as conditions are not as they are supposed to be no obligation is contracted, but if they are really so, the promise is at once valid and begins to obligate purely.

But it should be observed that a condition which concerns a present or past time can properly be affixed to a promise, only if it be unknown to one or both of the parties who are making the negotiations. And such a promise seems to carry with it the addition of a lapse of time. For nothing can be sought from it before it has been clearly shown the promissor that the condition really took place, and for this some time is necessary. For instance, some one ignorant of history can promise, 'I will give you ten something or other if the dictator Caesar ever crossed the Rhine.' In this case, before the amount can be demanded, it is necessary that the fact be first demonstrated on the

authority of trustworthy historians. So when I promise, 'If Maevius, who is on a journey, be still alive, I will give you ten something or other,' the second party can require the sum, only when I am satisfied that he is alive. Yet if we wish to examine the matter more closely, the real sense of such promises, dependent upon a condition of present or past time, is this: 'I will give you ten something or other, if you prove to me that Caesar crossed the Rhine,' or 'that Maevius in his journeying is still alive'. Now these are really conditional promises, yet the condition consists not in the fact of that past or present act, but in the proof which the other must offer. It is therefore certain that if both parties knew that the condition was true, and are serious in their dealing with each other, it will be an absolute promise. But if both parties knew that it was untrue, the promise will be but a jest and produces no obligation.

But if the addition takes the form of an event, which, although future, it is known beforehand will certainly take place, for instance, 'If the sun will rise to-morrow,' it is generally agreed that such an addition should not be considered a condition, since it does not delay the obligation, inasmuch as the truth of the future addition is well established. But since it is not lightly to be presumed that such an addition is made with no purpose, we should consider whether the word 'if' is not used for the temporal conjunction 'when', so that such promises are not conditional, but signify a period of time, as if you would say, 'I will give it to-morrow at sunrise.'

Thus, therefore, every condition properly so called, contains something not yet established, at least to one of the parties who are concerned in the matter, and until the condition either comes to pass, or it has been proved that it has come to pass, the obligation remains in suspense. When the condition is found to be true, an absolute obligation is contracted; when untrue, the obligation also disappears.

4. Conditions are usually divided into *possible* and *impossible*. The former are those which make an obligation depend on an event which may physically or morally happen. These are again divided into *casual* or fortuitous, *arbitrary* or discretionary, and *mixed*, as partaking of the first two. See *Code*, VI. li, § 7. A casual condition is such as depends on the will of some third person not subject to us, or on mere chance or fortune, as far as we are concerned, such as, 'I will give you ten something or other, if Gaius marries Titia,' or 'if it does not rain within three days'. An arbitrary condition is one the outcome and existence of which depends on the will and strength of the person to whom something is promised contingent to it; the name promiscuous is given it in *Digest*, XXV. i. 11. But a promise is judged useless from the very first when the condition is placed at the will of the party promising, that is, of him who makes the promise; for example, 'I will give you ten something or other, if it suits my pleasure.' For the sense of such a promise is merely

this: 'I make you no absolute promise now, and in the future it will be within my own discretion whether or not I shall choose to make you an absolute promise.' From this the other person acquires no right, unless the promise be made anew, for the promissor can always withhold or evade such a condition. And so the saying is proper, that what is in our power should not be given to chance. See *Digest*, XVIII. i. 7; *Ibid.*, XLIV. vii. 8; *Ibid.*, XLV. i. 17, 108, § 1. But if the condition is, indeed, placed at the will of the promissor, but in such a way that he is not able or willing to evade it indefinitely, the condition will have the addition of time; for example, 'I will give you ten something or other, if I put on new shoes,' or 'if I marry,' that is, 'when I do this or that.'

From what has been said an explanation is forthcoming of the words of Grotius, Bk. II, chap. xi, § 8:

If the thing is not at present within the power of the promissor, but may at some future time, the validity of the promise will be in suspense; under such circumstances the promise ought to be thought of as made on the condition that the thing should come into the power of the promissor. (K.)

This can be taken as true, if the other man knew that the thing was not at the time in the power of the promissor. For otherwise it savours of deceit to substitute for an absolute and present promise one which is given for some after time.

Grotius goes on to say: 'If the condition under which the thing can come into the power of the promissor implies his power to obtain it, the promissor will be bound to do whatever is morally right, in order to fulfil the promise.' (K.) This means that if I promise you something, which for the present, it is impossible for me to perform, but may be made possible hereafter by my endeavour, it is my duty to try my best to develop the faculty whereby I may perform my promise. As an example, a student of the law, as yet unskilled, may promise another: 'I will conduct all your cases in court, if I acquire some skill at law.' According to Grotius such a man will be in duty bound to show all diligence in the study of law, so that he may become fitted to conduct the cases. This, however, is only to be understood when the man expressly promised, or from probable conjectures may be understood to have promised, that he would strive to give himself the power to perform. Otherwise the condition can be extended indefinitely.

It should be observed, furthermore, that Grotius uses the term 'arbitrary condition' in a sense different from that used above, that is, as a condition the fulfilment of which is in the power of the promissor.

Finally, a mixed condition is one the fulfilment of which depends partly on the will of him to whom it is made, partly on chance; for example: 'I will give you ten something or other if you marry Maevia.' For that is not entirely within your power, since she may refuse your offer of marriage, or meet with death before the ceremony.

It should be added, in conclusion, that a condition is considered fulfilled when it is the other party's fault if it is not fulfilled. See *Digest*, XVIII. i. 50.

5. Conditions are impossible either physically or morally; that is, some cannot be done from the very nature of things, some should not be done because of the laws. Added conditions of this kind, if we adhere to the natural simplicity of the terms, and especially when each of the parties knew that they were impossible, make the promise negative and hence void. See *Digest*, XLIV. vii. 1, § 11; *Ibid.*, 31. And certainly when the business is between such as are living in natural liberty, it is clear that there is no transaction when the added condition is naturally impossible, although to deny a man's¹ request by such means has the appearance of insult, which is, apparently, not to be found in a simple negation. An illustration is in the reply of the Lemnians to Miltiades in Cornelius Nepos [*Miltiades*], chap. i. For when Miltiades quibbled about the exact meaning of the words which they had used, the decision is very properly reached, that 'the Lemnians were overcome not by their own word but by the good fortune of their adversaries'. And what has been said holds good also of a condition morally impossible or wicked. An illustration of this is in the reply of Esdiguerius to Maphaeus Barberinus about his professing the Catholic religion, as given by Gramondus, *Historiarum Galliae*, Bk. XVI, p. 708. But if
304 a man has fulfilled a wicked condition, the question of whether at all, or to what extent, he can require the fulfilment of the promise is to be answered by what we have said before, chapter vii, § 8.

But in states civil laws can ordain that a promise with an impossible condition shall be considered as though such a condition had not been added, especially if the person promised did not know it was impossible; and that the person promised shall not be made the object of idle jest. And pacts and promises to which wicked conditions have been added, civil laws properly declare void, lest it should be believed that the pacts of individual citizens have any power to subvert the laws of the state. Thus the laws of Rome declared that added conditions, which were impossible, wicked, or absurd, were void in wills, since it seemed unreasonable that in an act, which had every occasion to be serious and weighty, men should be made sport of by idle clauses. In Petronius [*Satires*, 141], Eumolpus stipulates in his will: 'All those who come into money under my will, except my own children, will get what I have left them on one condition, that they cut my body in pieces and eat it up in sight of the crowd.' (R.) In Horace, *Satires*, Bk. II, sat. v [84 ff.], Tiresias says:

I will tell you something that happened while I was an old man. A determined old woman at Thebes was carried out to her burial, according to her will, in this way: her corpse

¹ [For *aliqui* read *alicui*.—Tr.]

was oiled all over, and her heir carried it on his bare shoulders. She wished to see (you understand) whether when she was dead she could slip through his fingers. I suppose when she was alive he had pressed her too hard. (W.)

On this passage the Scholiasts remark: 'She specified in her will that with her body naked and oiled she should be carried to burial by her legacy-hunter, himself also naked, in the thought that possibly in her death she might slip from the shoulders of the man whose importunity she was never able to avoid while living.' This matter is more fully discussed by the Roman Jurisconsults on *Digest*, XXVIII. vii. See *Digest*, VII. viii. 8.

6. It should be added that, if mention of place be inserted in promises without mention of definite time, it is understood that as much time is allowed for the fulfilment of the promise as will allow one conveniently to arrive at the place where the promise is to be carried out. See *Digest*, XLV. i. 73 pr.; *Ibid.*, 137, § 2.

7. The addition of a definite time has the result that the effect of an obligation is not put forth before that space has elapsed, or, in other words, that the obligation can be required only on the appointed day.

8. In conclusion, the difference should be explained between conditional promises and pacts. Now they agree in this, that as the former are not binding, if the condition is not met, so the latter do not obligate one party, when the other party has not satisfied the terms of the agreement. This is the reason for the old saying that the particular articles of contracts are like conditions in each contract. Yet some make an exception in case the condition serves no purpose, being added only for form and by way of completeness, so to speak. Yet such an exception should not be extensively indulged in, lest it be extended to the point of glossing over important articles of a pact, and because it is not presumed that useless clauses are inserted in pacts. Gramondus, *Historiarum Galliae*, Bk. XVI, states, regarding the secret articles added to the marriage pact between Charles, Prince of Wales, and Henrietta of Bourbon, that 'they were added more as a matter of form, as by so doing the Most Christian King secured favour with the court of Rome, while neither party believed that the pact was added with the intention of keeping it'.

Promises which have an arbitrary condition agree with pacts in this respect, that in both the one party must perform something, if he desires to exact from the other his promise or agreement. But the two differ in this respect, that in a promise under an arbitrary condition,¹ it appears to be no concern of the promissor whether or not the condition is fulfilled; at any rate he has no desire to constrain the other party to fulfil it, but leaves it to his own choice. But in a pact I undertook to perform something on the assumption of something being performed by the other party; and hence, if he does not do so, not only am I not bound to perform anything, but I can also compel him to perform what was agreed upon.

¹ [For *conditione* read *conditio*.—Tr.]

CHAPTER IX

ON THE AGENTS FOR CONTRACTING OBLIGATIONS IN GENERAL

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| 1. We can make promises and pacts through another. | 5. How far a man can accept for another. |
| 2. The different kinds of commissions. | 6. Acceptance cannot be made by heirs. |
| 3. Supposing an agent die before the matter is concluded. | 7. On a burden added to a promise. |
| 4. The difference between an agent and a mediator. | 8. The division of pacts. |

It very frequently happens that promises and pacts are ratified by the intervention of other men. It must, therefore, be made clear at this point what should be observed in such cases. Now it is certain that a man is obligated, not only when he personally makes known his consent to the one to whom he wishes to be obligated, but also when he signifies it through another man whom he appoints the interpreter or commissioner of his consent. Such a person acts in the business like an instrumental cause, in that he not only carries on all negotiations upon the authority of the other, but also acquires no right for himself, and contracts no obligation touching the person with whom he is appointed to treat; but he secures a right for the man whose affairs he is conducting, and he is bound to him to conduct his affairs with all fidelity. For those actions, for the undertaking of which we have clothed another with authority, and have openly proclaimed that we will acknowledge them as our own, also produce an obligation in us and furnish us with a right, and are therefore regarded as ours. But that a man may treat effectively with such an agent, he must be assured that we have seriously chosen him to be the spokesman of our purpose, and that we will hold¹ whatever he does as our own acts. On these general principles depend most of the rules, given in Roman laws, on *acts of trade* and *acts of agents*. Here also belongs the heading *quod iussu* in the *Digest* [XV. iv].

2. We usually commission a person to conclude agreements in our stead, either with the general instruction, that he do whatever will appear to him to be of greatest advantage to me, or with an express designation on the manner and substance of the agreement which he should reach. If the first is done, I shall be bound by whatever agreement he has reached, in good faith, on the business at hand. We say 'in good faith'. For I shall in no way be bound by what he has done in bad faith, and by any fraud that he has perpetrated to my undoing, since,

¹ [For *habitura* read *habituos*.—Tr.]

in vesting him with authority, it is understood that I presupposed his good faith as a condition. Indeed, good faith includes this further condition, that what he does be not opposed to the honour and advantage of his agent, at least so far as present conditions go. Ignorance of this indicates a negligence comparable with malice. The same is to be held of blank papers, signed with our name, which we often give into the hands of our agents for them to write in the terms of our undertaking. These will not obligate us if anything is written into them which had nothing to do with the matter of the commission, and to which it can 306 be presumed that we would not have consented.

A famous instance of a fraud committed by means of a blank paper of this kind is in Zonaras, Bk. III, and Glycas, Bk. IV, on Romanus Lacapenus, concerning the patriarch Tryphon, who signed his name to a blank, in order to prove that he was not ignorant of letters, as was falsely charged. On the page thus signed his enemy of Cacsarea filled in his resignation to the patriarchate, which the emperor took as an opportunity to eject him from that office.

In Gunther, *Ligurius*, Bk. VI [656 ff.], there is a criticism of the issue of such signed blanks: 'Surely it is a fair deed¹ and worthy of the head of the church to issue papers in blank filled in with only his name! These the dispenser may fill in with any kind of idle charge, when he wishes to trump up false crimes against the already unfortunate.'

When, however, certain limits have been prescribed, my representative cannot obligate me beyond them.

But if two sets of orders are given a man, the one open, to be shown to the other party to the contract, the other secret, instructing only the agent, and stipulating how far he should proceed, the question may arise whether the agent obligates his employer if he exceeds the secret instructions, and yet keeps within the strict letter of the open. The reply is that he can. For by the open instructions I bind myself to the third person, the party to the contract, to ratify what is done by my agent; in my secret instructions I bind my agent not to depart from them, and, if he does so, he shall be liable to me for the loss I suffered because he departed from my orders. But I am obligated to the third party for what the agent did. Were this not true, there could be no safety in dealing with agents, since there would always be the fear that the secret instructions were different from the open, and no easier excuse could be found for invalidating everything done by agents and tricking people with idle arrangements. See the anonymous work² *Mémoires touchant les Ambassadeurs*, pp. 582-3 and 588. In this case also it is understood that the agent did not depart from the secret instructions out of bad faith.

¹ [For *Anpulerum* read *An pulerum*.—Tr.]

² [By Abraham de Wicquefort.—Tr.]

3. But if we have used an agent to carry our promise to a man, and the agent happens to die before our will has been expressed to the third party and he has accepted it, it is clear that the promise can be recalled. For the promissor had expressly desired that the obligation be contracted through the direct conversation of his agent. And so, if the agent should have happened to mention to a third person the business he had in his instructions, and it should come through this party to the ears of the person for whom it was intended, I am still not obligated by that fact. For it was not my wish to be obligated by the word of that third person, nor has he so clear a knowledge of my will that he can make the other man sufficiently certain of it. But the matter is entirely different in the case of a courier to whom letters expressing my will are given to be carried to another. For even if he dies before the letters are delivered, and they are handed to the man by some one else, that in no way interferes with the contraction of the obligation. For the courier is not properly the instrumental cause for contracting the obligation, but only the conveyer of the binding instrument, that is, the letters, and it is of no concern to either of the contracting parties by whom they were conveyed and delivered. Cf. Grotius, Bk. II, chap. xi, § 17.

4. But in other cases as well, it makes a great deal of difference whether a man acts as a go-between in the negotiations of other men and as a pure agent and transmitter of another's decision, or as a real mediator who may to some extent interpose his own judgement. This Grotius, *loc. cit.*, expresses as follows: '[. . .] The servant who has been chosen to report the promise, or the agent authorized to make the promise himself.' (K.) In the former case, should I withdraw the
307 promise before it has been accepted by the other party, my withdrawal will hold good, even though it be unknown to my agent, and he, because of his ignorance, proceeds to indicate my desire to the parties, as it was first stated. Cf. *Digest*, XL. ii. 4. But when a man intervenes in another's affairs in the second capacity, unless the withdrawal is known to him it will be of no avail, and he puts his principal under no obligation, in case he has completed the execution of the business. Because, of course, the principal had decided that the offer of his promise should be made known to the other party by the act of his agent, who was to be not only the bodily conveyer of the terms, but also allowed to exercise judgement. Here apply the opinions of the Roman Jurisconsults, *Digest*, XVII. i. 15. Cf. *Digest*, I. xviii. 17; Costalius on *Digest*, III. iii. 65; [*Constitutions of Clement*, I. iv] *De Renunciatione*.

It is felt that the same distinction applies in the question, whether a gift is valid in case the donor dies before it is accepted. Authorities say that it is, if the agent be of the first kind, since nothing was lacking on the part of the donor; but they deny that it is, if he be of the second

kind, since the gift had not been entirely fulfilled in the lifetime of the donor, and they say rather that merely an order had been given; in other words, because he had not yet offered the thing, but had only commanded that it should be offered. Yet compare Ziegler on Grotius, Bk. II, chap. xi, § 17, where he renders the opinion that the gift can be accepted, if the agent had already offered it in the lifetime of the donor. And yet it is not clear on what ground the recipient would delay accepting it, if the gift had been offered.

Grotius, *loc. cit.*, feels that the same principle should be used in deciding the argument as to whether an agent can bring an action for a commission against the heir of the man who gave the commission, to recover expenses incurred in carrying out the commission after the death of him who gave it. The author of the *Ad Herennium*, Bk. II [xiii], says that on this question the praetor, M. Drusus, allowed an action, and Sextus Julius denied one.

5. Now since through an agent we can signify our consent to another man, the further question arises whether a third party can accept a promise in the place of the man to whom it is made. This has nothing to do with the person who has been authorized by the mandate from us to make the acceptance in our name, for we are supposed to have done ourselves what we do through such a person, and it is felt that we desire what we have left to his own pleasure, if he also desires it. But the question concerns those who have received no mandate from us about the matter. It is the opinion of Grotius, Bk. II, chap. xi, § 18, that a distinction should be made between a promise made to me about giving something to another, and a promise conveyed in the name of the person to whom the thing is to be given; that is, whether the promise runs: 'I promise you that I will give to Seius,' or 'I promise I will give to Seius with you as arbiter and witness'. In the former case it seems the natural meaning of such a promise, that upon my acceptance I acquire a right to see that the thing reach the other person, if, indeed, he has accepted it, so that in the meantime the promissor cannot recall his promise. But I, as the one to whom the promise was actually made, may remit it, provided the other person has not already accepted it. And so the promise amounts practically to this: 'I will give to Seius, if you so desire.' In such a case it assuredly seems to lie with you, whether you wish to pass the promise on to Seius or, by refusing it, to destroy it, at least so far as its passing to him through you is concerned. For if it is my firm intention to give it I can do so without your intervention. But if you show that the offer is acceptable to you, I shall be unable to withdraw it before Seius has been informed of my promise. And when he has accepted the promise it will be valid by natural law.

Yet the Roman laws declared such stipulations as looked only to

the use of a third party void if there was no added penalty, their reason being that stipulations are invented in order that a man may
 308 secure something that is of value to himself; and if it is given to another it is of no value to the stipulator. But if the penal stipulation be couched like this: 'Unless you give Seius one hundred something or other, you will pay me by way of penalty eighty,' I have thereby acquired this much right, that, if the first condition is not met, I may on my own score claim eighty. But, as a matter of fact, this seems to have been made a positive rule, so as to reduce the number of suits, for a judge could justly rebuke the importunity of a litigant because he troubled the court and others with a matter in which he had no direct concern. And although, strictly speaking, it is some concern of ours if another receives any benefit through us, for on this score he is under an obligation of gratitude to us; yet it seemed inconsistent that an action be allowed for the recovery of something in another's name when the person concerned could not recover it in his own name and that, therefore, an action be allowed whereby a man could put one person under obligation to him at the expense of another.

But, in the second case, when the promise runs: 'I promise I will give to Seius, with you as witness,' if you lack authority to accept the promise for Seius, no matter what you say by way of agreement, you have secured no right for yourself or for Seius, since he does not recognize your action as his own. And so it makes no difference whether or not the intervening witness assents to the promise, since it was not directed to his person. And since the acceptance secured no right for Seius, the promissor can recall his promise without injury, although not always without discredit to his constancy and truth.

6. But it is certain that if something be offered to a man who is still alive, let us suppose by letters or by an agent, and the man dies before he has accepted it, his heir cannot make the acceptance, and so such a promise can legally be withdrawn. For it appears that the promissor directed the acceptance to the will of the dead man, not to his heir, and it is not presumed that he thought of the possibility of his death, and so was ready to perform his promise in that eventuality. Since we are often quite willing to give a man something which he can also hand on to his heirs, and yet not willing to give it to his heirs directly; for it makes a very great difference who the man is that receives a kindness of us. See *Digest*, L. xvii. 191.

7. The last question to be added in this connexion is whether a man can add a burden to his promise after it has once been given. That at the first as many conditions can be added as one wishes, there is no doubt. And this can be done when the promise is not yet completed by acceptance, or is not rendered unchangeable and irrevocable by the giving of one's word. For the other party has not yet acquired

a right before the acceptance, and hence, just as the promissor can for that reason withdraw his promise, so he can also add a burden to it. But a completed gift allows no further conditions. See *Code*, VIII. liv. 4.

But what if the burden is added for the advantage of a third party? Suppose I should say: 'I will give you one hundred something or other, if you will meet the expenses of Seius' studies for a year.' In this case we maintain that this burden can be withdrawn by the promissor, so long as it has not been accepted by Seius, for no right can lie in Seius before his acceptance.

8. The most general division of pacts is this: That by some pacts a right is constituted which contributes to the use of all mankind, while by others a right arises which benefits only certain men. That is, the life of men would have been simple indeed and barbarous had not the gifts of nature been increased by their own institutions, whereby their relations were accorded striking advantages and no less signal grace. The most important of these institutions are speech, ownership of property, value, and sovereignty or command, all of which presuppose 309 a universal pact, tacit or express, whereby a fixed form has been assigned them. Reason, in view of the increase of the human race, advocated their introduction, on the ground of their great contribution to the grace and tranquillity of mankind. And so, now that we have noted the nature of pacts in general, we will examine those institutions and observe upon what covenants they rest, and what precepts of natural law, which we termed before hypothetical, proceed from them.

SAMUEL PUFENDORF
ON
THE LAW OF NATURE AND NATIONS
BOOK IV

CHAPTER I

ON SPEECH AND THE OBLIGATIONS THAT ATTEND IT

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| <ol style="list-style-type: none">1. How speech is used.2. The different signs.3. On the origin of speech.4. Words take their meaning by imposition.5. They are attended by an agreement.6. Which is either general of special.7. The origin of the obligation of baring our mind to another.8. What is truth and what is falsehood.9. Not all dissimulation is falsehood and so wicked.10. The nature and source of the right which is violated by falsehood.11. How far a part of the truth can properly be withheld. | <ol style="list-style-type: none">12. How far deception in things is lawful.13. On ambiguous speech.14. On mental reservations.15. How far one may speak falsely to children.16. It is allowable to speak a falsehood for the safety of others.17. How far is it allowed to heads of states to disseminate falsehoods.18. How far one may deceive the maliciously curious.19. It is allowable to lie to an enemy.20. Whether a defendant in court may deny his crime.21. What the defendant's counsel may do in this respect. |
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THIS one fact alone might be sufficient proof that man was intended by nature for a social life, namely, that he of all creatures has been given the ability to express his thoughts to others by means of articulate sound, which faculty can be of no logical use to men, unless they lead a social life. Aristotle, *Politics*, Bk. I, chap. ii, well says:

310 Nature makes nothing in vain. And the gift of speech (that is, such as is joined with intelligence and an understanding of what the words mean, and is not the mere repetition of borrowed sounds, like the chatter of parrots) is possessed by man alone of all animals (by the aid of which one man can most conveniently instruct and command another, and understand his orders, while without it scarcely any society, peace, or discipline among men, save of the most rudimentary nature, would be possible). For mere sound (or a kind of inarticulate noise) is but an indication of pleasure or pain, and is therefore found in other animals, for their nature attains to the perception of pleasure and pain and the intimation of them to one another. (Hence it follows that all sounds of animals are determined by nature and not by invention, as is the case with the speech of men.) But the power of speech is intended to set forth the expedient and inexpedient, and likewise the just and the unjust. And it is a characteristic of man that he alone has any sense of good and evil, of just and unjust, and the association of living beings who have this sense makes a family and a state. (J.)

Add Isocrates, *Nicocles*, towards the beginning. Pliny, *Natural History*, Bk. XI, chap. li [271]:

It is the voice that serves to express our sentiments, a power that distinguishes us from the beasts; just as, in the same way, the various shades and differences in language that exist among men have created an equally marked difference between us and the brutes. (B. & R.)

Quintilian, *Institutes of Oratory*, Bk. II, chap. xvi, also has an excellent discourse on this. Sophocles, *Oedipus at Colonus* [1188]:

By open words

A scheme of villainy is soon betrayed. (S.)

Also Pliny, *Natural History*, Bk. VII, chap. i, neatly points out the necessity of speech when he says: 'One man of foreign speech is not a human being to another.' Add Garcilaso de la Vega, *Comentarios Reales*, Bk. VII, chap. i.

Now since the weakness which is the lot of individual men can be removed most conveniently by the aid of others, and since another man cannot gird himself to bring me aid unless he first knows my needs, which knowledge can be gained most promptly by signs, and best of all by articulate words; it follows that in order that this instrument, of the greatest usefulness for the life of man, may gain its end in binding together the family of men, and that man may not become less sociable through the use of speech than through silence or dumbness, the law of nature is understood to command that *no man shall deceive another by the use of signs which have been instituted to express his thoughts*.

2. That we may trace this matter 'from the egg', as they say, we must realize that the nature of the way in which things come to our senses is such that not only do they give proof of their own presence, as it were, but they also are the means whereby the mind of man can arrive at a knowledge of other things. And this is either because those things have a natural relationship or connexion with what they suggest, or because beings, endowed with perception and understanding, without regard for their natural connotation, have vested them with notions, by which the images of certain things are presented to the mind. As a consequence of this there arises the distinction between natural signs and such as secure their power by agreement. Of the former the majority are found in the world about us, such as the dawn, which signifies the approaching sunrise, smoke, the presence of fire, &c. By agreement for their use in signifying something, men have adopted things and actions, certain movements and words, that is, articulate sounds made by the tongue and afterwards reduced to writing; and all these are understood to have some force, either with certain men, or the majority of mankind, or the world over.

Under the first general head can be classed lighthouses to guide the course of ships, which Nauplius once abused in dashing the tempest-tossed Greeks against the cliffs of Caphareus, that he might revenge the death of his son Palamedes. Add *Digest*, XLVII. ix. 10. Also other signs by which the course of ships is directed in the daytime, and channels and reefs are pointed out, as well as those on land routes, such as Herms, signposts, and the like. Thus, as we are informed by Barclay,

Argenis, Bk. I, the Persians used to light fires along the tops of their mountains and pass certain messages through their kingdom in a very short time. Add Polybius, Bk. X, chap. xxxix ff. [X. xliiv], *On Communication by Means of Beacons and Signal Fires*; Casaubon, *Letters*, DCCCXII, ed. Graev.; Julius Africanus, *Κετοί*, Bk. II [xxxvii].¹ See also Ferdinand Pinto, chap. lxi, on the horn kept in every house in Japan, which they use for signalling.

An infinite variety of such signs whereby different things are announced to the citizens is to be found everywhere in states. Of such are clocks, the ringing of bells, spears, wreaths, signs upon houses, and the like; in warfare the sound of bugles, the beating of drums, firing of
 311 shots, setting up of ensigns. Likewise certain gestures and movements are everywhere taken as signs for certain things. To make way before one, to rise from one's seat, to bow the head, and to kiss the hand are among most people signs of honour. To bare the head in address and to take off one's shoes are among some a sign of honour, among others of contempt. Thus in some places it is a sign of contempt to point with the middle finger, to turn up one's nose, to 'show the fig' as the Italians say, and there are many others of the same kind. To take a person by the beard is among some peoples an insult, among others a sign of honour, as with the Tartars, some of the races of India, and, as some think, among the ancient Gauls, according to Livy, Bk. V, chap. xli.

It is also customary to express by gestures desires for acts, the rendering of which requires a similar motion of the body; by such gestures strangers after a fashion supplement their ignorance of the language among foreign people. It is also generally accepted that we affirm something by a slight downward movement of the head, and deny it by a movement from side to side, while we reject it decisively by turning our back. Our use of motioning with the hand, or pointing the finger at a spot or object which we wish to designate, is perhaps more to be classed among natural than among arbitrary signs. It is well known, at least among such as have agreed upon their significance, what may be indicated by a nod, a wink, movements of the hands and feet, and it is not to our purpose to dwell upon them at length. Aeschylus, *Agamemnon* [1061]: 'Then wave thy foreign hand in lieu of speech.' (P.) Add Lucian, *De Saltatione*, where he tells about a dancer who depicted the amours of Mars and Venus so well by his dancing that he seemed to recite them; a certain foreigner thereupon asked Nero the gift of the dancer to act as his interpreter. Likewise Monsieur de Sancy, a French ambassador to Turkey, told of his once seeing two mutes, the one a Turk, the other a Persian, who could not understand each other

¹ [All derived from Aeneas Tacticus; see his fragments, no. 3 f. in the edition of the *Loeb Classical Library*.—Tr.]

because they used different signs and gestures; whereupon a third mute was found, able to serve as an interpreter between them.

3. But it is our chief concern here to consider speech, by far the most common as well as useful sign for the intercourse of men, invented that men may communicate to each other their concepts or thoughts. Because of his ignorance of the origin of mankind, Diodorus Siculus, Bk. I [viii], invents the following account of its birth:

Men at first led a rude and brutish sort of life, wandered up and down the fields, and fed upon the most agreeable herbs, and the natural fruits of the trees. And since they were attacked by wild beasts, they were taught by their own advantage to help one another, and as they came together out of fear they began to recognize little by little one another's forms. Their words were confused, without certain signification; but by degrees they spoke articulately, both making signs, and giving proper terms to everything upon occasion; and at length their discourse became intelligible one to another. But being dispersed into several parts of the world, they spoke not all the same language, every one using that dialect proper to the place, as his lot fell; upon which account there were various and all sorts of languages in the world. (B.*)

Lucretius, Bk. V [1027 ff.], gives an exactly similar account:

But the diverse sounds of the tongue nature constrained men to utter, and use shaped the names of things, in a manner not far other than the very speechlessness of their tongue is seen to lead children on to gesture, when it makes them point out with their finger the things that are before their eyes [...] Again, to think that any one then parcelled out names to things, and that from him men learnt their first words, is mere folly. For why should he be able to mark off all things by words, and to utter the diverse sounds of the tongue, and at the same time others be thought unable to do this? Moreover, if others too had not used words to one another, whence was implanted in him the concept of their use; whence was he given the first power to know and see in his mind what he wanted to do? Likewise one man could not avail to constrain many, and vanquish them to his will, that they should be willing to learn all his names for things; nor indeed is it easy in any way to teach and persuade the deaf what it is needful to do; for they would not endure it, nor in any way suffer the sounds of words unheard before to batter on their ears any more to no purpose. (B.)

He adds¹ that since brute animals were able to express different feelings with different sounds, why could not man as well, 'having voices and tongues, distinguish things by varying sounds to suit varying feelings?' (Add Diogenes Laertius, Bk. X [76]; Vitruvius, *De Architectura*, Bk. II, chap. i.) By such an account Lucretius seems chiefly to have wished to oppose Cratylus in Plato, who maintains that the man who gave names to things was a person of the greatest wisdom, a topic about which we shall speak later. And certainly those who believed that men in the beginning crawled up out of the earth, 'a dumb and filthy drove' [Horace, *Satires*, I. iii. 100], could scarcely give any other account of the origin of languages. For it is clear that no language is congenital with man, but that all men learn a language by practice. This is the reason why those who are born deaf

¹ [For *deneque* read *denique*.—Tr.]

are also dumb. And it is considered as good as a miracle to teach such a person to speak—a thing which has been done in our time in the case of the brother of Velasco, Constable of Castile, who, although born deaf, was taught to speak, write, read, and understand authors; and not long since Wallis of Oxford told of another such case.

Nor does it seem likely that some one man at the beginning fashioned any language in its entirety, with the relation of words carefully thought out and applied to things. Indeed, the majority of Christians are persuaded, on the authority of the Sacred Scriptures, that the original language was directly transmitted by God to the first men, whose children thereupon learned it by hearing; and that the difference in languages came by a miracle, while men were constructing the tower of Babel against the will of God. Add de Mornay, *Traité de la Vérité de la Religion chrétienne*, chap. xxvi. Some, indeed, question whether the language of Adam himself was supplied with all distinctions, and fitted to express every kind of thought, because the Sacred Scriptures mention expressly only the names which he gave to animals. And likewise, it is well established that most languages were at the first but poor and simple, and only in the course of time did they become rich and polished in form; that, indeed, in the course of time they have experienced great changes, and from their debasement and confusion not a few new ones have arisen in times not far removed from us. Cf. Hobbes, *Leviathan*, chap. iv.

4. But it is clear that the power which words have of bearing this or that meaning, that is, of giving rise to a certain idea in the mind, is theirs not by nature, or any intrinsic necessity, but arises from the mere judgement and institution of men. For otherwise no reason could be shown for the same thing being expressed in different languages by different words. This is also true of the different forms and outlines of letters. On this point Augustine, *On Christian Doctrine*, Bk. II, chap. xxiv, has this to say:

A single letter, shaped like a cross, means one thing among the Greeks, and another among the Latins, and this not by nature, but by agreement and consent regarding its value. Therefore, when a man knows both languages, if he wishes to indicate something in writing to a Greek, he employs this letter in a different value from that which he places upon it in writing to a Latin. Furthermore, the word *beta* means a letter of the alphabet in Greek, but in Latin is the name of a vegetable.¹ And when I say *lege*, in these two syllables a Greek understands one thing,² a Latin another.³

Nor is it any proof to the contrary to believe, as is recounted by Philo Judaeus, *On the Creation of the World*, that Adam gave animals their names with mature judgement and not at random, choosing them from each animal's own nature, and carefully describing thereby their characteristics, so that the nature of each could be gathered from the

¹ [The beet.—*Tr.*]

² ['Speak.'—*Tr.*]

³ ['Read.'—*Tr.*]

first sound of the word. For even if we grant that animals and some 313 other things (for no one can easily prove this of everything) were given names descriptive of their nature or outstanding characteristic, yet the very roots from which names are derived denote the underlying idea only arbitrarily. For example, although the reason given by Adam for naming his wife 'Heva', was that she was the mother of all living men, yet the word *hava* gets its meaning 'to live' only by imposition. And although in all languages cognate names are given to cognate things, along with the preservation of a conformity of inflection which is called analogy, this is by no means always preserved, many words following their own course of inflection; and even that analogy, which consists of a special inflection and arrangement of words, is itself due to the pleasure of men.

Quintilian, *Institutes of Oratory*, Bk. I, chap. vi [16]:

But we must remember that the course of analogy cannot be traced through all the parts of speech, as it is in many cases at variance with itself. For analogy was not sent down from heaven, when men were first made, to give them rules for speaking, but was discovered after men had begun to speak, and after it was observed how each word in speaking terminated. It is not therefore founded on reason, but on example; nor is it a law for speaking, but the mere result of observation; so that nothing but custom has been the origin of analogy. (W.)

In the *Cratylus* [p. 383 A B] of Plato, Cratylus advances the following view: 'Names [. . .] are natural and not conventional' (which is absurd), 'not sounds which men, giving articulation to a portion of their voice, agree to utter'; (This may be accepted as true in cases where men, contrary to common usage, choose to give special names to things in order to make sport for others, as is done by strollers and vagabonds. In such cases fictitious names are opposed to true, in that they are applied to a thing or person in opposition to general usage.) 'but there is a truth or correctness in them, which is the same for Hellenes as for barbarians' (which is likewise false). To which Hermogenes replies [p. 384 c]:

I cannot convince myself that there is any principle of correctness in names other than convention and agreement; any name which you give, in my judgement, is the right one, and if you change that and give another, the new name is as correct as the old: just as we frequently change the names of slaves (which we allow, provided that entails no prejudice to the common agreement); for there is no name given to anything by nature; all is convention and habit of the users. (J.*)

But what Socrates maintains, in the passage already referred to, in support of the theory of Cratylus, does not settle the matter, for example, when he proposes as absurd, that, if I call a 'horse' what we commonly call a 'man', the same object will properly be called both 'man' and 'horse' [p. 385 A]. A brief answer to this is that words used by people have a sense given them by popular usage, which sense indi-

viduals cannot change to the confusion of the same; and on this topic more anon. This further argument of the same philosopher is also erroneous: If the whole proposition may be false, a part also, for example, a word, may be false [p. 385 c]. For in a single word no falsity can exist of the kind that commonly appears in an entire proposition. His following lengthy discussion on the correct use of terms is proper only in the case of the derived terms, but not of roots. Furthermore, since different peoples express the same things by different words, those that denote the same thing very often have entirely different etymologies.

- 314 For instance, the Greek word for 'god' (θεός) is derived from the verb 'to run' (τρέω), because the ancients believed that the stars, which are always moving in their course, were only gods. But what relation is there in Latin between *deus* and *currere*? So the word for 'man' (ἄνθρωπος) signifies one who meditates on what he sees (ἀναθρῶν ἀὶ ὁρωπε). But can the Latin *homo* be derived in any way from *contemplatio*? The word 'soul' (ψυχή) is related to the verb 'to cool' (ἀναψύχειν). Is *anima* then from *refrigerare*? And others can be adduced to the same purpose. In a word, however much a man may busy himself in tracing etymologies and reasons for words, yet when he comes to their simple and root forms, he is forced to recognize no other influence than pure imposition. On this subject we can add the words of Quintilian, *Institutes of Oratory*, Bk. I, chap. vi [34]: 'Or shall we allow *homo*, "man", to be from *humus*, "the ground", because he was sprung from the ground, as if all animals had not the same origin, or as if the first men had given a name to the ground before they gave one to themselves?' (W.)

It is indeed amusing that, when Socrates was asked to explain the words for 'fire' (πῦρ) and 'water' (ὕδωρ), he could only say that they owed their origin to other languages. And he himself confesses that no further inquiry is possible on the derivation and reason for words, when one has arrived at 'those things which are, as it were, the elements of all other ideas and names';¹ even though he afterwards shows much cleverness, all to no end, in investigating the reasons of roots. And yet after he has delivered himself at great length, as if in defence of the position of Cratylus, he concludes by leaving it in doubt. Sosipater Charisius, *Instit. [Ars] grammatica*, Bk. I [p. 50, 25 ff. K.], quotes Varro to the following effect:

The Latin language is made up of nature, analogy, custom, and authority. The nature of verbs and nouns is immutable, and turns over to us not a bit more or less than it has received. For if any one should say 'scrimbo' for 'scribo', he is shown the error of his way not by virtue of analogy, but by the constitution of nature herself.

The same thought is found in Diomedes, Bk. II. But for my part I do not understand that necessity of nature. Unless we wish to say that the Latin tongue has naturally a certain remarkable agreeableness,

¹ [Cratylus, p. 422 A.—Tr.]

which accords marvellously with the judgement of the ear, and that is the reason why the ear at once rejects harsh combinations of letters in that language. See Huartes, *Scrutinium Ingeniorum*, chap. xi. The reason alleged by P. Nigidius in Gellius, Bk. X, chap. iv, to prove that words get their meaning by nature, is certainly unfounded. Arnobius, *Against the Heathen*, Bk. I [lix]:

No language is naturally perfect, and in like manner none is faulty. For what natural reason is there, or what law written in the constitution of the world, that *paries* should be called *hic*, and *sella haec*?—since neither have they sex distinguished by male and female, nor can the most learned man tell me what *hic* and *haec* are, or why one of them denotes the male sex while the other is applied to the female. The conventionalities are man's. (B. & H.)

Grotius, Bk. III, chap. i, § 8, on the other hand, rightly opposes those who have declared that the difference between things and words is that words are the natural signs or expressions of thoughts, while things are not. Now if the meaning of this assertion is that words were instituted to the end that they should be signs of concepts, and that therefore it is their nature and essence to signify something, while it is merely an extrinsic attribute of other things that they are used in place of signs, then, indeed, it must be admitted quite freely. But if its meaning be that words have by their very nature the power of signifying something, while things have not, the assertion is false. It is, on the contrary, the case that words by nature and without human imposition signify nothing, unless it happen to be some confused and inarticulate [*ἀναρθρος*] word, as in grief or laughter, which should rather be called mere sound than speech. But if the statement means that man has this endowment above all other animals, that he can express the thought of his mind to others, and has invented words for that purpose, then it is true; although it should be added that he can do this not merely by words, but also by nods and the like. This last is the way in which some mutes very ingeniously convey their thoughts. Therefore, in *Digest*, XXXIII. x. 7, § f. [XXXIII. x. 7, § 2], it is held that those who cannot 315 speak may express themselves by their very attempt and effort at sound, and by *τῇ ἀνάρθρω φωνῇ* (the inarticulate voice). And in *Decretals*, IV. i. 25, it is said that dumb persons may marry, the consent being expressed without words, that is, by nods. Nay, Pliny, Bk. VI, chap. xxx, tells us that among some peoples of Ethiopia nods and movements of the limbs take the place of speech. Add Quintilian, *Institutes of Oratory*, Bk. XI, chap. iii. On the symbols used by the natives of Peru under the Incas, see Garcilaso de la Vega, *Comentarios Reales*, Bk. VI, chap. ix.

Under this head fall also those symbols which denote not sounds formed by the tongue, that is, words, but the things themselves. This may be because they have some likeness to the things they express, as in most of the Egyptian hieroglyphics, or because the imposition of man

has endowed them with such a force, as is the case with the Chinese characters, which express whole thoughts and sentences.

In this connexion it will not be amiss to make some observation on that imposition whereby a fixed and special name is customarily given to persons, as well as to places and to other things. The purpose of this is that one man may be distinguished from another, one place, one city, or country, from another, and that by such a distinction men may know what each of them may be judged to have done or said. Now just as the proper terms of other things follow the nature of appellative or common nouns, as they are called, so it should be observed regarding proper nouns, that the right to impose them belongs to those who have power over others. Thus it is customary for parents to give names to children, masters to slaves, kings to subjects whom they reward with some honour. When this has been omitted by those in authority, or if many persons are using the same name, every man will have the right, in order to avoid ambiguity or mistake, to take to himself some distinctive name. But just as a man is not allowed to take another name, should it defeat the purpose of their imposition, or should such a change work to any one's loss or prejudice, and to his own probable danger and suspicion, so it will not be permissible to conceal one's name, except in case such a concealment does no injury to the right of another, but works some advantage, or else wards off from us some loss and danger. And this according to those principles which we shall shortly lay down upon the obligation to tell the truth. Add Valerius Maximus, Bk. IX, the last chapter [xv]; and Bk. VII, chap. iii, 8-9; the oration on the same point of M. Antonius Maioragius; Casaubon, *Exercitationes in Baronium*, Bk. XIII, n. 13.

5. Now just as all signs, except natural ones, denote a certain thing from imposition, so this imposition is attended by a *συνθήκη, ὁμολογία* [consent, agreement], and pact, by reason of which such signs must be used to point out one and only one thing. And a pact of this sort must be understood in the case of all things used for signs, no matter what origin we posit for human speech. For even though we should hold that the first languages were directly breathed into men, yet any man had his own faculty to speak, and could use it as he pleased, in applying certain words to certain things; and that faculty could not have come into use had there not been an agreement among men, that every man would use them in a uniform way and express the same things with the same words. For since a man in a state of natural liberty does not hold his faculties subordinate to another man, but may use them according to his own judgement, another would have no right to demand that I should use them in this way and no other, in order that
 316 he may thereby be able to judge the meaning of my mind, unless there were some pact between us on the matter. The force of this pact extends

no farther than to produce a probable certainty as to another's thoughts, not an infallible one, since men are skilful in dissimulation and deceit.

A saying of Archidamus in Plutarch, *Laconian Apophthegms* [xix], concerns the matter before us: 'A sheep always uses the same voice, but a man various and many, till he hath perfected his designs.' (G.) Moschus, *Idylls*, i [8-9]: 'Of an ill-disposition, but fair spoken, for he means not what he says'; (E.) yet it is assumed that a man really wanted what he expressed by these signs. And so the effects of a right follow upon the consent of a man, as it is represented by signs, even though it happens that the intrinsic purpose of his will differs from the signs. Add Grotius, Bk. II, chap. iv, § 3. Were this not the case, their use would be entirely cut off. But since the mutual exchange of duties among men could not be exercised unless every one could be certain of the will of men, and since human nature could not make this possible in any other way than by signs open to the perception of the senses, it followed that their use had to be sanctioned and protected by a special agreement, so that each man might be certain of what he could demand of another. An instance may be cited in this connexion from Livy, Bk. XL, chap. xlii: 'On the request of the people of Cumae that year, leave was granted them to use the Latin language in their public business, and that their auctioneers should have a right to use the Latin language in selling.' (M.) Although in general the Romans were zealous enough in spreading their language. See Valerius Maximus, Bk. II, chap. ii, § 2.

6. This agreement on the use of signs, and especially of words, is either *general* or *special*. The former applies among men who use the same language, so that they express certain things, especially such as concern daily use and commerce, by certain words which the common use of the time approves. For according to Horace, *Art of Poetry* [70 ff.]: 'In usage is the arbitrament, the right and rule of speech,' and at its will 'many a term which has fallen from use shall have a second birth, and those shall fall that are now in high honour.' (W.) Quintilian, *Institutes of Oratory*, Bk. I, chap. vi [20]: 'To retain words that are obsolete and disused, is a species of impertinence, and of puerile ostentation in little things.' (W.) Add Gellius, Bk. I, chap. x. Sextus Empiricus, *Against the Mathematicians*, Bk. I, chap. iii [82]: 'Now there are all manner of changes in sounds, and have been, and will yet be. For the age loves change not merely in plants and animals, but also in words.' *Idem*, Bk. I, chap. x [178]:

As in a state where a certain kind of money is locally current, whoever employs it may conduct every kind of business there without let or hindrance, while the man who does not accept this, but mints some new variety and wishes to use it as money, is a fool; so also in life, he who is unwilling to follow the kind of speech which is customarily employed, as he would use the current money, but coins a new language for himself, is not far from being a mad man.

Especially since no use can be made of speech, unless it is understood by both parties. Cicero, *Tusculan¹ Disputations*, Bk. V [xl]: 'We are all deaf with regard to those languages which we do not understand.' Ovid, *Tristia*, Bk. V, el. vii [V. x. 37]: 'Here it is that I am a barbarian, understood by nobody.' (W.)

It should also be noted, in this connexion, not only that many languages differ in dialects, but that words of the same language have different meanings in different places. The meaning, therefore, of such words will be judged according to the usage of the place where the business is being conducted, unless it appears that a stranger has not yet dropped his native speech and conformed to the parlance of the place.

317 Thus in one place and time some words convey an insult, but not in another. It is well known that this is true of the word tyrant. The word barbarian among the Greeks and Romans was a mark of disdain, yet King Theodoric in an edict applies it to his nation. Also in many passages of the *Law of the Burgundians* the Burgundians call themselves barbarians.

It should further be observed that many words have, beside their principal meaning, another accessory one, as it were, which carries with it an expression of our judgement or passion and esteem. Hence it is that of many words which are synonymous, so far as their principal meaning is concerned, some convey an insult and injury and some do not, all because such an accessory meaning accompanies some, and is wanting in others. Thus, if I say to a person, 'You are lying,' I not only mean that his speech does not agree with his thoughts, but the connotation of my words is that he did it with evil intent, and to work us an injury. Likewise, if I call a man an impostor and ignoramus, I insult him because those words connote contempt and censure, and because there are words with which I may, without insulting him, express the fact that he has done me an injury or is ignorant of some matters, and which, for this reason, would have expressed the facts in the case without the connotation of censure.

Sometimes this connotation arises not from the general imposition of men, but from the tone of voice (which is of one kind for instruction, another for flattery, a third for reproof), the expression of the face, gestures, and other natural signs, all of which play no little part in changing, decreasing, or increasing the principal meaning of words. Likewise, figurative language usually connotes passion in the speaker, while a direct statement merely expresses the simple fact. 'Is it then so hard a thing to die?' [Vergil, *Aeneid*, XII. 646] means more than 'It is not so hard a thing to die'; for the first statement suggests a contempt for death. It is due to this connotation that some words are considered obscene, and others not, although they signify the same

¹ [For *Tuss.* read *Tusc.—Tr.*]

thing, nay, even though there may be no disgrace in the thing itself. One reason for this seems to be because some words describe a thing or act a little more generally, others more distinctly and in a descriptive manner, as it were. Therefore, when a man uses the latter kind of word he immediately betrays for that thing or act a lust, and delight or approbation unworthy of a respectable man. Sometimes also words derive their obscenity from the fact that they either signify contempt for the thing, or are used only by men of a low type and towards persons who are shown no respect. See also Cicero, *Letters to Friends*, Bk. IX, ep. xxii. Casaubon, *Commentary on the Satires of Persius*, p. 342, questions whether it is even proper to use obscene words in the criticism of vices, as is the custom with the writers of satire.

Such words as have received a particular meaning from common usage, or which are unknown to common usage, acquire their force by special agreement. To this kind belongs the vocabulary of artisans, or the terms of an art which were either invented, or separated by a new meaning from common usage, because of the great number of articles, or from mere fancy. The nature of the business at hand can easily prevent any one of those who are skilled in the art from being deceived by them. Among the unskilled they should be described by words in common usage. This is, furthermore, necessary if the workers themselves are uncertain of their use, or if a man for certain reasons wishes to invent new words, or to give a new sense to old ones. Add Bacon, *The Advancement of Learning*, Bk. III, chap. iv, at the beginning. Nay, some people can and do invent words and symbols of things for their 318 own use, or give a new meaning to common words, so that these can be understood among themselves, but not by others. (How far this is allowable will be clear from what follows.) They serve their purpose if they show the true meaning of my mind to those with whom I have made a special agreement on their use, and this also holds good of other signs, defined by a special imposition of certain men. This is especially¹ true of military signals. Sometimes their place can be taken by silence. Thus Polyænus, *Strategemata*, Bk. I [xi], tells us that the commander of the Arcadians in their night attack upon the Spartans at Tegra gave his soldiers a sign that they should cut down those who asked for a password. Accordingly the Arcadians asked for none, while the Spartans, not recognizing their own men at night, and therefore asking for a password, were killed by the Arcadians. The same writer, Bk. V [xvi], also recounts how Pammenes tricked his opponents by using the signals of the trumpet in their opposite sense, for he commanded his troops to advance on the call for retreat, and to withdraw on the signal for attack.

7. The further point must be carefully observed that, although we are bound by this general and special convention to use words and

¹ [For *comprimis* read *cumprimis*.—Tr.]

other signs as agreed upon and according to general custom, we are not in the least obligated by that fact to disclose to every one all our thoughts and ideas. To this thought may be applied the saying of Apollonius of Tyana, in his life by Philostratus, Bk. IV, chap. xi [33]: 'Palamedes invented writing not only in order that people might write, but also in order that they might know what they must not write.' (C.*) But for this there is need of another obligation which arises either from a special pact, or from a general precept of natural law, or, it may be, from the nature of the business at hand, for the undertaking of which use is made of speech. Thus, if I undertake the instruction of some person, I am obligated by the contract of letting and hiring, to acquaint him with all that pertains to that subject. If I send a person to ascertain the state of a certain thing, he is bound by agreement to inform me of all that he has found out about it. If I must fulfil for a man an office of humanity which is performed by speech, it is obvious that my words must conform to my thoughts. If a man has undertaken to give a history to the world, because of that common obligation whereby we are bound to promote the advantage of others, he will not be allowed to record anything he knows to be false. Of like nature is that general obligation to express our thoughts by clear signs, lest by doing otherwise others receive an undeserved injury. Finally, in the commercial relations of men, and in all undertakings in which a right or obligation arises from agreement, in points which concern the matter at hand our thoughts must be clearly expressed to those with whom we are dealing. For if this is not maintained, there remains no proper way to complete such arrangements.

But since it is not always the case that any of the rules mentioned above require that I make known my thoughts about affairs, especially such as concern me alone, it is obvious that I am not required to indicate to all men everything that I am turning over in my mind, but only such things as the other person has a full right to know, or at least a right which corresponds to the obligation lying upon me. And so I can rightfully keep silent upon what another has no right to learn of me, and which I am under no obligation to disclose. Aeschylus, *Choephoroe*¹ [582]: 'Silent if need be or the right word speaking.' (P.) Nay, when it works no injury to the right of another man, and neither my advantage nor that of another man can be secured nor safety assured in any other way, I shall be able to use signs that represent something very different
 319 from my real meaning. For since that agreement about using signs in a special way looks to other obligations, the fulfilment of which is sought by those signs, it follows that when they cease, there is no reason why I may not use those signs in a different way, if I work no man an injury and can find no easier way to advance my own interest and that of other men.

¹ [For *Coephoris* read *Choephoris*.—Tr.]

8. Upon these principles one can easily decide what is the *truth*, which all men are obligated to speak, and what is a *lie*, a thing so detested by all honourable men and held among the basest reproaches to be thrown up to a man. Sophocles, *Trachinian Women* [454]:

The name of liar
Is to free-born man a deadly brand. (S.)

Add Michel Montaigne, *Essais*, Bk. I, chap. ix; Bk. II, chap. xviii. Now the former consists in this: That our signs, and especially words, should in a convenient way represent our thoughts to another, in whom there lies a right to know them, and upon us there lies a perfect or imperfect obligation to disclose them to him; and this to the end that he may gain some advantage from his knowledge of my thoughts, or that he may not experience an undeserved loss by my signifying the opposite. And so to logical truth, which is a conformity of words with facts, ethical truth, which we are now discussing, adds the intention and obligation of the speaker. Hence it is that a man who speaks the truth by error or lack of foresight has not observed ethical truth, but only spoken logical truth. And he who has spoken the truth without regard for his obligation or the right of another will be held to have done more¹ chattering and gossiping than speaking of the truth.

It is easy to conclude from this what is the nature of a lie; that is, when signs or words represent our thought as being something very different from what it really was, and yet the man to whom those signs are directed had a right to know and judge of them, and an obligation lay upon us to make them in such a way that he would understand our feeling. I hold that on this reasoning it can be more clearly understood why I must by my words express my thoughts clearly, than if we should derive the evil of a lie from that general precept of natural law, namely, that 'No one should be injured', as if all the force of a lie lay in the injury it works. For, strictly speaking, a man is not injured if things are not done for him to which he has only an imperfect right, yet the violation of such a right is enough to make a lie. In the same way there is little clearness in the reason put forward by Philostratus, *Life of Apollonius of Tyana*, Bk. II, for the evil of a lie, when he writes that among the Hindus, if any one of them who had taken up the study of philosophy was ever detected in a lie, his punishment was that he could never fill another magistracy or office, 'because by his lie he had cheated the common society of men.'² But as in all acts which diverge from the law, error, imprudence, and rashness are distinguished from malice, so it

¹ [For *poti* read *potius*.—Tr.]

² [The reference is apparently to II. xxx, but if so the original has been somewhat misunderstood. It runs: 'For whenever an Indian dies, there visits his house a particular authority charged by the law to make a record of him, and of how he died, and if this officer lies or allows himself to be deceived, he is condemned by the law and forbidden ever to hold another office, on the ground that he has counterfeited a man's life.' (C.)—Tr.]

cannot properly be said that a man lies, unless, with guile and malice aforethought, he tells another things different from the thoughts of his mind, to the end that he may injure him or deceive him by a false hope. And so when a man who has been deceived by another, tells what is false, although he himself believe it to be true, he is passing a falsehood, but he is not lying. Yet the man who spreads abroad among others everything that has appealed to his hasty credulity may not escape the censure of rashness and folly. And the imprudent spreading of another's falsehood, or of something imperfectly understood, can carry the obligation to make good the damage caused by it, especially when it approaches closely serious fault [*culpa lata*]. See the case of Caesellius Bassus, in Tacitus, *Annals*, Bk. XVI, chaps. 1 ff.

320 9. Now that the real principle of truth and of a lie has been discovered, it is clear that those are mistaken who claim that there is no difference between a lie and an untruth; that a man who says something different from his own thoughts always lies; and so assert that it is essentially base to say anything different from what you think. Of course it is an untruth for you to use words in such a way that another may gather from them a meaning quite the opposite of your real thoughts. And yet, if another man has no right whereby he should know exactly what is in my mind, and if he receives no hurt beyond his desert, there is no reason why, if it is to my advantage, I should not use the words in question to my own advantage rather than to another's. Therefore, every lie is an untruth, but not every untruth can be called a lie. And if this interpretation is to be given to the statement of Aristotle [*Nicomachean Ethics*, IV. xiii] that 'Falsehood in itself is base and censurable' (W.) there is no need for the limitation of Grotius, Bk. III, chap. i, § 9, who explains 'in itself' as what may be interpreted 'generally', that is, 'considering the thing without regard to attendant circumstances.' (K.) For an untruth, which may escape censure because of certain circumstances, should by no means be branded a lie. But that every lie, properly so called, is disgraceful, goes without saying.

In this connexion it should be observed that an untruth can sometimes produce the effects of a lie. This is the case not only when a man speaks the truth, yet as though he were lying, and, by the attitude, gestures, and nods with which his speech is usually animated, makes his audience believe the opposite of what he is saying; as Quintilian, *Institutes of Oratory*, Bk. I, chap. v, shows that, like a solecism, a lie can also be conveyed by a gesture, when one impression is given by the voice, and another by a nod or gesture; but especially when this is done by those who, because of their many lies, have destroyed all confidence in their word. Just as no one finds it easy to believe them, even if they make every endeavour to tell the truth, so they can use the diffidence

of others for their deception, because, in the belief that such men are always consistent in their knavery, they are imposed upon by their believing the opposite of what is said. This is like the boy in the fable who had so often tricked the farmers by his pretended cries for help that, when at last the wolf actually came, he could get no aid from them in his real need. [Aesop, *Fables*, 353]. Agesilaus used this scheme in his strategy. For since a general is not expected to announce openly what he has in mind, and therefore the enemy do not usually credit what is scattered about with little care, he cleverly used that impression to induce the Persian satrap to lead his troops in a different place from where Agesilaus had announced he would go. Xenophon, *Greek History*, Bk. IV [III. iv. 20-1]; Cornelius Nepos, *Agesilaus*, chap. iii. Another instance is the cleverness of the old fox in Terence, *Self-Tormentor*, Act IV, sc. iii [679 ff.].

Just as no one will dare to impugn the dignity of an Epaminondas who would not tell a falsehood even in jest, so it is very simple to believe that a man owes some penance if he tells something the opposite of his own thoughts, when it works no one an injury, and even leads to some advantage to himself and others. One might, indeed, express the wish with Cicero, *On Duties*, Bk. III [xv]: 'that pretence and dissimulation might be banished from the whole of life'; (E.) and that therefore all men would be so constituted, that no one would envy the property of others or lay snares for them, nor use their guilelessness to work some trickery upon them, or to resist sound reason. Such a man Achilles boasts himself to be in Homer, *Iliad*, Bk. IX [312-13]: 'For hateful to me even as the gates of hell is he that hideth one thing in his heart and uttereth another.' (L.) But since the man who carries all his thoughts before him like an open book is exposed to the deceits of depraved men, and since most men like to be led by empty professions rather than by solid accomplishments, we will not banish from human intercourse the harmless artifices of dissimulation and evasion, until all the malice or folly of men has been changed into probity and wisdom. Pindar, *Nemean Odes*, v [30 ff.]: 'It is not every truth that is the better for showing its face undisguised; and full oft is silence the wisest thing for a man to heed.' (S.) And it is an idle prayer of Theseus in Euripides, *Hippolytus*, lines 925 ff. Although it is certain that, if a man makes more use of the artifices of dissimulation and evasion than is necessary for his own protection, he destroys in himself every ground for confidence and makes of himself a man with whom no one can deal in good faith, since the words and deeds of such a person cannot fail to be suspected.

The arguments whereby some wish to prove that every untruth is wicked in itself, carry no weight. They say that he who tells an untruth defiles by such misuse his own tongue, that most noble instru-

ment, and robs himself of all trustworthiness; not to mention the interference with a great many duties, which might otherwise be mutually fulfilled by men, since among other things a liar gains the distinction of being never believed, even if he does speak the truth. But all this is true of actual lying, not of that untruth which wisdom often persuades one to use.

They add that a lie proves a man's humble and abject spirit; for when a man can rely upon solid accomplishments and truth, why should he take refuge in such deceptions? Yet untruths that are necessary and free from guile do not always proceed from an abject spirit, and solid accomplishments can often be preserved among wicked men only by indirect dealings.

Others like the argument that speech was given to be the interpreter of the mind; that since untruth is opposed to this end, it may properly be held to oppose the order of nature; and that there is discord in the harmony of the faculties of man, if his speech does not accord with his mind. We freely admit the truth that speech is the interpreter of the mind, but in this way, that it shall not babble forth more than the mind commands, with which remains the decision as to what may advantageously be disclosed, and what must necessarily be withheld.

10. Not all men are agreed on the nature of that right which we have said is violated by a lie, and on how men have secured it. Some maintain that because there belongs by nature to men, as to God, a faculty to know the truth, which faculty is hindered by lying, they therefore are entitled to exact the right from others that their words express facts in such a way that these can be understood as they actually are. Now there can be no question of this right in regard to God. For not only would it be highly irreverent to use any untruth toward Him, as if the simple truth were not so efficacious with Him as a show of outward forms, but the greatest folly as well, since He has no need of our information to know the truth. Hence it was both impious and silly of Cain to attempt to conceal from God the murder of his brother, especially by a reply so impudent and rude. And the remarks of Sophocles, *Antigone* [495 f.], accord with what has thus far been said:

More hateful still the miscreant who seeks
When caught, to make a virtue of a crime. (S.)

And yet it does not follow that, because a man can naturally understand something, he therefore has a right to understand it; for a moral faculty is not without further ado to be inferred from a physical one. But what others add at this point: that he who hears an untruth understands it, and that therefore the right of understanding is not destroyed by false speaking—all this has nothing to do with the case.

For such a person understands not the actual fact that he wished to, but only some idle invention in its place.

Others seek that right which is violated by a lie, not from nature but from an institution of men, and indeed from some tacit pact. For, they say, once speech and other similar tokens have come into use by the institution of men, men thereby bound themselves by a mutual obligation to use them in such a way that others might be able from 322 them to judge the thought of the one with whom they are speaking. For were there no such obligation, and if a man could use words as he pleased, and in such a way that no other could be sure of his meaning, that invention of signs would have been useless. This is the view of Grotius,¹ Bk. III, chap. i, § 11, on which it should be observed that a careful enough distinction² is not made between an obligation that concerns the proper use of signs, so that another can gather our thought from them, and that obligation which is concerned with the question, whether we shall tell our³ thoughts to another by those signs. These are two very different obligations, and they arise from different principles. For since words acquire their significance from imposition, it is understood that an agreement has passed between the men who use the same language, that in common usage they should indicate certain things by certain words. But that obligation actually to make known those signs to another, or to disclose to a person my thoughts on a certain subject arises, as has been shown above, either from some general precept of natural law, or else from a special pact.

From this last point it is clear what judgement should be passed on the position of those who deny that the nature of a lie must be sought from the violation of some pact, maintaining that whatever depends not on nature but on the pacts of men, and those for the most part tacit, is to be traced to and measured by its utility⁴ and this alone; that it cannot be shown to be a thing of such great value for us to understand all that another says; but that, on the other hand, it is a matter of much concern that a man preserve unimpaired his liberty to cover by silence, or by sufficient evasions,⁵ whatever can remain secret without injury to another and with advantage to himself.

But there is a confusion here of things that should be accurately distinguished. For no advantage lies in one man knowing the thoughts of all other men, or of their knowing his, nor were men mutually obligated in this way upon the introduction of speech. We have already discussed sufficiently the question, how far a man is supposed to tell his thoughts to another, and what right the other has to know them. But upon the supposition of an obligation to communicate our

¹ [For *Grotii* read *Grotii*.—Tr.]

³ [For *seu* read *sui*.—Tr.]

⁵ [For *coloribus* read *coloribus*.—Tr.]

² [For *distingnuatur* read *distingnuatur*.—Tr.]

⁴ [For *utillitate* read *utilitate*.—Tr.]

thoughts to another, a pact, which accompanies the introduction of languages, thereupon exerts its force to require such a use of words that our thoughts may be known by another. This pact has so much advantage that, without it, speech would be of no use.

II. From these premises it will be easy to judge by what right things are commonly branded as lies, when only something that is not a fact has been stated. At the outset, some draw a distinction between speaking an untruth and not saying a part of the truth, or dissimulating, where the former is unlawful, while the latter, they say, is often blameless. Here it should be noted that although not to speak, that is, to keep silent, cannot be, properly speaking, a lie, especially if no sign equivalent to speech has been used, yet for another reason silence may be a criminal act; if, for instance, it leads to the prevention of some good which a man should have procured, or to the doing of some evil which he should have warded off. Silius Italicus, Bk. XVI [610]: 'It is a sin to defile my conscience by keeping quiet.' Thus, if a man has been put in a look-out to announce the approach of the enemy, he will be severely punished if he has kept silent. Nay, Polybius, Bk. XII, chap. vii, calls it no less a lie for a man who has undertaken to write a history, to fail to record what took place. Yet when I am not obligated to tell another some matter, it is proper for me to tell but a part of it, if I cannot safely conceal it all. Here they cite the illustration from *Jeremiah*, xxxviii [24 ff.], where the prophet prudently conceals before the princes, at the command of the king, the fact that he had been questioned by the latter on the outcome of the siege, giving some other reason, though not a false one. For he told only a part of the truth, being in no way obligated to tell it all to them.

323 The same is true of Athanasius, who replied to the questions of those who had been sent to arrest him, that Athanasius had just passed by this way, concealing the fact that he had just now gone back on the ship, for he was under no obligation to betray himself. Touching the case of Abraham, in *Genesis*, xx. 12, some question whether that holy man acted prudently in concealing his marriage with Sarah and calling her his sister, because he knew that her beauty was such as to arouse the love of others, and that maidens were more easily approached than married women. They add that the complaint of Abimelech was not unjust, and that it was unnatural of Abraham to presume that there was no respect for piety and justice in any state, until he had taught it to them. Yet others undertake to excuse his action, on the score that the hope of life usually weakens great minds, and scarcely anything that may avoid death should be considered base. But this matter we leave undecided.

12. Grotius, *loc. cit.*, § 8, also distinguished between those signs which have been invented to signify some things *μετὰ συνθήκης* or that

carry a mutual obligation, and other things regarding which there is no such agreement. (For whenever something has been limited by a pact, it can thereafter be used in only a uniform manner.) And he feels that signs of this latter kind can be used, even if we foresee that another will draw a false conclusion from them; provided no other hurt follow, or such a hurt is lawful, apart from the effect of the guile, and could have been openly done him. This we freely admit. For since there is no general or special agreement that the thing in question must be used in this manner and no other, to the end that the other may learn therefrom my thought, it follows that it is understood that full liberty has been left me as to its use, provided that no man receives any hurt therefrom by way of injury. For the other man is himself to blame for the false idea he receives, since he was surely over-curious in drawing conclusions about the affairs of other people.

Nor am I supposed, in the exercise of my own right, always to take care that another man may not conceive a false opinion, otherwise harmless. For instance, if a man keeps a light going in his bedroom, in order to dispel the fears of the night, or to have it at hand in case of need, he is not obligated to extinguish it, however much a neighbour may believe that he is using it for purposes of study. The example in *Luke*, xxiv. 28, is quite plain. For every one is allowed to make such a gesture, and nothing is more usual in social intercourse than for us to make a move towards leaving, so that we may know whether or not we are welcome guests. For we seriously intend to leave, unless we are strongly urged to remain. The case in *Acts*, xvi. 3, seems a question of higher consideration. But that an enemy whom one can openly combat, may lawfully be deceived by such stratagems as flight, the use of uniforms, insignia, and arms admits of no question.

13. The same writer, in the passage cited, asserts that we do not always receive the censure of lying, if we use an ambiguous word or phrase, which has more than one meaning, be it by common usage, or by the custom of some art, or by an unusual figure or trope, provided our thoughts agree with one of those meanings, even though it be expected that the hearer will take it in another way. But he adds very properly that such speaking is not to be rashly approved, unless it be used in instructing a person who has been entrusted to our care, or in avoiding an improper question (see Seneca, *Troades*, 597 ff.), or in securing for ourselves some advantage without injury to another. 1 *Samuel*, xxvii. 10. For, on the other hand, if you are obligated clearly to tell me your thoughts, it makes no difference whether you deceive me by a direct lie or by an ambiguous statement. Especially since the latter must, if it is to serve your purpose, be so couched that I accept 324 the more common meaning, while the more abstruse and less common corresponds to your thoughts. For should both meanings be equally

probable, no one would be so careless as not to ask in what sense you wish your statement to be taken. But to speak ambiguously or obscurely to one whom you wish to instruct, or whose proficiency you would test, can come in for no censure in any respect, if that end can be obtained by such a course better than by open speech. Here belongs the illustration in *John*, vi. 5. Thus, supposing there is a person to whom I am under no obligation at all to disclose my thoughts, and yet I cannot keep silence, nothing prevents me from supplying him with a false opinion in exchange for his simple ignorance, provided that he incur, besides his error, no other damage which he does not deserve. Thus, no one would condemn Athanasius because upon being asked by a man sent to run him down, how far away Athanasius was, he replied that he was not at a great distance. In Theodoret, *Ecclesiastical History*, Bk. III, chap. viii.

From what has been said it appears that Grotius, in the passage cited, is to be taken with caution, when he declares that, 'in order to exemplify the idea of falsehood, it is necessary that what is spoken, or written, or indicated by signs or gestures, cannot be understood otherwise than in a sense which differs from the thought of him who uses the means of expression.' (K.) For when a man is obligated to express his thoughts clearly, his speech should be so delivered that the sense which the business in hand or the common usage of language suggest should also agree with his thoughts. Nor should he order the other to lay at his own door his error or loss, because he did not delve into all the less common and the intricate senses of his words, allied to the present matter, or because he was not a diviner. Isocrates, *Panathenaic Oration* [240]: 'If you engage in litigation about contracts and profits, it is disgraceful and no slight indication of rascality.' (F.)

14. Much more to be detested are those mental reservations which some men have devised by disgraceful scheming, to twist the sense of clear words into an opposite meaning, and that, too, even in those matters where there was an obligation to tell the truth, and in the case of assertions confirmed by an oath. As a result of these mental reservations a man appears to affirm something which he inwardly intends to deny, and *vice versa*. By this every use of speech is destroyed, and a man can no longer be certain in what way he should take another's words. And yet that invention is highly absurd as well. For since speech was introduced that we might express what we have in our mind; and yet our thoughts are without effect in human intercourse so long as they are not expressed; in what way may that tacit mental reservation, so abhorrent to common usage, take away that effect which spoken words would otherwise naturally produce?

It very frequently happens that, from the matter concerned, or other circumstances, there is added to a general statement a tacit

condition or restriction, whereby the statement is neatly turned to fit the business at hand, and freed from any impropriety. But where is the rationality or subtlety if, upon being asked whether I did a thing I should swear that I did not do it, referring either to a different thing, or a different day from that which was meant in the question? Or if I should say to a man who asks me for some money, 'I do not have any,' meaning 'I have none to give you'? Or if I should say 'I promise to give it to you', meaning 'only as a matter of form'? It is foolish to try to free such a person from the crime of lying and perjury, on the argument that 'he does not speak the single determinate truth which his hearers understand the words to signify, but he speaks another truth of a different kind'. As if my question is met satisfactorily, when I hear some truth of a different¹ kind, and one that has no connexion with the present business; or as if a man had met my question directly who talked to me about garlic,² when I asked him about onions!

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No less absurd is the position of some, that out of the open statement and the mental reservation there is made a complete statement, in which, as made up of two parts, there is no falsity. For instance, if a man says: 'I am not a priest' with the reservation 'that I need tell you', the complete statement will be true: 'I am not a priest that I need tell you.' But just as speech was contrived for the sake of others, and not that a man might mutter to himself, so its truth and falsity is judged by what is openly addressed to others. Lud. Montaltius [Pascal], *Lettres Provinciales*, ix.

15. It is generally asserted, and therefore held permissible, that one is guilty of lying in telling something to a child or a demented person, which bears a false signification. Lucretius, Bk. I [935 ff.], illustrates this truth: 'That unthinking childhood may be deluded.' (R.) Theocritus, *Idylls*, xv [40]: 'No; I'm not going to take you, baby. Horse-bogey bites little boys.' (E.) The reason given by Grotius, *loc. cit.*, § 12, is: 'Since they do not have liberty of judgement, it is impossible for wrong to be done them in respect to such liberty.' (K.). This reason does not seem to me entirely satisfactory. For, to speak especially about children, it is, of course, well known that they are so lacking in the faculty of judgement that they accept in all simplicity and with no reserve, whatever is told or represented to them in a false manner, and know not how by reasoning to separate the true from the false. Yet because, by virtue of their being part of mankind, they have the right that they be not injured by others, that they receive offices of humanity, and that they be in a special way imbued with every good principle by their parents and instructors (add *Matthew*, xviii. 10); and because they have at least the faculty of understanding simple matters, it should be maintained with all strict-

¹ [For *disparatam* read *disparatam*.—Tr.]

² [For *decepis* read *de cepis*.—Tr.]

ness that they share the same right with their elders, in so far as what ought to be told them should be presented in such a way that they can understand it.

But since they usually reject the simple truth because of the immaturity of their minds and the vehemence of their passions, it is more effective to instruct them by stories, or to restrain them with fabled terrors, until they have learned to apprehend and weigh the true and the false. And so we employ fictions with them, not to make sport of them or do them harm, but only because they cannot conveniently be instructed by more serious reasoning. So the passage of Lucretius, Bk. I [935 ff.], mentioned above, is quite to the point:

When healers essay to give loathsome wormwood to children, they first touch the rim all round the cup with the sweet golden moisture of honey, so that the unwitting age of children may be beguiled as far as the lips, and meanwhile may drink the bitter draught of wormwood, and though charmed may not be harmed, but rather by such means may be restored and come to health. (B.)

Strabo, Bk. I [ii]:

The poets were not alone in sanctioning myths, for long before the poets the states and the lawgivers had sanctioned them as a useful expedient, since they had an insight into the emotional nature of the reasoning animal; for man is eager to learn, and¹ his fondness for tales is a prelude to this quality. It is fondness for tales, then, that induces children to give more attention to narratives and more and more to take part in them. The reason for this is that myth is a new language to them—a language that tells them, not of things as they are, but of a different set of things. And what is new is pleasing, and so is what we did not know before; and it is just this that makes men eager to learn. But if you add thereto the marvellous and the portentous, you thereby increase the pleasure, and pleasure acts as a charm to incite to learning. At the beginning we must needs make use of such bait for children, but as the child advances in years, we must guide him to the knowledge of facts, when once his intelligence has become strong and no longer needs to be coaxed. (J.)

See the special commendation given the fables of Aesop in Philostratus, *Life of Apollonius*, Bk. V [v]. It is proper also to pacify² even the insane by fictions, in cases where they can understand in no other way.

16. Nay, all people in general, for whom we cannot gain some well-intended end by plain speech, can, without being blamed for lying, be led by fictions into a mistake that is for their own interest. 326 Nor is it necessary to say, as a ground for our licence, that it is presumed that the other will not take offence at the infringement upon his liberty of judgement, but will rather be grateful for the benefit which he thereby secures; and that an injury is not done to him because of his approbation. For he had the right that by our speech some good would be secured for him or some evil avoided, but not in the manner of our speech, which would have produced just the opposite effect. And this it would have done, if he had grasped the matter as it really stood,

¹ [For *antem* read *autem*.—Tr.]

² [For *deliniuntur* read *deleniuntur*.—Tr.]

without artifice and at its face value. Therefore, in such a case, the speech should be tempered to the nature and condition of the hearer, no less than a physician adapts his medicine to the strength and state of a patient. Since, then, no person can have a right to be addressed in such a way that he hears a speech so framed that it will be to his hurt, it is not proper to say that any right has been waived in the case before us. And then, on the side of the speaker, since he was supposed to perform his duty to the other by the use of speech, from the law of humanity or some stricter obligation, it is clear that the obligation did not dictate that he should so frame his speech that it would fall short of its purpose.

Therefore, such feigned speeches as protect the innocent, appease the wrathful, relieve the downcast, or bring any advantage which could not have been secured by plain speaking, are free from every taint of lying, and even merit praise for their prudence. See *Exodus*, i. 17, 19; 1 *Samuel*, xix. 12 ff., xx. 5, 28-9; 2 *Samuel*, xiv. 4 ff.; 2 *Corinthians*, ix. 2-4; Pliny, *Letters*, Bk. III, ep. xvi, on Arria; Horace, *Odes*, Bk. III, ode ii [xi. 35-6], on Hypermnestra,¹ whom he calls 'gloriously false, a maiden noble for all time to come'. (B.) Euripides, *Phoenician Maidens*, line 998; Sadi, *Persian Rosegarden*, chap. i: 'A lie that does a kindness is better than a truth that brings ruin.' Heliodorus, *Ethiopica*, Bk. I [26]: 'At times even a lie is a fine thing, namely, when it helps the tellers and does not hurt the hearers.' Another case in point is that of Rahab in *Joshua*, ii. 4, where we cannot approve of what Grotius, on *Hebrews*, xi. 31, *James*, ii. 25, has to say on that affair: 'Before the Evangel a lie that looked to the safety of worthy men was not held a fault. This act is praised as suited to those times.' For we hold such a thing to be still lawful, provided it violate no civil obligation. Add Socrates, *Ecclesiastical History*, Bk. III, chap. xii.

Under the same head come those who raise the drooping spirits of their troops in battle by a false report, and thus spur them on to win for themselves victory and safety, or who belittle before a battle the number of the enemy. See Cornelius Nepos, *Eumenes*, chap. iii, and scores of such instances among the historians. Xenophon, *Memorabilia of Socrates*, Bk. IV [ii. 17]:

If a general, seeing his troops demoralized, were to invent a tale to the effect that reinforcements were coming, and by means of this false statement should revive the courage of his men, to which of the two accounts shall we place that act of fraud? On the side of right, to my notion. (D.)

Sophocles, *Philoctetes* [108-9]:

NEOPTOLEMUS. Thou deem'st it, then, no shame to tell a lie?

ODYSSEUS. Not if success depends upon a lie. (S.)

¹ [For *Hy. permnestra* read *Hypermnestra*.—Tr.]

Add Frontinus, *Stratagems*, Bk. I, chap. xi; Bk. II, chap. vii; Polyaenus, *Stratagems*, Bk. I [xxxiii], on Leotychides. Maximus of Tyre, *Dissertations*, 3 [xiii. 3d]: 'It is nothing so very remarkable to speak the truth, except it be for the good of the auditor. For the physician frequently deceives the sick man, the general his army, the skipper his sailors, and there is no harm done. Nay, more, a falsehood has often helped men, and the truth hurt them.'

Yet I question whether we can approve the act of Agesilaus, who, upon seeing his troops in consternation at the multitude of the enemy, wrote the word 'victory' upon his hand, and snatching the liver from the soothsayer, held it in his hand against the letters until¹ they appeared on the liver. Then he shows the writing to his companions, saying that the gods promise them victory, Plutarch, *Laconian Apophthegms* [p. 214 E]. Thus physicians are not liars if they undertake to convince a fastidious or irritable patient of the sweetness or mildness of their medicine. Libanius, *Declamations*, xxix [p. 664 D]: 'We see physicians beguiling with deceit the desires of the sick. We do precisely the same thing to the well whenever it would be better for them to be deceived than to hear the truth.'

But I doubt whether one should place in this class the stratagem of Erasistratus, the physician of King Seleucus, who represented to his patron that his son Antiochus was in love with his wife, Lucian, *De Dea Syria*.² You may list here the deed of Joseph who, by false charges, kept his brothers in a state of anxiety for a long time, so that he might awaken in them the real repentance for having sold him, and might know their real feeling towards their father and his brother Benjamin. *Genesis*, xlii; Josephus, *Antiquities*, Bk. II, chap. iii. Finally, it is easy to allow the tales of the poets, in which the truth is concealed under a pleasing cloak, to be excluded from the class of lies. See Plutarch, *De Audiendis Poetis*. And to this extent the words of Sophocles, *Electra* [61], can be allowed:

The end, methinks, gives any fraud excuse. (S.)

17. The heads of states may also sometimes avail themselves of false speech, since if their counsels and designs are divulged, they often are brought to naught, or else cause damage to the State. When these are not sufficiently protected by simple silence, it will be permissible to conceal them, misleading the curiosity of other men with feigned language. Plato, *Republic*, Bk. III [389 B]:

If a lie is useful only as medicine to men, then the use of such medicines will have to be restricted to physicians; private³ individuals have no business with them [. . .]. Then the rulers of the state are the only persons who ought to have the privilege of lying, either at home or abroad; they may be allowed to lie for the good of the state. But nobody else is to meddle with anything of the kind. (J.)

¹ [For *quod* read *quoad*.—Tr.] ² [For *Syria* read *Syria*.—Tr.] ³ [For *antem* read *autem*.—Tr.]

An illustration of this is the decision of Solomon, 1 *Kings*, iii. 25. Suetonius, *Claudius*, chap. xv: 'When a woman refused to recognize her son, and the evidence on both sides was conflicting, the emperor forced her to admit the truth by ordering her to marry the young man.' (R.) Thus when a father and son were brought to justice for the murder of a priest, and it could not be established which one was guilty, since neither wished to betray the other, Charlemagne is said to have ordered that both be put to death, whereupon the father confessed that he was the author of the crime. There is a law in Spain that, if a female slave has had a child by her master, she shall become free. On one occasion a nobleman's maid bore a child by her master and he denied it. Since there was insufficient proof, King Alphonso ordered the child, who was a boy, to be publicly sold into slavery. On hearing this the father declared himself; Panormitanus, *De rebus gestis Alfonsi*, Bk. II. When the soothsayers announced to Neleus, on his departure to plant a colony, that his band should be cleansed of all polluted men, 'He himself pretended that he had killed a boy and needed to be purified. So he prevailed upon others who were conscious of their guilt to do the same; and when in this fashion he had discovered those who had contaminated themselves, he sailed away and left them.' Aelian, *Varia Historia*, Bk. VIII, chap. v. There is a saying among the Spaniards: 'Tell a lie and you will ferret out the truth.' Of the same nature are false reports on the health or death of a ruler, that the people be not disturbed; yet I would not agree that such can be brought to include the falsehoods of Numa. Add Polyænus, *Stratagems*, Bk. II, on Epaminondas, n. 6, 12; Polybius, Bk. XVI, chap. xi. Thus such a licence can by no means be extended to promises. Add Bacon, *Essays*, chap. vi.

18. After Grotius [III. i], § 13, has declared that a lie arises 328 from a violation of the right which a man has to know the thought of another, he draws the following conclusion from his statement: That it is not a lie when we make a false statement to another person, who is not deceived thereby, even though a third party may receive from it a false impression. For it is supposed that it is a private business between me and a second party, and that a third party has no concern in it. Therefore, the other person is not deceived by my feigned remarks, since he fully understands my thought from what I have said, just as if I should spin a fable, or use some irony or hyperbole to one who understands my meaning. But I cannot be blamed with a lie to the third party because my business is not with him, and so he has no right whereby he should know what is in my mind. Whatever opinion he forms upon that which is said not to him but to another, he can lay to his own curiosity. But to prevent this privilege from being abused, it should be observed that two men should not agree to use such

occasions to make sport of a third. For even though that third party has no full right to understand me, the law of humanity and charity nevertheless requires that my speech should not be the occasion of his receiving an injury beyond his desert. Therefore, the distinction should be carefully observed between the case in which a man hears the remarks of others through no fault of his own, and that in which he listens in on their secrets from wantonness or malicious inquisitiveness.

This principle, therefore, is to be invoked especially against those *ὠτακουσθαί* [busybodies] who strive secretly to overhear, with designing ears, the conversation of other men. When we do not wish to keep silent altogether, we usually avoid the importunate curiosity of such men by turning our conversation to some other matter, or by agreeing to invent some tale for which the hearer will be laughed at if he pass it on to others, in the persuasion that he has happened upon some great secret. And this is proper, provided neither he nor others suffer therefrom any further harm.

We know, of course, that no one should detract from another's honour and position, and make him a laughing-stock. Yet just as we feel that we have not sinned if we disclose another man's error, provided it be done without rancour and insult, which are so unworthy of men of breeding, and even though it detract somewhat from his reputation rather than add to it; so nothing prevents us from correcting, even by making a man an object of ridicule, some defect in his character which is troublesome to us, so that he may rid himself of it. For it is not judged unlawful to correct and reprove others, merely because that tends to lessen their reputation of excellence. Thus, since it is universally to the advantage of mankind that men should not know the private matters of all others, it is established by the tacit agreement of all peoples that sealed documents are to be opened only by the one to whom they are addressed. Therefore, if I observe that some one is prying into the private matters of my correspondence, I will surely do no wrong in putting into a letter which he will open some matters which he will get no great pleasure from reading. So if there is a boy in the house who regularly gets into all the food stored in the pantry, no injury will be done him if we reprove his greediness by putting among the jars one of very bitter content. You may bring under this heading the story given by Herodotus, Bk. I [clxxxvii], of Nitocris or Semiramis, who had the following words carved on her tomb: 'If any king of the Babylonians is greatly in need of treasure, let him open my tomb and take as much as he chooses.' But when Darius opened the tomb, he found instead of a treasure only the following words: 'Hadst thou not been insatiate of pelf, thou wouldst not have broken open the sepulchres of the dead' (R.); or as Maximus of Tyre [xx. IX e] gives it: 'O greediest of men! who had the audacity to touch a corpse in your

passion for gold.' See also Ad. Olearius, *Itinerarium*, Bk. IV, chap. vii. 329 Indeed, to put confidence in such inscriptions is evidence as much of credulity as of avarice. They were in the right who, in the story given by Gellius, Bk. I, chap. xxiii, of the incident of Papirius, praise the force of his argument, that is, the wit and discretion of one so young, but censure his address, as lacking in the respect due his mother, especially since his jest produced a petition, surely of little credit to matrons, that 'One wife would better have two husbands than two wives one'. Yet I have never yet been able to bring myself to any great anger towards that husband, who, in Plutarch, *De Garrulitate* [p. 507 B ff.], to meet his wife's incessant curiosity to know the deliberations of the senate, told her about a quail which was seen flying across the forum with a gold helmet. Yet he should have seen to it that others should not be frightened for nothing, nor suffer any damage by his wife spreading the tale. For the subsequent enjoyment of the story easily made up for the temporary mistake.

Now if care must be taken to keep a third person from being deceived by the one who deserved the ridicule that we laid upon him, all the less will it be permissible to persuade a man to something that is not so, to the end that he may deceive a third person, although the man himself may possibly receive no injury. For it is offensive to be used as the instrument to deceive another, while we ourselves are the ones who deceive a person, whether we do it directly, or through another person suborned by us. Although not a few have taken up the art of first cheating those by whose agency they plan to cheat others. See Seneca, *Thyestes*, line 320. Of course, because '[Does it make] so little difference whether you say things honestly and naturally or after preparation?' (S.) Terence, *Andria*, Act IV, sc. iv [794]. Add also Gellius, Bk. XII, chap. xii.

19. It is clear that since the obligation to disclose our mind ceases between enemies, a man can, without censure of lying, make false statements to them, and terrify them, or inflict some damage upon them by false reports, provided no undeserved damage arise therefrom to a third party who is our friend. For what prevents us from inflicting damage upon one by cunning and without any peril to ourselves, whom we may hurt by open violence? The reason why some have spurned this manner of injuring an enemy is not because they believed that it violated some right, but because among more hardy spirits glory only attaches to those acts against an enemy, which show a certain vigour and dash on the part of mind and body.

But what is said about deceiving an enemy should in no wise be extended to any pacts entered into with the enemy about concluding peace, or about an armistice. For since the law of nature commands that peace be maintained as far as possible, and that any violence

offered it be healed, it is also understood to enjoin the use of the means without which that end cannot be attained. And yet enemies cannot meet together again to make peace, unless there is a mutual obligation clearly to reveal their thoughts on the present matter, and consequently¹ unless the necessity of their mutual suspicion is removed by an obligation to speak the truth in their negotiations for peace. And when it is said that it is lawful to deceive and injure an enemy by false speech, that should under no circumstance be so extended as to allow the dissemination of false crimes and atrocities about the enemy in order to impair his reputation. It is true that the state of hostility makes it allowable for me to conceal my thoughts from the enemy, or to find a way to injure him by the dissemination of false reports; but if a man, who undertakes to accuse an enemy of a crime, wishes his word to be believed among those who are neutral in the conflict, he should lay aside designs of war, and deport himself as a purveyor of the truth, and assume before his audience the attitude of an historian. If, then, he wilfully strays from the truth of matters, he will be unable to escape the censure of being a liar and a calumniator. But to accuse falsely an

330 enemy to his face is the act of an impotent reviler; while to meet lies with other lies is merely to copy the fruitless example of the enemy. Add Ludovicus Montaltius [Pascal], *Lettres*, xv, and notes. But when Lipsius, *Politica*, Bk. IV, chap. xiv, n. 32, joins foreigners with enemies as those against whom dissimulation and evasion should be used, his statement can be admitted only in so far as it is to our advantage to hide our counsels and affairs from their knowledge. For the common kinship of all men does not permit us at our will to bring any loss to such persons by false statements.

20. It is more difficult to decide whether a defendant may deny a crime with which he is charged, or evade it with false arguments, and yet not be guilty of a lie. There is here no reference to the divine tribunal before which one would do best to make his humble confession and implore forgiveness. Surely it would be no less impious than foolish to endeavour to avail oneself of evasion and negation before the Omniscient God. On this reason rests the plea in *Joshua*, vii. 19-20, for the guilty person there was pointed out by the divine witness. Therefore the question concerns human judgements, and these have two ends in view: First, that each person may receive what is owed him; and second, that those men may be restrained by punishment who either have already dared in their wickedness to violate the rights of others, or would violate them because of their sluggish regard for justice, did they not fear that the punishments which have befallen others would likewise be their fate.

Some feel that it is not proper to use falsehood in order to avoid

¹ [Strike out the (before *adeoque*.—Tr.]

the severity of punishments, primarily because the judge has a right to know the truth. And that neither the sanctity of judges, who act in the place of God, nor the necessity of obedience, gives any room for circumvention or contumacy. They add that confession is not so much necessary as denial is dangerous, for once the crimes have been disclosed the punishment is all the greater. And this especially when not deeds but *false propositions* are advanced, since to do this is prejudicial, first in itself, and secondly, because one false statement gives rise to no end of others.

But the opposite opinion seems preferable to others, who feel that a distinction should be drawn in every offence between the damage inflicted and the guilt itself, to the former of which corresponds restitution, to the latter the punishment proper. By natural law every man is supposed to make restitution for any damage occasioned by his transgression; but on the other hand every one that repents and makes restitution should be granted pardon. Therefore, every man who commits an offence is bound by an obligation, properly so called, to stand always ready to make reparation for damage caused by himself. But no man is required to give himself over of his own accord to punishment, or to inform against himself. When the offence is still concealed, and restitution cannot be made openly without confessing the crime, it should be made indirectly and in some secret manner. For punishment should be inflicted on a man against his will, since otherwise it cannot obtain its end, which is to deter by fear the guilty one and others from sinning. But whatever we are obligated to do should be done willingly, and without coercion. Since, therefore, no one is obligated to invite punishment upon himself (see *Digest*, XLVIII. xxi. 1), and a man cannot naturally avoid shrinking from such a thing in every way open to him, especially when it may mean even death or some other serious evil, there appears no good reason why a person may not avoid it in any way possible, provided no injury be done a third party. Compare, however, *Digest*, XLVIII. iii. 13.

Nor is it to the real interest of a State that, after the damage for an offence has been made good, it should be punished while yet unknown to the public, and for that reason able still to be covered over or excused with some show of reason. Therefore, as only a fool will deny manifest misdeeds, so it seems possible to conclude, from what has been said, that the charge of guilt may also be evaded by a false defence. But it is idle for the prisoner to adduce false propositions, for it is supposed that the judge is cognizant of the law. Indeed, the judge has the power to 331 extort the truth by every means possible, provided the matter is of such importance that the safety of the state absolutely requires punishment for it. Therefore a judge is free from the censure of having lied, if he contrives some falsehood in order to worm out his crime from the

prisoner; suppose, for instance, he says that he has knowledge of the matter from another party, or that he will do such and such a thing, if he persists in his denial, and the like. (Although Grotius on *Deuteronomy*, xiii. 8, observes that the Hebrews allowed the use of deceit in order to find the guilty party, only in the offence of enticement to the worship of false gods.) But it does not follow at once from this that the defendant is himself bound to confess his crime. For not every faculty, which implies the mere exercise of some act, has a corresponding obligation in its object; while there are other means of getting at the truth of the matter, such as by arguments and the evidence of witnesses. These last, even when unsworn, are obligated at the command of the civil power to tell the truth when questioned about the offence of another person.

Furthermore, so much favour is allowed self-defence that it is held even odious to condemn unheard patent criminals; and it is not held against a man if he advances any kind of plea for his deed. See *Digest*, XLVIII. xvii. 1 pr., and the remarks upon that section by Grotius, *Florum Sparsio*. No human tribunal has all the attributes of the divine, nor does a judge on earth preside with such majesty as does God.

Yet if a defendant is not bound to confess his own offence, his negation in no way infringes upon his duty to obey the civil power. Yet usually a crime is more severely punished because of the contumacy shown by the defendant in his denial, since a voluntary confession would seem to indicate penitence which greatly decreases the offender's guilt. But the question as to whether it is more advantageous to enter a crafty¹ denial than to embrace the ingenuousness of an open confession, belongs to a discussion of a different nature, not to the point now before us which concerns what a man is or is not obligated to do. Which of these opinions is to be preferred to the other, any man who knows how to weigh the force of arguments will easily recognize. It is a very interesting thing which is told us by Haythonus, chap. xlviii, *History of the Tartars*. Although they are confirmed liars in general, in two cases they will not lie: not one of them ever lays claim to any brave deed which he has not actually achieved; and if a man has committed a crime, for which he knows he may even be put to death, he never conceals the truth when questioned by his lord. Furthermore, among the Japanese it is a capital offence to be caught in a lie before the judge.

21. But what licence will be allowed the advocate in such matters? Here we must distinguish between civil and criminal cases. In the former it does not appear that the advocate can with good conscience hinder the other party from getting his right at the earliest opportunity. And so in such cases we hold unlawful not only false claims and

¹ [For *callidere negare* read *callide renegare*.—Tr.]

fictitious arguments, but also dilatory quibblings, since they all delay the one in delivering what he owes, and the other in receiving what is due him. Cf. *Digest* [Code] IX. xxii. 9, § ult. But in criminal cases, where the only issue is the penalty, I should feel that the further point should be considered whether, namely, the advocate has been appointed by the court to take the case of the defendant, or whether he has been retained by the latter himself. In the former case it does not appear that he has been allowed to use false charges or specious pleas, since he is appointed by the court to repel any calumnies directed against the defendant, and to see that no injustice is done him. This purpose is served by his merely testing the arguments of the prosecutor. But when the advocate has been retained by the defendant to defend him, I should feel that he can use the same means of defence as the defendant could, were he to plead his own cause, since the advocate acts only as his spokesman. Cicero, *For Cluentius* [1]:

Whoever thinks that he has my positive opinions recorded indelibly in those orations which we have delivered in the courts of justice is greatly mistaken. For all those speeches are speeches of the cause, and of the occasion, and are not the speeches of the men or of the advocates themselves. (Y.) 332

The same author, *On Duties*, Bk. II [xiv], maintains that it is not contrary to any moral duty to defend now and then a guilty person. Nor, indeed, will justice be in great danger from this permission, for inasmuch as a knowledge of the law is supposed on the judge's part, the advocate will not accomplish anything in adducing fictitious laws or false opinions. Nor is any credence given to a man who advances facts, unless he has shown sufficient proof for them. If, therefore, sometimes the guilty escape punishment by such arguments, the blame will lie not with the advocate or the defendant, but with the judge, who did not have wits enough to distinguish between real currency and stage money. Yet Plato, *Laws*, Bk. XI, towards the end, apparently does not sanction such practices in his ideal state, and according to Diodorus Siculus, Bk. I, chap. lxxvi, the ancient Egyptians felt that the speeches of such pleaders obscured the law in a heavy fog. Especially since, as Euripides, *Phoenician Maidens* [471 ff.], says: 'Truth deserves a simple speech,' and therefore such as stands in no need of the divers evasions of interpreters;

But the unrighteous plea,
Having no soundness, needeth cunning salves. (W.)

Pindar, *Nemean Odes*, vii [70-1]: 'For an honest cause three words will suffice.' (S.) Isocrates, *To Demonicus* [37], also has this good advice: 'If the cause is bad, do not support it or plead for it; for it will be thought that you are doing yourself what you assist others in doing.' (F.)

It is clear, from what has been said, how far we should admit the following statement of Quintilian, *Institutes of Oratory*, Bk. II, chap. xvii [27]: 'To tell a falsehood is sometimes allowed, even to a wise man; and the orator will be compelled to appeal to the feelings of the judges, if they cannot otherwise be induced to favour the right side.' (W.) And his further statement (XII. i [41]): 'Even that which appears, when it is first stated, of so objectionable a character, that a good man, in defending a cause, may sometimes incline to withhold the truth from the judge, reason may find cause to justify.' (W.) Yet the illustrations which he advances in this passage require a more accurate consideration. He says: 'Misrepresentations can be used in the defence of a man who has made an attempt upon the life of a tyrant.' (W.) This comes from the principle of the Greeks, that the murder of tyrants is lawful. But it is otherwise unlawful to defend by false arguments a man guilty of treason against his sovereign, to whom he has sworn faith, for the reason that every citizen is obligated to defend him with all his might. This obligation cannot accord with the attempt to free a traitor to his sovereign from his just penalty.

He continues: 'Or what if a judge would condemn a man for something that was done with justice, unless we convince him that it was not done: would not an orator, by producing such a conviction, save the life of a fellow-citizen, when he is not only innocent, but deserving of praise.' (W.) But such a case is scarcely imaginable. For that which should go under the name of a good deed, must necessarily accord with the laws of the State. And it does not appear how a man may be called into court for such a deed. Let us grant, therefore, that a man by some good deed has incurred the envy of wicked citizens who have later secured possession of the courts. If such a deed was well known, and a disgraceful charge is levelled against the defendant because of it, there is no use in his undertaking to deny it. Thus, if Cicero had been called to judgement for the execution of the associates of Catiline, it would have been folly for him to undertake to deny the charge. But when the deed can still be denied with some plausibility, surely nothing will prevent an innocent defendant from¹ defending himself before wicked judges with false arguments as well as true.

In another case offered by Quintilian, where the orator wishes to plead against such things 'as are just by nature, but disadvantageous to the State in the condition of the times', there is no advantage in trying to show by false argument that those just things are unjust. It is enough to point out that what can be done justly should not necessarily be done at all times; and that the present times require that the useful be preferred to what seems just and right. And this can be urged also by true arguments.

¹ [For *quo minus* read *quominus*.—Tr.]

The hope of the future reform of the defendant may lead the advocate to hesitate less¹ in lending the aid of his wits to his client to help him avoid punishment, since the advocate knows that acquittal will not be to the prejudice of the State. Fictitious arguments will be of no avail to rescue from punishment a good general who is manifestly guilty of crime, but whose services are necessary, if the State is to be victorious. The simpler course to follow is that used by Marcus Antonius in defending Manius² Aquilius, as Cicero tells us in his *Against Verres*, Bk. V [i. 3]. 333

¹ [For *eo eminus* read *cominus*.—Tr.]

² [For *M.* (Marcus) read *M'*. (Manius).—Tr.]

CHAPTER II

ON AN OATH

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| <ol style="list-style-type: none">1. The sanctity of an oath.2. The nature of an oath.3. An oath must be taken in the name of God;4. And by the faith of the swearer.5. On the intention of the swearer.6. An oath is an accessory bond of obligations.7. On oaths elicited by fraud.8. On oaths extorted by fear.9. Oaths to perform unlawful things do not obligate;10. Nor such as impede a greater good.11. An oath does not change the nature of an act to which it is added.12. An oath excludes cavils.13. It should not always be interpreted strictly; | <ol style="list-style-type: none">14. Nor without tacit conditions and limitations.15. An oath is to be interpreted in the light of the intention of the one who requires it.16. On an oath taken for another.17. How far an heir is obligated by an oath of the deceased.18. The classes of oaths.19. Oaths in confirmation;20. In bearing witness;21. Decisive of a controversy;22. Supplementary and purgative.23. Whether every violation of an oath constitutes a perjury.24. On releases from oaths. |
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WE must now consider the nature of an oath, something that is looked upon as adding great force to our speech and all acts which are framed upon speech. Although it could well be discussed below, where we treat the enforcement of pacts, yet we have preferred to take it up at this special place, because not only pacts, but mere speech as well, are usually confirmed by an oath. Hence it is that among the Hebrews it was not felt that oaths as well as vows carried any obligation, unless they were delivered in speech. See Grotius on *Leviticus*, v. 4, and *Numbers*, xxx. 3, *Deuteronomy*, xxiii. 23. But among the other ancient peoples the greatest force and sanctity was attached to an oath, so that it was held that the most severe penalty awaited perjurers, and even passed down upon their descendants; and the mere will to commit perjury, without the act, incurred a penalty. See Grotius, Bk. II, chap. xiii, § 1; Philo Judaeus, *De Sacrificiis* [*Abelis et Caini*, xxviii]: 'Our opinions are confirmed by an oath; but an oath itself is confirmed by the addition of the name of God.' (Y.) Among the Egyptians¹ 'Those were to die who were guilty of perjury, being such as committed the two greatest crimes; that is, impiety towards the gods, and violation of faith and truth, the strongest bonds of human society.' (B.) Diodorus Siculus, Bk. I, chap. lxxvii.

2. An oath is a religious declaration, whereby we renounce our

¹ [For *Aegiptios* read *Aegyptios*.—Tr.]

claim upon God's pity, or call down His punishment upon us if we do not speak the truth. For that this is the nature of oaths is easily discernible from the formulæ in which they are usually couched; such as 'So help me God'; 'God be my witness'; 'God be my judge', or their equivalents, which amount to practically the same thing. For when a superior having the right of punishment is called in as a witness, vengeance for the perfidy is at once sought of him; and He who knoweth all things is the avenger, because He is the witness. In this very fact lies the most severe punishment, if God in His mercy does not come to man's aid. Plutarch, *Roman Questions* [xliv]: 'Every oath ends in a curse of the perjurer.' (R.) In the same passage he has this to say 334 on the reasons why the Flamen Dialis among the Romans was not allowed to take an oath:

Is it because an oath is a kind of freeman's torture, and both soul and body of the priest must be untortured? Or because it is absurd to distrust in trifles one who is entrusted with all-important divine affairs? Or because every oath ends in a curse on the perjurer, and a curse is an ill-omened thing and unlucky? This is why priests are forbidden to curse others also. We know that that Athenian priestess who would not curse Alcibiades at the people's bidding was well thought of; she declared that she was made priestess to pray, not to curse. Or because the danger in case of perjury is public, if an impious and perjured man takes the lead in vows and prayers on behalf of the State? (R.)

But it should not be inferred from the fact that God is said to be called in as a witness in an oath, that an oath is to be taken as the witness of God, or that God himself is made a witness to the veracity of the swearer, as apparently is the view of Robert Sanderson, *On the Obligation of Oaths*, Prelection I, § 6. But to call in the all wise and all powerful as a witness or arbiter, as well as a vindicator, is itself a presumption of truth, since no one is supposed to be so impious as to dare lightly to call upon himself the vengeance of Almighty God. And so perjury is by far the most monstrous of sins, since the perjurer witnesses thereby that he despises God, but fears men, and since he shows himself bold before God, and timid before men. See Charron, *De la Sagesse*, Bk. III, chap. x, n. 7.

Also the end of oaths may suggest their real sense. This is that men may be more strictly held to tell the truth and keep a promise of their fear of God as omnipotent and omniscient, whose punishment they call down upon themselves because of the oath, if they knowingly deceive; while otherwise their fear of men did not seem effective enough, since they hoped that they could despise or evade their strength, or deceive their knowledge. Lucian, *Phalaris*, I [i]: 'Although mere men are no doubt easy to cheat, a god [. . .] cannot be hoodwinked.' (H.) Pliny, *Letters*, Bk. IV, ep. xxv: "'Who will find out?'" is the argument that most of all emboldens little and base men to act in this way.' (B.) For when the man who deceives us in bare

promise or asseveration, cannot conceal himself or avoid human punishment, it seems superfluous to require an oath. Demosthenes, *De falsa Legatione* [lxxi]: 'For the man that escapes you, leave to the gods to punish; but do not leave to their judgement any one whom you once get your hands upon.' (K.) For this reason I should judge that it was absurd for the Roman law, on the other hand, to permit a woman to swear that she is not pregnant. See *Digest*, XII. ii. 3, § 3. And this is all the more true because respect for an oath loses much of its force among many people by its excessive use. Hobbes, *De Cive*, chap. ii, § 23. And I like much the tenet of Pythagoras [Diodorus, X. ix. 2], who used to command his followers 'rarely to make an oath, but, when once they had done so, by all means to stand by it'. A similar advice is that of Isocrates, *To Demonicus* [23]: 'For money's sake swear by no god, not even if you intend to swear a true oath; for those who do not think you are swearing falsely will think you are grasping.' (F.*) Add Valerius Maximus, Bk. II, chap. x, § 2 *ext.*: 'The most faithful of mortals are those whose only oath is to keep their word'. See Curtius, Bk. VII, chap. viii [29]. Oedipus speaks thus in Sophocles, *Oedipus at Colonus* [650-1]:

OEDIPUS: No need to back thy promise with an oath.

THESEUS: An oath would be no surer than my word. (S.)

335 Epictetus, *Enchiridion*, chap. xliv, and Simplicius, on the passage.

Now just as it is proper that the greatest religious scruples be attached to oaths, so it is presumptuous to expect¹ or demand that the truth or falsity of oaths be proved by some immediate miracle, as if God were bound to exercise His function at the whim of men's judgements. Yet this belief prevailed not merely among the non-Christians, but was most common as well among Christians in the barbarous ages. Sophocles, *Antigone*, 269 f. [264 f.]:

We challenged each
The ordeal, or to handle red-hot iron
Or pass through fire, affirming on our oath,
Our innocence [. . .] (S.)

See the formulae of exorcism in Marculphus. Phil. Baldaeus, *De Idololatria Indorum*, the last chapter, reports that among the Malabars a man who is going to take a purgative oath has the first three fingers of his hand dipped in boiling butter, wrapped in a leaf, and then inspected after three days. Others are commanded to swim across a stream, between Cochin and Cranganor, that is infested with crocodiles. Still others must pluck an apple out of a jar filled with serpents. If they do all this without injury they are adjudged to be innocent. See also Bernhard Varenus, *Descriptio Japoniae*, chap. xviii, and Jodocus Schouten, *Descriptio Regni Siam*, where he described the

¹ [For *expectare* read *expectare*.—Tr.]

process¹ of their judicial procedure. Eusebius, in Stobaeus, *Florilegium* 27 [III. xxvii. 13]: 'Many exhort men to keep their oaths, but I regard it as a man's duty not lightly to swear in the first place.' Add Grotius on *Matthew*, v. 34.

And if we should confess the real truth, oaths prove or presuppose man's lack of confidence, unfaithfulness, ignorance, and passion. For what use would there be for oaths, if we had sufficient confidence in the faith and constancy of another, if there were no instances of perfidy, or if we had enough strength to force him to fulfil his obligation? Why, finally, should a judge try to find out a matter from sworn witnesses, if he were not ignorant of it himself? This principle is, in my opinion, the basis of that statement of Frederick in Gunther, *Ligurius*, Bk. III [511 ff.]: 'Right and reverence,² above any oath, doth abide in the naked words of a king.' And this not only because it is of the greatest interest to rulers that their honour should be held sacred, but also because their majesty is tarnished if even a suspicion of perfidy, falsehood, or deception seems to touch them. Thus Garcilasso de la Vega, *Comentarios Reales*, Bk. II, chap. iii, tells us that among the inhabitants of Peru no use was made of oaths, but those who were going to testify merely promised that they would tell the truth to the Inca.

3. Now since there is nothing omniscient or omnipotent besides God, it clearly follows that it is absurd to swear by anything which is not held to be divine, at least in the sense that that thing is called as a witness and an avenger of perjury. Therefore, the heathen commonly swore by the heavenly bodies, because they were believed to be gods, but for Christians to imitate them in this would be impious and absurd. But undoubtedly some oaths should be taken as mere jokes, such as those of Socrates, 'by the dog,' 'by the goose' (whatever may be said to the contrary by Porphyry, *On Abstaining from Animal Food*, Bk. III [xvi]), 'by the plane-tree,' that of Zeno, 'by the caper-bush,' or of others, 'by the cabbage.' See Athenaeus, *Banquet of the Learned*, Bk. IX, chap. ii [IX. ix]. They swore by such as these, not that they might swear by the gods, but to avoid swearing by the gods, as Apollonius of Tyana expresses it, in Philostratus, Bk. VI [ix], after there had grown up among most men the evil custom of using oaths as a kind of adornment and supplement to their speech.

But the most frequent by far of the oaths among the ancients were those by things which a man held dear or valued highly. Ascanius in 336 Vergil, *Aeneid*, Bk. IX [300], says: 'By my head I swear, by which my father swore before me.' (B.) Thus you may read everywhere of a man swearing by his own head or soul, or those of his dearest friends. Lovers held most sacred an oath by the sparkling eyes, the sweet lips,

¹ [For *processim* read *processum*.—Tr.]

² [For *referentia* read *reverentia*.—Tr.]

the golden locks of their sweetheart. Ovid, *Amores*, Bk. III, el. iii [13-14]: 'By her own eyes not long ago she swore, I mind me, and by mine—and mine have been the ones to smart!' (S.) All these cannot have the meaning that such things are invoked as witnesses and as avengers of perjury, which is believed, among others, by Apuleius, *De Deo Socratis* [5]; or that they are called as witnesses, as though, created by God, they shared in His attributes, showing forth, that is, His truth, goodness, power; and that a person both recognizes that he enjoys them by God's mercy and would not be deprived of them by His justice, as if they would say, 'I swear by my life', that is 'by God, to whom I am indebted for my life'. This is the view, among others, of Robert Sanderson, *On the Obligation of Oaths*, Prelection I, § 4.

But they called God to witness, so that He might take vengeance for their perjury on such things, as being most dear to them. Ovid, *Tristia*, Bk. IV, el. iv [45-6]: 'Swearing it by his own life and by thine which I know he counts not cheaper than his own.' (W.) Just as it was the custom among the Athenians in their oaths to condemn themselves and their family to death, if they broke their word; and, on the contrary, to ask from the gods every blessing on themselves and theirs, if they swore truly, as is to be found frequently in Demosthenes. Add Antiphon, *Orations*, XV [v. 11]. And they believed that the violation of such an oath brought down the wrath of the gods on the heads of others as well.

An interesting example of this last is in Pliny, *Letters*, Bk. II, ep. xx, where he tells how Regulus once visited Verania who was seriously ill, and persuaded her that he knew from his observation of the stars that she would get well:

Upon this the good woman, whose danger made her credulous, calls for her will and gives Regulus a legacy. She grew worse shortly after this; and in her last moments exclaimed against this wicked, treacherous, and worse than perjured wretch, who had sworn falsely to her by his own son's life. (Pliny adds): But imprecations of this sort are as common with Regulus as they are impious; and he continually devotes that unhappy youth to the curses of those gods whose vengeance his own frauds every day provoke. (B.)

Lysias, *Oratio adversus Diagitonem* [*Orations*, xxxii. 13]:

I am ready,¹ whenever you please, to swear an oath by the heads of those children and of the others that were later born to me. And yet I am not so miserable nor do I value money so highly, as to care to die² after calling down a curse upon my children, and to take away property from my own father unjustly.

In this connexion you may, in passing, mention that among the Banjans of India, who hold in greatest esteem the worship of cows, one of their most sacred oaths is to hold up a butcher's knife beside a cow and say: 'If this is not true', or 'If I do not fulfil my promise, may

¹ [For *Paratus* read *Parata*, since the speaker is a woman.—*Tr.*]

² [So most modern texts. Pufendorf follows a version which would mean: 'to secure a livelihood for my children by calling down', &c.—*Tr.*]

this cow be struck through with this knife.' Petrus de Valle, *Viaggi*, Pt. II, ep. iii. 3.

From these facts the meaning is also clear of those oaths which used to be made by the head, or genius, or safety of the ruler, as is still done among the Persians, and, according to Petrus de Valle, *Viaggi*, Pt. II, ep. i, are held more sacred than oaths made only in the name of God. The reason for such oaths is not because they believed that there was any divinity in their rulers while still alive, nor because they called down the wrath of their sovereigns upon themselves if they played false, but because many men, seriously or in flattery, wished to appear to value the safety of their ruler above their own, and therefore to hold it more heinous to bring down the wrath of the gods upon his head than upon their own. Therefore, the meaning of such oaths is properly as follows: 'May the health of my prince be so as I shall do this', that is, 'If I do not perform my oath, I pray that God may vent his wrath upon my prince.' Augustine has well said, as quoted by Grotius, *Sparsio Florum*, on *Digest* XII. ii. 33 [*Sermones*, clxxx. 7]:

What else is swearing [*iurare*] but paying your due [*ius dare*] to God, when you swear by God? paying your dues to your children, when you swear by your children? Now what right do we owe to our safety, to our children, to our God, except that of love, and truth, and not of falsehood? [. . .] When any man says, 'By my safety', he engages his safety to God, when he says, 'By my children', he consigns his children as a pledge to God, implying that whatever falls from his lips shall light upon their heads, truth if he speaks truth, falsehood if he speaks falsely. Whatever, therefore, a person names in his oath, whether it be his children, his head, or his safety, he puts those under obligation to God. 337

Therefore, although Philo Judaeus, *On Special Laws* [II. i], is entirely to be commended when he condemns profane looseness in taking oath, yet the following words do not merit a vote of approval:

Even if particular necessities shall compel a man to swear, then he should make the witness to his oath the health or happy old age of his father or mother, if they are alive; or their memory, if they are dead. And, indeed, a man's parents are the copies and imitations of divine power, since they have brought people who had no existence into existence [. . .]. And those men also deserve to be praised, who, when they were compelled to swear, by their slowness, and delay, and evasion, cause fear not only to those who see them but to those also who invite them to take an oath; for when they do pronounce the oath they are accustomed to say only thus much, 'By the —'; [. . .] without any further addition, giving an emphasis to these words by the mutilation of the usual form, but without uttering the express oath [. . .]. For a man can add, if he pleases, not indeed the highest name of all, and the most important cause of all things, but the earth, the sun, the stars, the heaven, the universal world. (Y.*)

Nor can I see how any excuse can be offered for that oath of Christian soldiers, given by Vegetius, *De Re Militari*, Bk. II, chap. v, embodying a far too rude and excessive reverence for their emperors: 'They swear by God, and by Christ, and by the Holy Spirit, and by the majesty of the Emperor, which next to God is to be loved and cherished by the human race. For when our Emperor has taken on

the title "Augustus", he must be served with a faithful devotion, and presented with a watchful service as though he were God present in the body.' For even if we concede the truth of the reason which he adds, namely, that 'a civilian or a soldier, then, serves God when he faithfully loves him who reigns by God's authority', that is no reason why an oath should be taken by the majesty of the Emperor, in the same way as by the name of God. Nor do common soldiers have such subtlety as to be able to use in the same formula the word 'by' in two senses, as they speak of God and of the emperor respectively. Indeed, according to Eusebius, *Ecclesiastical History*, Bk. IV, chap. xiv, it is clear that to swear by the fortune of the emperor, which Polycarp steadfastly refused to do, was one of the proofs that a Christian had renounced his religion. Thus I question whether the form of oath is to be approved, which Charles Gonzaga instituted for his new order of knights: 'I swear by the eternal God and the ancient nobility which I profess' (Gramondus, *Historiarum Galliae*, Bk. V). It is obvious also from this that it was not without reason, in former times, that they who had sworn falsely by the head or safety of their prince were severely punished, since it was believed that by so doing they had made their prince, with whose fortune the safety of the State was so intimately connected, liable to the punishment of heaven. See *Digest*, XII. ii. 13, § f. [XII. ii. 13, § 6]. Thus we are told in Herodotus, Bk. IV, that when their king fell ill the Scythians used to inquire whether any citizen had sworn falsely by the king's throne; and that, if such was the case, the perjured man was executed. In Zosimus, Bk. V [li], the magistrates replied that the demands of Alaric, fair enough though they were, could not be granted, since they had sworn by the head of the emperor that they would make no peace with him: 'If their oath had been made to God, possibly it could have been neglected, relying upon the divine mercy for pardoning such sin, but since they had sworn by the head of the emperor, it was morally impossible for them to transgress so solemn an oath.' In *Capitularies of Charles*, Bk. III, chap. xlii, a man is forbidden to swear 'by the life of the king or of his children'. In *Digest*, XII. ii. 33, Ulpian admits that it is an oath when a man swears by his own safety, but he says that it is not binding unless the oath was delivered to him in that particular form. Add *Digest*, XII. ii. 3, § 4; ii. 4; ii. 5 pr. And that was because oaths are taken for the sake of the person who delivers them. For this reason it is customary for oaths to be taken in
 338 the words given by him who delivers them, in order that they may be binding in the meaning which he intended (cf. Livy, Bk. XXII, chap. xxxviii [1 ff.]); and that the swearer might not attempt to avoid the force of the oath by using oaths couched in scheming or ambiguous terms. Another reason is because such oaths lose their reverence by virtue of constant use, and so one person is not obligated

to accept as a solemn oath the trite formula of another person, which often enough punctuates his speech, without his thinking about it. Nay, Hobbes, *Leviathan*, chap. xiv, is right when he says that such asseverations are not oaths, but an abuse of the name of God, arising from a depraved habit of men who make all their asseverations too vehement.

From what has been said, it is clear that even though execrations, taken in their special sense, as when a man merely calls down evils upon himself or others, or offers himself and others to dire punishment, are not oaths, they nevertheless are to be taken as part of an oath, in so far as they are directed to an assertion or promise of ours. Cf. Ziegler on Grotius, Bk. II, chap. xiii, § 10. And this attitude should be extended to those petitions wherein a man prays that some good may befall him, according as he keeps his oath. An example of such is the following in Aelian, *Varia Historia*, Bk. XII, chap. ix: 'So may I dash out the brains of Timesias.' Ammianus Marcellinus, Bk. XXIV, chap. v [39]:

But Julian encouraged his army not by the idea of their families, but by the thought of the greatness of the enterprise on which they were embarked: < continually making vows >—'So might he be able to make the Persians pass under the yoke'; 'So might he restore the Roman power which had been shaken in those regions,'—in imitation of Trajan, who was accustomed frequently to confirm anything he had said by the imprecations—'So may I see Dacia reduced to the condition of a province; so may I bridge over the Danube and Euphrates.' (Y.)

Add also Grotius on *Genesis*, xxiv. 2. Thus the Patanes of Hindustan are such a proud people that they often use as their oath, 'May I never be king in Delhi, if this be not so.' Whence, also, we see the proper explanation of those oaths which occur in the Holy Scriptures, where even godly men mention created things. See *Genesis*, xlii. 15; 2 *Samuel*, xiv. 19; 1 *Samuel*, xxv. 26; 1 *Kings*, ii. 23; 2 *Kings*, v. 4 and 6. So also it is shown by *Matthew*, xxiii. 16 ff., that the Jews of a later time very frequently swore by the head, the heavens, the temple, its gold, the altar, and by victims. Our Saviour in that passage severely criticizes the profane abuse of such oaths and their petty distinctions. Didymus in the Scholiast on Homer, *Iliad*, Bk. I, 234 [Scholia A], explains the words: 'Yea, by this sceptre,' in this wise: 'We must realize that in mentioning the sceptre he swears by God, the protector of the throne.' That passage of Homer has been imitated by Valerius Flaccus, *Argonautica*, Bk. III [707 ff.]:

This spear, the spoil of great-hearted Didymaon, which shall never put forth green branches, nor shade, now that it has once been torn from the ridges, and its mother has been slain; and sternly meets its faithful ministrations and hard battles—this spear I call upon, and this I swear to thee, O leader, by every deity.¹

¹ [For *nomine* read *numins*.—Tr.]

Cf. Vergil, *Aeneid*, Bk. XII, line 396. Yet Ovid, *Remedy for Love*, Bk. II [783-4], says: 'For, inasmuch as the son of Atreus swore by his sceptre that the daughter of Briseus had never been touched by him; 'tis clear that he did not think his sceptre was the Gods'.' (R.) Add Grotius, *loc. cit.*, § 11. The Persians in later times used to swear by salt, according to Procopius, *Persian War*, Bk. I, chap. iv. And Ducas, *Historia Byzantina*, chap. xxiii, writes that the Turkish emperor Mohammed took an oath to Bajazet, his vizier, by bread and salt.

4. Now that formula in oaths, by which God is called upon as a witness or avenger, should be taken in accordance with the belief or religion which the swearer entertains towards God. For it is idle to try to hold a man to an oath by a god whom he does not believe in, and so is not afraid of. And no man thinks that he swears by God in any other formula, or under any other name, than such as is contained in the precepts of his religion, the only true one in the opinion of the swearer. Hence it follows that he who swears by false gods, whom he holds to be true ones, is bound by his oath, and if he plays false, is guilty of actual perjury; for he had before his eyes a concept of God of some nature or other, and so, in knowingly perjuring himself, he violated, so far as he could, his reverence for the divine majesty. 339 Juvenal, *Satires*, XV [37-8]: 'Each place hates its neighbour's gods, and believes that those only ought to be held as deities which itself worships.' (E.) Add *Digest*, XII. ii. 5, § 1, which is not opposed by *Digest*, XII. ii. 5, § 3, and [Gratian], *Causa xxii, Quaestio v*, chap. 10. But if a man accepts an oath in a formula of that religion which the swearer holds as true, but he, the recipient, does not, the latter does by no means thereby give the seal of his approval to that religion, or hold it to be true. Thus, the man who accepts an oath from a Jew does not approve the tenets of a man who denies that the one God, Creator of heaven and earth, is the father of our Lord Jesus Christ. But I question whether the illustration taken from *Genesis*, xxxii. 53, by Grotius, *loc. cit.*, § 12, applies in this case, for the God of Abraham, and the God of Nahor, and of their fathers, was the true God. Add [Gratian], *Causa xxii, Quaestio i*, chap. 16.

5. If an oath is to obligate one it is necessary that it be taken with deliberate thought. And so that man will not be bound by an oath, who, not realizing that he is swearing, repeats the mere phrases of an oath, who simply recites an oath and nothing more, or who dictates to another such words framed in the first person, as it is called. Add *Digest*, XLIV. vii. 3, § 2. And to this extent the saying of Lucian, *Pro Lapsu inter Salutandum* [xviii], can hold good: 'Never mind what he said; it is what he meant that matters.' (F.) Therefore, it was idle of Cydippe to create for herself a religious scruple when she had read

the oath which Acontius had written on the apple. And she is right when she says in Ovid, *Heroides* [XXI. 135 ff.]:

It is the mind that swears, and I have taken no oath to that. It is counsel and the prudent reasoning of the soul that swears, and, except the bonds of the judgement, none avail. You possess in vain but words without a force of their own. I took no oath—I read words that formed an oath, &c. (S.)

A similar story is told by Antonius [Antoninus] Liberalis, *Metamorphoses*, at the beginning, of a maiden, Ctesylla of Ceos, whom an Athenian, Hermochares, beguiled by the same device.

But it would certainly be most absurd if a man, wishing to take an oath or showing every intention of doing so, is still unwilling to be obligated, and if he should say, that, when the oath was administered to him he intended to go through the mere recitation of the words and not to lay an obligation from them on his conscience. The real reason for this is not so much that an obligation is inseparable from an oath, and is its necessary effect, as that on such reasoning all use of oaths, indeed every manner of obligating oneself by an exchange of signs, would be taken from human intercourse if a man, by his own secret intention, could prevent an act having the effect for which it was instituted in the first place. Therefore, you will most surely be bound by your oath, whatever you may have in mind when you swore it, provided the man to whom it is made accepts your words as indicative of an oath, and you, when you tendered it, made every sign of acting seriously in the matter, and not of taking it as a jest. And, as a matter of fact, it is a pure contradiction to be willing to take an oath and yet to be unwilling to be obligated by the oath, to be willing to promise, and unwilling to be held by the promise, to be willing to speak in all seriousness, yet not in such a way that your words shall afford the use which common agreement has assigned them. And so it was a stupid reply of the people of Milan to Frederick I, when they said: 'It is true that we gave our oath, but we did not promise to keep it.' Radevicus, Bk. II, chap. xxv. Add Grotius on *Matthew*, v. 33. Here belong also the remarks of Petrus Suavis, *History of the Council of Trent*, Bk. I:

Whenever the papal seat is vacant, the cardinals usually draw up a number of articles into a document to reform the papal regimen, which they individually swear carefully to observe, if they are elected to the papacy; yet it is the witness of experience throughout all the ages that no one of them ever intends to abide by his oath, since immediately upon their election as Pope they claim that they could not be obligated, or that the assumption of that office has released them from the restraint of their oath.

Add *Idem*, Bk. V, p. 358, ed. Gorinch, 1658.

But if a man shall prove to have had such an absurd design in **340** taking an oath, the conclusion will be that he was only jesting. For instance, when the title of Doctor has been conferred upon a person in the accustomed manner, he shall be none the less a Doctor, even

though the one who gave him the degree, all the time he was reciting the usual words, may have thought that he was investing an ass. But if an actor upon the stage with all pomp and ceremony bedecks a man with the robes of that degree, the man will be no more a Doctor than before. 'The very situation shows that the action is fictitious.' Quintilian, *Declamations*, cccxlii. From this it is clear that it is absurd to ask whether a man is obligated who repeated an oath with deliberate thought, but without the intention of actually swearing. For if he merely recited the words it is obvious that he did not swear and is not obligated. But when the thing was done in all seriousness, that is, when he who repeated the words gave every appearance of one who takes an oath, and the other party took his declaration in that sense, he unquestionably took an oath and is under an obligation, no matter what the swearer may secretly have had in his mind.

6. But this further point should be carefully noted: Oaths in themselves produce no new and distinct obligation, but come in as a kind of accessory bond to an obligation already valid in itself. For in the taking of an oath we presuppose something, upon the non-fulfilment of which we call down upon our heads the punishment of God. And this would be useless were it not unlawful to omit that which is presupposed, and, therefore, unless we were already obligated. Although a single sentence may often include both the principal obligation and the accessory bond of the oath, as if I should say: 'May God so help me as I will pay you one hundred something or other.' Yet an oath is not superfluous merely because it is added to an obligation that is already established. For although all men except atheists believe that God punishes the violation of promises, even though they have not bound themselves by an oath, still they are justly persuaded that those who have expressly called down the wrath of God, and to the best of their ability shut themselves off from His mercy, are punished all the more severely; since such a man perseveres in his evil course, with an intention so firm as to show that he does not care whether he displeases Him who has the power to dispense the greatest good as well as the greatest evil.

From what has been said, we conclude that those acts in which some intrinsic blemish, which prevents the rise of an obligation is inherent, are not obligatory, even when an oath is added to them. In the same way a preceding valid obligation is not destroyed by a subsequent oath, nor is the right which it gives a man thereby removed. And so it will do no good for a man to take an oath that he will not pay another his due.

7. It follows, also, that since in promises and pacts consent secured by error is not capable of producing an obligation, so an oath is not binding when it is established that the swearer supposed some fact,

which was not actually as he thought, and that he would not have taken the oath, had he known that to be the case; especially when he was led to the error by the craft of the person to whom the oath is given. For here that fact has the force of a condition, the absence of which invalidates all that is based upon it. Thus, if a man brings me some good news from a distant place for which I promise him a reward upon my oath, I shall in no wise be bound by my oath after I have learned that he brought a false report. Grotius, *loc. cit.*, § 4, adds the following on this case: 'If, however, it shall be doubtful whether a person would not have taken the same oath even without the erroneous supposition, he will have to stand by his words, because in an oath the greatest possible simplicity is required' (K.), and it must be clear of every kind of evasive explanation, and because the promise was not based on that error¹ alone, even though its scope may, perhaps, have been widened by virtue of that error. But the case is not yet entirely clear. For which of 341 the two will decide whether the promise would have been made, had the error been lacking? Surely not the man to whom the oath was given. For how may one person be able clearly to judge what the other's thought would have been if this or that condition had been true? No more can he who made the oath judge with sufficient certainty on this point; for of course the same thing is not equally pleasing to us at another time, nor if it is proposed at the same time, indeed, but in a different way. It seems probable, therefore, that such an oath is not even binding, at least in so far as it is built upon an error. But if a man out of respect for God decides not to recede from it altogether, he shall judge by the state of his affairs how far he can fulfil it conveniently.

In this place it may be to our purpose to make some comments on Joshua's fulfilment of his oath to the Gibeonites, *Joshua*, ix [3 ff.]. It should be observed, at the outset, that the cunning of the Gibeonites was not culpable, nor did it fall under the term of a lie properly speaking. For who may reprove a man if he tries by some false story to preserve his life from an enemy bent upon his destruction? In the next place, no damage properly speaking was caused to the Israelites by their stratagem. For a man suffers no loss if he is not permitted to shed the blood of another, whom he can, nevertheless, strip of all his property and keep in perpetual servitude, so disarmed and weakened that he can never afterwards rise in revolt. Therefore, the crux of the matter lies in this: Whether, namely, God by express command ordered them to put to death every one of the inhabitants of Canaan, even those who willingly bowed their necks to slavery and from whom no danger could come in the future. If this is absolutely affirmed, then the oath of Joshua was void; for it would only have served as a means of breaking the command of God, that is, Joshua would have called upon God to

¹ [For *errori* read *errori*.—*Tr.*]

punish him unless he broke that command. Nor can it be said that Joshua wished to keep his oath, only in order that the respect owed Jehovah should receive no hurt among those peoples from his failure to keep a pact in which he had invoked the name of God. For no less prejudice would have followed if he had failed to execute some command laid upon him by God. And so Grotius feels that the injunction of *Deuteronomy*, xx. 16, had this added limitation: 'Unless they at once did what was commanded them,' for which he proceeds to point out several reasons. Add Selden, vi. 16, where he shows that such an extermination was not so much a command for the Israelites as an indulgence. And others feel that this position has added weight, from the consideration that the reason of that disposition is the following: Lest the people, at that time unusually inclined to follow strange beliefs, should imitate their idolatry, and furthermore, lest the ancient inhabitants, being left in large numbers, should order the new-comers to migrate again, especially if they lived with the latter on equal footing. See *Judges*, i. 34; ii. 2; iii. 5-6. With this danger removed, they say, some could surely be spared, and in particular such as had abjured the worship of idols.

However this may be, it is clear that when Joshua discovered the deception he nevertheless held to the letter of his oath. In a phrase much used by Orientals they had professed themselves servants of the Israelites and had requested a treaty. Joshua gives them their lives and enters into a treaty. By this their property and their liberty would have been left the Gibeonites, had they been what they claimed they were, that is, a nation beyond the bounds of those peoples whom God had destined for destruction. See *1 Kings*, xx. 4. But, because of the deceit they had practised, he took their words in the strict sense, and left them nothing except their lives, and, as it appears, the bare means of existence. Add Ambrose, *On Duties*, Bk. III, chap. x.

342 8. But what is to be thought of oaths extorted by unjust fear? Surely the man who by unjust fear has secured a sworn promise, is no less obligated to release the promise extorted by force, to which an oath was added, than if it had come from a person without an oath. Therefore, there seems to be no reason why, in this case as well, compensation may not be expected, according to the principles which we laid down above on fear. Indeed, Grotius, *loc. cit.*, § 14, holds that:

If either the words of an oath do not have a man in view for the conferring of a right upon him, or if they do have him in view, but if there is something which can present an obstacle to his claim, then the force of the oath will be such that the man will indeed acquire no right, but nevertheless he who has sworn will be under obligation to God to keep his oath. (K.)

As an example of this he gives the instance of a man who has secured a promise by unjust fear. But an oath the words of which are

directed not to a man, but to God, is entirely different in nature; for instance, if I say alone or before witnesses, 'I swear to God that I will give Seius so much.' (Add Paulus Servita, *De Inquisitione*, pp. 55-7, where he distinguishes between an oath directed to God and one placed in the hands of men.) Such an oath partakes of the nature of a vow, by which I promise God that I will fulfil something for His honour, and therefore by that I have resolved to confer a right not on a man but on God. But those oaths are different which are directed to a man, that is, when I promise a man something, calling on God as my witness, since in this case it appears that the obligation ceases, if there lies in the man to whom the promise is made some fault because of which he cannot rightfully accept the promise. For I did not promise God, nor did I say that I would give to a thief for the honour and glory of the divine name. And even though you grant that also this kind of oath has the force of a vow, yet a vow is not binding, unless it is accepted by God, and how shall I be assured that God is pleased that I, an innocent person, should deprive myself of my goods, and bestow them on an impious rascal, that his villainy may not go unrewarded? There should be no fear that the neglect of such an oath would lessen the honour paid God by a thief, since the man shows quite clearly, by the character of his life, how highly he esteems God. If, however, there is a man who, in order to prevent a scandal to the weak and in order not to seem, now that he is safe, to hold in any lack of reverence the name of God, which was his deliverer in perils, prefers to dispense the promised money, it will be a wiser investment, and one more acceptable to God, to spend it in pious works rather than to let it support the wickedness of some villain. And this procedure is all the safer when the swearer lives in some State, where the civil laws as well declare such oaths to be of no force. See *Authentica Sacramenta Puberum* [Frederick II], *Code*, II. xxviii. The examples which Grotius adduces for the opposite opinion will seem to any one who properly examines¹ the matter, to have nothing to do with the case. Add also Anton. Matthaeus, *De Criminibus*, XVI. v, on *Digest* XLVII, where I wonder how he approves the instance 'of Julius Caesar, who, on being captured by pirates, gave them his oath and paid his ransom; then collected a fleet, and captured and crucified them'. For neither Plutarch, Velleius, Suetonius, nor Polyænus, Bk. VIII [xxiii. 1], mentions any such oath of his, and Matthaeus seems in this case to follow those who think that an oath can be fulfilled by a mere payment at the moment, and then that the swearer of the oath can immediately, either by himself or by officers called to his aid, recover what he has given. Such, indeed, is but an idle and perfunctory performance of one's oath, since it is no payment when a person may at once recover what he has paid.

¹ [For *inspicienti* read *inspicienti*.—Tr.]

Also Cicero, *On Duties*, Bk. III [xxix], maintains that 'it is not a fraud not to pay a price for your life, agreed on with a robber', and this for the reason that a robber 'is the common foe of all men, with whom neither should faith nor an oath be in common'. (E.) But Grotius, *loc. cit.*, and Bk. III, chap. xix, § 2, disagrees with him, for the reason that, even though that special community of rights, which the law of nations has introduced among nations in the regular course of war, has no respect for a robber, yet because he is a man, he has a communion of natural right, which is the source of the principle that pacts
 343 should be observed. Yet something can be said for Cicero's position: Since a pirate is the common enemy of all, that is, a man who without having been injured robs and murders any person whomsoever that he meets, and therefore, on his own confession, disturbs and destroys that social relationship between men which has been instituted by God; he has, in consequence, no right to avail himself of that bond, whereby men are accustomed to engage themselves to a social life, according to the command of God. And since his manner of life is an open profession of atheism, he should reap no advantage from religion; just as on the contrary no prudent person places any confidence in the oaths of such men. And a pimp in Terence [*Adelphi*, 188 f.] holds it to be one of the requisites of his trade, that he be a perjurer. Niccolò Machiavelli, *Storie Florentine*, Bk. III:

When religion and the fear of God are lost, the sworn word is measured and observed only for its utility; and men use it, not with the intention of observing it, but that by it they may deceive the more easily, while they think they have gained all the more praise and glory, according as they have practised deceit with greater ease and security.

9. A further requirement for the validity of an oath is that the obligation to which it is added be lawful. Therefore, a sworn promise will have no force, if made on a matter which is unlawful by natural and divine law, even if it be not opposed by the human law, supposing a man to live in a state. See the passages which Gratian, *Causa xxii, Quaestio iv*, has gathered from the fathers. A most notable example, first of all, is that of David in 1 *Samuel*, xxv [4 ff.], who, having sworn in a moment of anger that he would destroy the house of Nabal for having with insulting words refused to do him a kindness, returns thanks to God, after being calmed by the words of Abigail, that he was prevented from incurring a greater sin in fulfilling his unlawful oath. So also it was a proper act of Alboin to recall the vow in which he had sworn to destroy with the sword the entire population of Pavia, because they had refused to surrender to him; Paul Warnefrid [Paulus Diaconus], *History of the Lombards*, Bk. II, chap. xxvii. Add *Idem*, Bk. V, chap. xl, at the end; Aeneas Sylvius, *Historia Bohemica*, chap. xviii. For it is absurd to invoke the divine vengeance, if you do not do something which God has forbidden upon threat of punishment, and thus to

abuse the reverence due God by ignoring His will. In fact oaths are introduced among men in order to confirm lawful and good actions, not to render service to evil deeds. Dionysius of Halicarnassus, Bk. XI [xi]: 'The gods desire not to be called upon to secure the performance of shameful contracts, but of those that are honourable and just.' (S.) In the Koran, *On Disputation*, a man is forbidden to swear that he will never¹ touch his wife; and if a man has taken such an oath, he is commanded to manumit a slave, as expiation for his oath, before he approaches his wife. In the same place the further question is raised, whether a man who has fallen upon robbers, and, to save his life, is forced to swear eternal silence, and to guard them from punishment to the best of his ability, must keep his oath. This in our opinion should be answered in the negative, especially if his silence will be the cause of peril to many others. For it is not unlawful for him to grant them impunity, so far as he is concerned, but not if his so doing will lead to the death of many innocent persons. And to such a case may be applied the words in Tacitus, *Annals*, Bk. III [lxx]: 'Forbearing as the Emperor might be in regard to his own private wrongs, he should not be indulgent to an offence committed against the State.' (R.) In Gunther, *Ligurius*, Bk. VIII [793 ff.], Frederick issues the following order: 'Oaths forced by fear of death or by torment, and chiefly those which prevent one from telling abroad of designs which will do harm² to many persons, or from making complaint against cruel sufferings, we here declare to have no standing or weight.'

10. Nay, even though a thing which is promised be not in itself unlawful, an oath will still be invalid if it interferes with some greater moral good, when, for instance, we are prevented by it from performing 344 some deed of humanity and piety. Under this head you may list an oath by which a man binds himself not to share with another some art that is honest and of advantage to humanity. See *Matthew*, xxv. 27. Yet this statement should have the following limitation: Provided the needs of mankind can be sufficiently met by myself and by others, who are acquainted with the art, and provided no damage is done him who required the oath. Such an oath is in Lucian, *Tragopodagra* [271 ff.]: 'A mystic oath which I swore does not allow me to tell, and the final injunction of my father on his death-bed, who bade us to keep secret the great potency of this drug.' Pliny, *Natural History*, Bk. XXV, chap. i [2]: 'To leave mankind uninstructed is looked upon as the high prerogative of learning.' (B. & R.)

Now this is true because we owe to God our accomplishment in some good thing, and every man is constrained to strive with all his might for the highest, so that we are not able to take from ourselves a liberty of this kind, nor by our own act free ourselves from a duty

¹ [For *unquam* read *nunquam*.—Tr.]

² [For *nocitur a* read *nocitura*.—Tr.]

laid down upon us by the law of God. Such oaths were not at all uncommon among the Jews, on which see Grotius, *loc. cit.*, § 7, and on *Matthew*, xv. 6; Selden, Bk. VII, chap. ii; Constantin l'Empereur, *Baba Kama*, chap. ix, § 20; Gratian, *Decretum*, II. xxii. 5. 22. Thus we hold the oath invalid by which Narses bound an old man not to tell any living soul of some gold he had dug up. But he, quite properly, upon the death of Narses, made it known to the emperor Tiberius. Paulus Diaconus, Bk. XVIII. Add also Gratian, *Decretum*, I. xiii. 2. And in this respect a vow is just like an oath, for the former also is not valid if it is unlawful, and even when only silly. An illustration of this is the famous saying of the Spartan, who had vowed that he would cast himself headlong from the promontory of Leucata, but drew back on seeing the height. And when his deed was thrown up to him, he replied: 'I had no idea my vow would stand in need of a still greater one' [Plutarch, *Laconian Apophthegms*, p. 263 D].

II. Finally, it is well established that oaths do not change the nature and substance of a promise or pact to which they are added. Thus, oaths on things absolutely impossible do not obligate, although a man is guilty of a grave offence if he makes a rash abuse of an oath by the name of God. Likewise, oaths added to a conditional promise in no wise change it into an absolute one, for an oath which supposes a condition stands and falls with that condition, no less than the promise made without the oath. But an oath, like any other promise, also ceases upon the termination of the quality under which the oath was taken; for instance, a magistrate upon quitting his office will no longer be held to the oath which he took on entering that office. And *vice versa*, citizens no longer owe obedience to one who has laid down or been deprived of his office, even though their obedience be not expressly abrogated, for that is understood from the very nature of the case. Add Grotius, *loc. cit.*, § 18.

In the same way acceptance is required as much for a sworn as an unsworn promise; and he who secures a right from a pact, can remit its fulfilment, whether it be sworn to or not. Thus, it will also be decided by the nature of pacts, whether an act, admittedly contrary to an oath, be only unlawful or void as well. For unless he who swore to his promise has renounced his right to the matter, and has conferred it upon another, the act will not be void, if he afterwards actually give it to a third party; for instance, if a man has sworn that he¹ will bequeath something to a person, and afterwards sells the same thing to a third party, the sale will not be invalid, although the person has perjured himself. Thus if a man, while his parents are living, promise with an oath that he will not marry a certain woman, and yet upon their death he
 345 does marry her, he will, of course, be guilty of perjury, but the marriage

¹ [For *sevem* read *se rem*.—Tr.]

will stand, unless the civil laws dispose otherwise. Furthermore, according to the nature of a promise or pact to which an oath has been added, that oath will derive its efficacy either from natural or from civil law. For the oath itself does not have power to turn into a civil obligation that which otherwise produced merely a natural obligation, except it be that the municipal laws make a special ruling on this point.

So also the same act does not change¹ its nature by the addition of an oath, as, for instance, a pure gift may not thereby become a burdensome contract, and *vice versa*. Here belongs the question whether a contract, sanctioned by oath, in which the swearer has been conspicuously injured, can be rescinded, and the swearer return to his former position of independence. Grotius, *loc. cit.*, § 16, denies this, giving as his reason that, although nothing, or perhaps less than stated, is owed the other person, yet faith must be kept with God. This reasoning we rejected a few pages back. On this question the expounders of the Roman law dispute at great length, on *Code*, II. xxvii. 1, and the subjoined *Authentic*, of which many lawyers, especially those of France, claim that it works a hardship. And upon the rescript of Alexander, they reply that it had no universal force, but was directed to a special case. That is, a soldier, which means a man of mature judgement, at least eighteen years of age, was petitioning the emperor, and claiming, as is evident, no great injury, but his mere immaturity in years. The religious prince was unwilling to make the soldier's contract, confirmed by an oath, void, and it appears that he had in his thoughts the examples of Hercules, who, according to Plutarch, *Roman Questions*, chap. xxviii, took an oath but once in his life. But that the *Authentic*, they say, was wrung from Frederick by the Pope Honorius III, on condition of crowning him emperor, and that Frederick had decided to change it, but was prevented by death. Any one who is acquainted with the inner workings of the papal state will easily understand the reason why the pope was bent upon that decree. Mornay, on the passage in question, reports that this law is not observed in France. See also Augustinus Barbosa, on the passage in question, Groenewegen, *De Legibus Abrogatis*, on the passage in question, and others.

Our opinion is that, if we are to arrive at a clear solution of this question, we should note, first of all, that pacts in which there is an outstanding inequality, and in which there has been fraud, deceit, or unjust fear, and which are entered into without deliberate thought, labour under a natural and intrinsic defect, and that the law of nature, therefore, demands their abrogation or correction. But that the fact that a person is under twenty-five years of age does not of itself make

¹ [For *mutat* read *mutat*.—Tr.]

a pact defective. Although it is easily presumable that some injury may have come to minors, because of the judgement that such an age is changeable and unstable, and opened to the wiles and deceits of many men. But when this injury is not apparent, there is no reason why a pact should be abrogated.¹

After premising this, we say that if a sworn pact or promise labours under no other defect, it cannot be abrogated on the sole ground that it was entered into by a minor, provided he was able to understand the matter before him. But if the other party was guilty of fraud, nay, even if without actual fraud but because of the mere imprudence of age a great injury has been done, the oath does not prevent the injured person, although he has sworn, from being able to seek an abrogation of his agreement, or at least its correction. For when a person under age confirms an argument with an oath, he presupposes that it has no defect, and the other party also gives him to understand that. A condition of this kind underlies an oath, and when it is not present the latter is also void.

But it is another matter if without the other party being guilty of fraud a youth of experience and forethought has given more than a thing is worth, for under such circumstances the transaction was a mixed act, made up of a contract and a gift. But it should be
 346 observed in general that a person who is subject to the authority of another cannot obligate himself to more than is allowed him by that authority. When he has exceeded that, the transaction can be declared void by the one in authority at his pleasure, whether an oath has been taken or not.

12. But this much is effected by oaths, from the fact that appeal has been made to God, whom a man may not deceive, however cunning he be, and whom no one may beguile with impunity: All cavil must be excluded from undertakings to which oaths are added. And so the Roman censors were justified in condemning the trickery of a captive who had sworn that he would return to the enemy's camp, and, after going in that direction a short distance, turned back as if he had forgotten something, and afterwards remained in Rome, claiming that he was free from the obligation of his oath. Cicero, *On Duties*, Bks. I and III [xxxii]; Gellius, Bk. VII, chap. xviii. So also we should condemn the casuistry of Dercyllidas, who gave his oath to the tyrant of Scepsis that, if the latter would come out to parley, he could return at once into his city. And when² the latter had come out, he ordered him on pain of death to open the gates, saying: 'Now I am letting you go back into the city, for I gave my word; however I am going to enter also with my army.' Polyænus, *Strategemata*, Bk. II [vi]. We must likewise condemn the wicked cavilling of the Locrians, given by

¹ [For *rescindi* read *rescindi*.—Tr.]

² [For *Ēgo* read *Ergo*.—Tr.]

Polybius, Bk. XII, chap. iv; and this because, as Cicero, *On Duties*, Bk. III [xxxii], says: 'Fraud does but foster, nor absolve perjury.' (W.) Add Stobaeus, *Anthology*, III. xxviii, of Cydias. Tacitus, *Annals*, Bk. XII [xlvi]: 'Radamistus also made as though he did not forget his oath. He employed neither sword nor poison against his sister and his uncle; he had them thrown upon the ground, covered up under a pile of heavy clothing, and so smothered.' (R.) Thus Henricus Stephanus, in his preliminary treatise to the *Apology for Herodotus*, chap. xvi, criticizes the well-known evasion of merchants, when they swear that they cannot sell a thing at such and such a price, unless they are ready to lose money; observing that they have in mind the proverb: 'A merchant loses money if he makes no profit.'

I am uncertain whether we should class under this head the act of the Count of Fontane, who had himself carried in a chair at the battle of Rocroi, because, as he said, he had taken an oath never to fight against the French on foot or horseback, Benjamin Priolo, *History of France*, Bk. II. Or that of Alexander VII, who, on becoming pope, swore that he would never receive his relatives in Rome, and then, on the advice of the Jesuits, got around his oath by 'receiving' them first at Castel Gandolfo, and then bringing them with him to Rome, as the story is told by the author of *Nepotismus*, Pt. I, Bk. III. Or what Tavernier, *Voyages*, Pt. II, chap. xiv, recounts of the agents of the East India Company, who take an oath before leaving Holland that they will be satisfied with their salary and will not engage in business in their own name. But soon after they have landed in India many of them take wives, who carry on secretly in their own name the forbidden business. Aelian, *Varia Historia*, Bk. XII, chap. viii, tells us that Cleomenes the Spartan made Archonides a partner in his design, swearing to him that, if he was successful in his undertaking, 'he would do everything along with his head.' But when he had secured the control of the State, he cut off the head of his partner and put it in a jar of honey; then, whenever he had decided upon some course of action, he used to bend over the jar and communicate it. Polyænus, Bk. VII [xxxiv], tells how Aryandes swore to the people of Barca over a ditch, secretly dug and covered with small sticks and earth, that he would keep his agreement so long as the earth stood; thereupon he broke down the construction and rushed into the city which suspected no hostile act. Although the same deed is attributed to the Persians by Herodotus, Bk. IV, towards the end [cc].

On the same principle, if one of two thieves steals a thing, and the other secretes it, while the former swears that he does not have it, and the latter that he did not take it, they will both be guilty of perjury. So it was a most glaring evasion of Suleiman who, after swearing to Ibrahim Bassa that while he lived he would not take his life, ordered him

347 to be killed in his sleep; as though men while asleep cannot be considered alive. On the other hand the ancients praised the firmness of Q. Metellus Numidicus, because he refused to swear to the law of Saturninus, although Marius the consul and others told him that he could properly do so because of the condition of the State, and that the force of his oath could be destroyed by this unspoken condition, that he swore to the law, provided it was a law; that is, if it had been properly presented and passed. That it could be easily shown afterwards that the law was not valid, since it was passed while it was thundering, at which time it was illegal for the public assembly to transact any business. But he preferred exile to the use of such trickery, alleging that those who swore certainly gave the impression that they recognized an action to be a valid law. See Appian, *Civil Wars*, Bk. I [iv. 31]; Plutarch, *Marius* [xxix, p. 432]. But we hold, for our part, that Lycurgus was unduly scrupulous when he ordered his ashes to be scattered over the sea, lest they should be returned to Sparta, and the citizens should believe that they were freed from the obligation of their oath. For a man is not held actually to have returned to his country merely if his body is brought home. See Plutarch, *Lycurgus* [xxxii]; Justin, Bk. III, chap. iii.

13. Yet the interpretation of oaths is not for these reasons always to be extended, but at times to be held to with all strictness, if the subject-matter seems to require it; for instance, if an oath has been taken out of hatred to another, and to confirm not so much a promise as threats, which of themselves can confer no right upon a man. Under this head falls the famous case of the Israelites in *Judges*, xxi [7], who had sworn that they would not give their daughters as wives to the Benjaminites. But they afterwards urged the latter to carry off the maidens, and interceded for them with the fathers of the stolen girls. For it is one thing to give, and another not to recover what has been taken. And it was easier to allow this strict interpretation, because it would have been cruel to blot out a whole tribe for one offence, however frightful, and such a case they may have excepted in their oath. Add Josephus, *Antiquities*, V. ii; Ambrose, *On Duties*, Bk. III, chap. xiv. According to Ammianus Marcellinus, Bk. XXVII, chap. iv:

Since Athanaric (a judge of the Goths), alleged that he was bound by a dreadful oath, and also forbidden by the strict commands of his father ever to set foot on Roman territory, and as he could not be brought to do so, while, on the other hand, it would be unbecoming and degrading for the emperor to cross over to him, it was decided by negotiation that some boats should be rowed into the middle of the river (Danube), on which the emperor should embark with an armed guard, and that there also the chief of the enemy should meet him with his people, and conclude a peace as had been arranged. (Y.)

Thus, as Livy, Bk. XXXIX, chap. xxxvii, relates, when the Romans demanded of the Achaeans that they should rescind some of their

decrees, they replied that they were prevented from doing so by their oath. But when Appius, the speaker for the Roman commission, said that he strongly advised the Achaeans to be glad that they could act on their own volition, lest they should later have to act unwillingly and perforce, they were struck with dismay, and asked that the Romans themselves make any changes they saw fit, and not force them to make void the things they had sanctioned with an oath. That is, they felt it was one thing to destroy their law of their own accord, and another thing through fear not to oppose its being destroyed by a greater power. You may also bring in here the account in Euripides, *Hecuba* [850 ff.], of Agamemnon refusing to punish Polymnestor the Thracian, because he was a friend of the Greeks, but promising Hecuba that he will not interfere with her taking vengeance upon him. Add Polybius, *Selections on Embassies*, viii, towards the end. Thus the worthless slave in Terence, *Andria*, Act IV, sc. iii [724 ff.]:

DAVUS. Take the baby, quick, quick, and lay it on our doorstep [. . .].

MYRSIS. Why don't you do it yourself?

DAVUS. Because if I happened to have to swear to my master that I didn't put it there, I might with a clear conscience. (S.)

But we feel ourselves that this was a lame subterfuge, since it comes to the same thing whether you place it there yourself, or have it done by some one else. Thus Aurelian quite properly put the strictest interpretation on his threat, in that he commanded his soldiers to scatter about in order to kill the dogs. Flavius Vopiscus, *Aurelian*, chap. xxii; add Valerius Maximus, Bk. VII, chap. iii, § 4. 348

Another illustration is the account that when Alexander had decided to destroy Lampsacus, he swore, upon the arrival of Anaximenes, that he would do none of the things which he wanted. Whereupon he asked that he destroy Lampsacus, and so the city was saved. In Herodotus, Bk. IV, when Etearchus secured the oath from Themison, that the latter would aid him in whatever he asked, he then demanded of him that he drop his own daughter into the sea; then Themison, putting out to sea, bound the girl with ropes and let her down into the sea, only to draw her up again unharmed. Here also belongs the story given by Plutarch, *Demetrius* [p. 890]: When Antigonus, because of a dream, had decided to slay Mithridates, and had disclosed his purpose to his son Demetrius, whom he had first bound with an oath to keep silence, the latter, fearing for the safety of the young man, took him aside from witnesses, and saying no word wrote with his spear on the ground while the other looked on, 'Flee, Mithridates.' A similar case is that of Caesar, as given by Suetonius, *Julius*, chap. lxxiv: 'Even in avenging wrongs he was by nature most merciful, and when he had got hold of the pirates who had captured him, he had them crucified, since he had sworn beforehand that he would do so,

but ordered that their throats be cut first.' (R.) Here belongs also the oath which David gave for the safety of Shimei, 2 *Samuel*, xix. 23. Yet it did not prevent him later, as death approached, from commanding Solomon to see to it that this worthless fellow should not end his days without shedding of blood. 1 *Kings*, ii. 8. For David had promised him safety, only so far as he personally was concerned. Nor did he actually command Solomon to punish him for that old crime, but merely that he carefully watch the wicked man, and on no account spare him, if he happened to sin again. And Solomon acted wisely in the case in commanding that turbulent and foolish man to live in the royal city under his eyes, that he might not upon pain of death stir up some new revolt; which injunction Shimei himself agreed to. And it was not without the providence of God that, upon breaking this rule, he paid the penalty for his latest as well as his old offence. Add Michel Montaigne, *Essais*, Bk. I, chap. vii.

Another case that may be brought under this head is that of Maria, Queen of Hungary, and wife of the Emperor Sigismund, who promised with an oath immunity to Horvatus, governor of Croatia, who had captured and subjected her to hardships; but it is said that after she had gained her liberty she urged her husband to take vengeance, asserting that she had made no promise in his name. Bonfini, *History of Hungary*, Bk. III, chap. ii. I am uncertain whether we should class under this head the deed of Timoleon, while warring upon the tyrant Milarchus, who had overcome many men by his deceptions, and killed them without respect for his oath. The tyrant offered to face trial in Syracuse if Timoleon would not accuse him. The latter swore that he would not accuse him, and on his pledge Milarchus came to Syracuse. When Timoleon had brought him before the assembly he said: I will not think of accusing him, since my oath was to that effect, but I command his immediate execution: 'For when he has deceived so many others, it would be no more than right to be deceived himself once in the same fashion.' Polyænus, *Strategemata*, Bk. V [xii. 2].

14. An oath does not exclude tacit conditions and limitations which properly arise from the very nature of the case. Thus, if I have allowed a person the option of asking for whatever he pleases, I shall not be obligated if he asks for something unjust or absurd. For whoever promises something to a man who is making an indefinite request, before he knows what the other will ask for, presupposes that he will ask for what is honourable and morally possible, not what is absurd and prejudicial to himself or to others. Ovid, *Metamorphoses*, Bk. II [101-2], makes Phoebus say: 'It shall be given [. . .] whatever thou shalt choose. But, oh, make wiser choice!' (M.) A case like this called forth the famous saying of Hippolytus, in Euripides, *Hippolytus* [612], praised by Cicero:

My tongue hath sworn: no oath is on my soul. (W.)

For he had sworn to the nurse that he would not reveal what she would tell him; but when she proposed to him adultery and incest with Phaedra, his step-mother, he denied that he was obligated by his oath to keep silent on so great a sin. Yet Euripides in the play tells us that he did keep it secret out of respect for his oath. Nicomachus uses the same excuse in Curtius, Bk. VI, chap. vii: 'He exclaimed that he had not plighted his faith to be a party in the plot, and that no sanction could oblige him to conceal treason.' (A.*) Since, of course, a citizen is bound by an obligation not to keep silence if he detects any plots against the person or government of his ruler. Thus Cicero, *On Duties*, Bk. I [x], says:

A promise and a paction may happen to be made, the performance of which is prejudicial to whom the promise was made. For (as we see in the play) had not Neptune performed his vow to Theseus, the latter would not have been bereaved of his son Hippolytus. For of the three wishes to be granted him, the third, which he made in a passion, was the death of Hippolytus, upon the granting of which he sank into the most dreadful distress. (Cf. Euripides, *Hippolytus*, line 1315.) 'Therefore, you are not to perform those promises which may be prejudicial to the party to whom you promise.' (E.)

Add also Diodorus Siculus, Bk. IV, chap. lxxv. So also Herod should not have given the head of John to the little dancer, his step-daughter, for just as one cannot be obligated to do what is unlawful, so it should be understood of a general promise that the person shall ask only what can lawfully be performed. *Matthew*, xiv [7]. So also Solomon did not keep his general promise, when his mother asked something which would have been prejudicial to his government, 1 *Kings*, ii. 20. Diodorus Siculus, Bk. XI, chap. lviii, has a story which is also worthy of our attention:

Xerxes longed to renew the war against Greece and required Themistocles to be general of the army; who assented, upon condition that Xerxes would swear that he would not undertake the war without him. Upon which a bull was sacrificed, and at the solemnity the king swore accordingly. Then Themistocles drank off a cup of the bull's blood, and immediately fell down dead, thereby causing Xerxes to give up his purpose. (B.*)

But surely if Xerxes had any other ground for undertaking a war against the Greeks, there was no reason why he should have been moved by that oath, in which he merely supposed the actual life of Themistocles; it was as if he had said that he would undertake nothing against the Greeks without that man's advice, so long as he lived. And so when the latter died, the force of the oath also expired. Add *Digest*, II. viii. 16. But Homer, *Iliad*, Bk. X, lines 307 ff., is scarcely correct in saying of Hector that 'he swore a false oath', because the tacit condition that underlay his promise was, 'if we get them and you return safe.' Unless we take the word *ἐπίορκον* in the sense of an oath which does not accomplish its end.

15. Now although the invocation of a divine being in oaths should

be suited to the belief of the one who does the swearing, yet the sense of the whole statement will hold good, according as the man who requires the oath claims that he understands it, for the oath is taken for his sake, and not for that of the swearer. And so it is his task to frame the words of the oath with the greatest care possible, so that he himself shows what meaning he takes them in, and the swearer signifies that he understands clearly the other's meaning; and then the swearer should state them so distinctly that the other can on no score evade and make a mockery of them. Therefore, the men spoken of by Tacitus, *Histories*, Bk. IV [xli], attempted in vain to avoid perjury, who 'conscious of their guilt were agitated, and, by various subtleties, varied the terms of the oath'. (O.) Thus, in Dictys Cretensis, Bk. V [x], Diomedes and Ulysses craftily swear to the Trojans that 'they will abide by the agreement
350 which they had made with Antenor', since they themselves understood thereby the agreement of betrayal into which they had entered with him. But when the Romans, in requiring oaths, commanded a man to swear 'according to his mind', that did not mean that the oath had the force only as any man conceived it in his mind, but that men should show that they took the oath in all seriousness, not evasively, or with feigned meaning, or, indeed, as only a kind of jest. Thus the formula regularly used by the censors was, for instance, 'Have you, according to your mind, a wife?' A certain Roman knight, making an ill-timed jest at this formula, replied that he had, 'according to my mind, but not according to yours,' and was punished by the censors. There is an excellent passage in Cicero, *Academics*, Bk. IV [xlvi], towards the end, where he is showing that man can have only a probable knowledge of things:

This doctrine, he says, is confirmed by the diligence of our ancestors who ordained, in the first place, that every one should swear 'according to the opinion of his own mind'; secondly, that he should be accounted guilty 'if he had knowingly sworn falsely', because there was a great deal of ignorance in life; thirdly, that the man who was giving his evidence should say that 'he thought', even in a case where he was speaking of what he had actually seen himself. And that when the judges were giving their decision on the evidence, they should say, not that such and such a thing had been done, but that such and such a thing 'appeared' to them. (Y.)

Idem, *On Duties*, Bk. III [xxix]: 'That which is so sworn that the mind conceives it ought to be done, that should be observed. What is otherwise, if you perform it not, involves no perjury' (E.); that is,¹ if a man does not understand the mind of the one who requires the oath, but understands the sense of the oath in a different way, the failure to perform it does not constitute perjury. For when the understanding of the swearer is different from that of the man requiring the oath, the former is not understood to have accepted the oath offered him, and without acceptance there arises no obligation on the part of the

¹ [For *e.i.* read *i.e.*—Tr.]

promisor. 'For to swear what is false', continues Cicero, 'is not always perjury,' that is, to assert by error with an oath something which in fact is quite otherwise; 'but not to do that which you swear according to the sentiment of your mind, as it is expressed in our law form, is perjury.' (E.)

16. There has been a dispute also among some scholars of our time over an oath taken for another; that is, whether a man can take an oath in the place and name of an absentee, which binds the latter. Our position on this matter is as follows: Just as an absentee can contract an obligation in writing, since his consent can be expressed as well by that means as by the spoken word, so there is nothing to prevent an oath being taken also in writing. When this has once been formally recited, it will obligate a person as fully as if he had been present and given it by the spoken word. But it seems that he can recall it before it has been recited, and so a man is not guilty of perjury if he withdraws his sworn admission before it has been thus conveyed to the place where it was to go. But it seems scarcely appropriate that deputies should assume positions as if they were in fact to take the oath for themselves, or that, from fear that they themselves should appear to assume the obligations, they should usually change the final statement of the oath into 'So help him God'. For it would be quite enough for the oath of the absentee merely to be read from his missive. Yet since it has, with good reason, been customary among most peoples to make oaths more impressive by the use of certain solemn ceremonies, and so to set more clearly before the eyes of the swearer the reverence due God by some religious symbol, such as by the use of a victim, approach to an altar, or some similar means, I should conclude that if the matter is of great importance the absentee should solemnly take the oath in the place of his actual residence; especially since a 'corporal oath', as it is called, is absolutely required, which name cannot be given to that which is taken for an absent person in the usual manner. For it is surely something more to invoke God as a witness, in the midst of solemn rites which show forth with a kind of sacred awe the presence of God, than it is to write it upon a piece of paper, which does not blush. Nor is it without 351 reason that the evidence offered by absentees in writing is called 'blind testimonies'. See *Law of the Visigoths*, Bk. II, tit. iv, chap. 5.

17. Finally, the query is often raised whether, if at all, and to what extent, an heir is bound by an oath of the person to whom he succeeds. In this case it is clear that if the other party has acquired from the oath a perfect right which should be met fully or partially out of the property of the swearer, the heir is bound to fulfil it, since that burden, attached to the property, passed along with it to the heir. But when no person has acquired a perfect right from the oath, and the obligation was based only upon the piety, fidelity, or constancy of the swearer, it

is clear that an heir is not bound, since he does not assume the person of the other in those obligations which ultimately and entirely terminated in his person. Thus, if a man has sworn or vowed with an oath, for instance, that he will fast one day in seven, that he will remain unmarried for five years, or that he will undertake a pilgrimage to the Holy Land, and dies without fulfilling it, his heir will not be bound to do so. But it would be otherwise if this were the condition upon which a man was made an heir. Thus, if a man has sworn that in each of the next ten years he will give one hundred something or other to the poor, and he dies before the time has elapsed, his heir will not be obligated, unless definite individuals had acquired the right to require such a sum. For whoever does not confer upon a person the right to exact a promise, only wishes that recourse be had to his fidelity, not to his property, and so upon his death that obligation will not affect his property or his heir, unless he had expressly stipulated it in his will. On this point Grotius, Bk. II, chap. xiii, § 17, observes: 'If in consequence of some defect no right is created for a person but good faith is pledged to God, no binding obligation rests upon the heir of the man who took the oath.' (K.) This we concede, provided the man who took the oath, from generosity, or to avoid a scruple of conscience, had intended to fulfil his faulty oath, which he might have withdrawn on the plea of fraud or of unjust fear. For we have already shown that in such a case not even the original swearer is fully obligated.

But in case the heir does not fulfil a sworn promise or pact of the dead man, does he thereby incur the stigma of perjury? Apparently this question should be answered in the negative; for that which is added to a simple obligation by an oath in its strict sense, that is, by an appeal to the divine vengeance, does not pass beyond the person of the man who took the oath. It cannot be said that the heir was lacking in reverence for God, because it was not he who called upon God as his witness. Hence the heir in question will be guilty of merely simple perfidy. But it will be otherwise if the entire people of a State has taken the oath, for many hold that so long as that body stands, it is held by the perpetual bond of an oath. But it seems to me that this is open to some question. For an oath and the violation of an oath affect the natural will and that of individual men, but not the will of a moral person, except by derivation from individuals. And so a people, that is, a moral person, cannot call down the wrath of God upon itself, that being possible only for each physical person who goes to form the people as a whole. Therefore, when a sworn promise or pact has been violated by a people, only those who actually took the oath will be guilty of perjury, if they agreed to the violation of the oath, while the rest will be subject to the censure of simple perfidy.

And so I should not accuse the Spartans of perjury, because many

centuries later they departed from the laws of Lycurgus; nor the Romans, if they designated their Caesars with the name of king, despite the oath which Brutus had once required of the Roman people. This will be all the clearer if we bear in mind that no man acquired any right from that oath, but that the Romans only wished by it to lay a restraint on the liberty of their will, so that it would not occur to them to restore that form of state once tried and found so unfortunate for them. By this oath they were able to obligate themselves not to set up a king in Rome, at least so long as the safety of the State did not require the kingship. For in such a case even those who had sworn are understood to be freed of their oath, since then the matter of the oath is made unlawful by the condition of the State, which, it is supposed, can no longer be safe without the kingship. But their descendants, who did not renew the oath, could not be bound by it, because, for one thing, it could not be imposed by any authority on them by their ancestors, and because they did not agree to it, as the present illustration supposes. Nor does it make any difference that the people remains the same, although the individual citizens change, and that therefore the act of one generation should apparently be passed on to another. For the act of one generation can bind another only when some man has acquired a right from it. But in such things as redound to a people from the acts of individuals, posterity does not always represent its ancestors, just as a lazy and degenerate posterity can in no way claim for itself the former martial glory that belonged to their nation. But it is a different matter, if such an oath has been repeated by posterity individually. On such oaths in general the statement of Sophocles, *Antigone* [388 f.], should be borne in mind:

No man should make a vow, for if
He ever swears he will not do a thing,
His afterthoughts belie his first resolve. (S.)

It is a good point made by Ioannes Labardaeus, *Historiae de Rebus Gallicis*, Bk. VI, p. 329:

Treaties with kings are more sacred than those with peoples, although they also control the State. For when an individual gives his faith, he is more likely to be scrupulous in observing it, than are the single members of a multitude, who have little or no part in the faith of the state, and so may lightly fall away from it.

Cf. Antonius Matthaeus, *De Criminibus*, XVI. v, on *Digest* XLVII.

18. Oaths may be, and usually are, taken with two ends in view: Either to make a promise with a special religious sanction, or to open the way to a decision on some point which is still not clear, and cannot be decided more conveniently in any other way. In this sense is to be understood the statement of Aristotle, *Rhetoric to Alexander*, chap. xviii [xvii]: 'An oath is an unprovable assertion combined with an appeal to the gods'; that is, a statement which is not demonstrated by argu-

ments, but to which faith is attached merely on the pledge of the swearer. For when a matter can be demonstrated by clear arguments, it is not right to gather proof from oaths. But when the decision of a controversy is left to an oath, no further proofs are sought. It is, however, clear why recourse is had to oaths not in questions of law, but of fact, for an oath is not taken on the question whether or not a thing has been done lawfully, but on the question whether or not a thing was done actually. When this is known, a decision can be reached by certain proof on the law in the matter. The oath taken by judges is not assertive but promissory, whereby they undertake to render a decision on¹ the case before them according to the demand of right and equity. Therefore, of the two divisions of oaths mentioned above, we can call the former promissory, and the latter assertive.

19. Use has very frequently been made of promissory oaths in public as well as in private suits, and perhaps more often² than was necessary. Regarding such oaths certain authors observe that some, called promissory in species, are taken to give rise to an obligation, some only to confirm an act already existing. This division should not
 353 be taken to mean that not every oath is accessory to an obligation, but rather that some promises include an oath in the very nature of the statement, as in the form, 'I swear that I will give you something'; while sometimes the principal undertaking is conceived separately from the oath. But the expositors of the Roman law are right in observing that, as we have shown above, those oaths are void which are added to undertakings that are unlawful and base according to the law of nature, are opposed³ to the public good, or tend to the damage of a third person. But that there are transactions, which are in themselves invalid in a civil court, but are made valid by the addition of an oath, the reason being not that they labour under any inherent fault, but that they may easily furnish the occasion for an injury to the person who undertakes them. However, since every man can refuse a kindness offered for his own advantage, it is presumed that the man who is willing to confirm an undertaking by an oath has considered in all seriousness whether or not it is to his advantage.

20. Now assertive oaths, or such as are used to decide controversies, the settlement of which cannot be effected by other arguments, are taken either by the person who is engaged in the undertaking, or by a third party. Those who take an oath on the deed of another party are called witnesses, whose fidelity, when no plausible evidence lays it open to suspicion, is justly accorded great weight, since it can be presumed that no pious man will for another's interest expose his soul to the wrath of God. Yet it is a wise provision that civil laws are usually

¹ [For *citra* read *circa*.—Tr.]

² [For *frequentis* read *frequentius*.—Tr.]

³ [For *repugnanti* read *repugnant*.—Tr.]

circumspect in admitting a man to give testimony in a case which concerns a person who is connected with him by kinship, which creates a powerful bond of affection; for such men may easily put their religious scruples after their affection. See *Digest*, XXII. v. 3 and 4. Nor was it without good reason that the Romans used to require witnesses of wealth, especially in difficult trials.

21. But even in one's own undertaking a party to it may often settle the question by his oath, this being possible either upon agreement of the parties concerned, or at the order of the judge. *Digest*, XII. ii. 1, 3. For when it happens that two men are in a controversy over a debt, and sufficient evidence is not forthcoming, the claimant can challenge the debtor to take an oath, promising that he will drop his claim if the swearer deny the debt. See Diodorus Siculus, Bk. I, chap. lxxix. But if the latter doubt whether he can take a clear oath; if, for instance, the debt has been passed on to him by another, he may in turn ask the claimant to take an oath, with the promise that he will pay, if the claimant swear the debt is due to him. And this offer and counter-offer of such an oath can be made either in court or out of court; with this difference, however, that the offer of an oath out of court need not be accepted, since it implies an agreement from which I may later become indebted for something; while no one who is without authority over me can force me to undertake a burdensome agreement against my will. But when one party offers another an oath in court, he may refuse it only upon very weighty reasons, and should either take it or make a counter-offer to his opponent. That is, when it is clear to the judge that the suit is well founded, and yet sufficient proof is not at hand, then, in case one of the parties is willing to commit the matter to the conscience of the other, the judge is justified in holding a man guilty who does not dare to deny the debt with a religious act, and will not challenge the other to a similar declaration of the debt. Such a refusal can be laid to nothing else than the fact that the man knows in his conscience that he owes the debt; for in order to avoid the appearance of swearing to a petty profit he may decline to do so, and return the proffered oath to the claimant. If he fears that the other may perjure himself, why does he not take the oath? Yet Plato, *Laws*, Bk. XII [p. 949 A B], allows an oath only in cases 'in which, as far as men can 354 judge, there is nothing to be gained by a false oath; but all cases in which a denial confirmed by an oath clearly results in a great advantage to the taker of the oath, shall be decided without the oath'. (J.) See *Digest*, XII. ii. 34, §§ 6, 7, 9, 38.

22. Finally, sometimes without the petition of the party concerned, the judge may require an oath, when other proofs are not sufficient, and this to the end that a man may secure for himself some right, or may clear himself of suspicion of having committed some deed.

But it should be observed that such oaths are usually never to be offered in cases when capital punishment or any grave loss would follow a confession of the truth. For besides the fact that it is most harsh, in connexion with a fact still unproved, to put a man to the necessity either of deeply wronging his conscience, or of suffering some serious hurt, little confidence is to be had in such oaths, since men are prone to the hope that they can at a later time placate an offended God, upon whose mercy not even a perjured man is forbidden to call. Libanius, *Declamations*, III [p. 249 A]:

In despair and when there is but one recourse, and it cannot be employed except by falsehood, a man does indeed venture to exchange one danger for another when he knows that what is immediately before his eyes is inevitable. And for this he often deceives himself with the fancy that with sacrifices,¹ worship, vows, burnt offerings, and beautiful gifts he can secure pardon from the gods.

For a fuller treatment of oaths of this kind see the expositors of the Roman law on *Digest*, XII. ii.

23. Regarding the violation of oaths, this further question should be cleared up, namely, whether, in view of the fact that, in civil governments, men are almost always bound by an oath faithfully to conduct the duties of office, a man is to be held guilty of perjury if he has been negligent in any part of his duty. Here there is no question about such oaths as concern some special act, in which, for instance, a man gives testimony, denies a trust, goes back upon his own promise, and the like; for he who violates such things, surely deserves the name of a perjurer. But it touches those whereby a man binds himself to a number of things under one general head. It is customary for such oaths to be required of those who are entrusted with some office to be fulfilled by different functions and actions.

Now there is no doubt that the question should be answered in the affirmative, when the violation comes upon full knowledge, and by malice aforethought, only, as in the case of other crimes, so there are different grades in such perjury. For just as the man who has broken only one or two laws is less guilty than he who has renounced once and for all every civil restraint, or has committed a crime against his ruler, so he who has broken all the requirements of his office has incurred a greater perjury than he who has broken but a part of them. But add Robert Sanderson, *On the Obligation of Oaths*, Prelection III, § 18. Nor should any attention be paid to those who maintain that a man should be freed from perjury if he has subjected himself to the penalty laid down for such offenders. For unless in the obligation a person is expressly allowed either to do something, or by paying some penalty to secure the right to do the opposite (see the marriage contract between

¹ [For *hostis* read *hostiis*.—Tr.]

Charles, Prince of Wales, and Henrietta, article 23, in Gramondus, *Historiarum Galliae*, Bk. XVI), the punishment does by no means free him from the crime, as we shall show below at greater length. Thus, he who has had a beating will be none the less called a thief, than if he still went about with a back untouched by rods.

24. The usual claims brought forward about dispensing with and weakening the force of oaths, and to some extent of vows, can be settled on two general principles. The first is: When a man has authority over the actions and property of another, nothing can be done to his prejudice by the subject, and when such a thing has been done, he shall have the right to make it void. The second is: He who has authority over a person can, as it shall seem to his purpose, curtail and limit any rights his subject has already secured, and especially any to be obtained in the future. From this it is clear that the acts of superiors cannot bring it about that an oath, in so far as it was truly obligatory, should not be carried out; that is, an oath which of itself labours under no fault, and was made on a matter of which the swearer had full power to dispose at his discretion, cannot be rescinded by a superior. Thus, the oath which Regulus gave to the Carthaginians on his return could not be rescinded by the Roman senate; although an additional reason was that Regulus was a slave of the Carthaginians, and the Romans had no longer any authority over him. But when the oath has been taken on matters and actions which lie under the direction of a superior, it will borrow its strength from the consent, whether express or tacit, of the superior, who can declare it void if it is not to his liking. Nor need there be any fear of perjury in such a case, if the oath has been rescinded in this way, for the approval of the superior was supposed as a condition by the subject. Furthermore, the superior commits no sin in so doing, because in refusing to allow his authority to suffer any prejudice by the act of his subject, he is only exercising his own right. 355

An oath is also void whether the superior forbids in advance the swearing of an oath on certain matters, or forbids that an oath, once taken, be fulfilled. Although in the former case the subject greatly sins in taking a rash oath contrary to orders. This was the reason for the law of the Hebrews, in *Numbers*, xxx [3 ff.], that, if it seemed best, the father could revoke the sworn vows of his own daughter, the husband those of his wife, the master those of his servant; for otherwise the latter could by their vows and oaths render void the power of their respective superiors. Nay more, Leo Mutinensis, *De Ritibus Hebraicis*, Pt. II, chap. iv, § 4, says that, if a man took any kind of vow or oath, and later repented of it for good reason, he could, provided it was not to the prejudice of a third party, be freed from it by a rabbi or through other men, when the reason for his retraction had been presented and approved. Thus also in *Decretals*, II. xxiv. 19, the statement is made,

that 'in an oath the right of a superior should be recognized as an exception'. Add [Constitutiones Friderici II. Imp.] *Feuds*, Bk. II, tit. lv.

The power of an oath taken by a subject may depend on the will of a superior in this way also; provided the superior stipulate that what the inferior may swear to in a certain case will be valid only if approved by the former. But it is clear that such a relaxation of an oath can be effected only by him who has authority over the swearer, and has such an authority as includes this power. Therefore, the Roman emperors were justified in exercising this authority; as is clear from *Digest*, L. i. 38, where the emperors Antoninus and Verus released from his oath a certain man who had sworn that he would not attend the senate, and was later chosen duumvir. The reason was that a citizen cannot by his oath withhold his services from the requirements of the State. Likewise, according to Suetonius, *Tiberius*, chap. xxxv, the emperor released a Roman knight from his oath, so that he could divorce his wife taken in adultery with his son-in-law, although he had sworn before that he would never set her aside. For Tiberius maintained that the oath could not be extended to a situation, where the wife had, by so foul a crime, made herself unworthy of further sharing his couch. But later the Christian emperors often turned over to the bishops the dispensation from oaths, so that the reputation of the latter for righteousness might eradicate any scruple that could arise among the more simple-minded. Yet it is notorious how far the bishops, and especially that Roman bishop who claims the first place among them, 356 have stretched this concession, and what a flood of evil has overwhelmed the Christian world from its abuse. And in view of the fact that it must be settled on the principles of law, what oaths can be relaxed and for what reasons, I cannot understand why the clergy have claimed for themselves above the civil lawyers authority in this matter.

But even when an oath cannot be declared void because of the person and status of the swearer, a superior who has acquired a right from the oath may still destroy its effect, in case he takes that right away from himself, or forbids that he may receive anything from the oath. And this may be done either by way of punishment, or for the public good by virtue of supreme sovereignty. In this case the swearer is free from the charge of perjury, because he is not responsible for the oath not being carried out, and he is released from the necessity of performing it by the person who acquired the right either directly or by reason of his position. Cf. Grotius, *loc. cit.*, § 20, and on *Matthew*, v. 37.

Finally, the sovereign who revokes an oath on just grounds is not guilty of sin in withdrawing the effect from an act on behalf of which the name of God was invoked, although a subject may sin at times because he has rashly invoked the name of God in connexion with an act, which he should have known was prejudicial to the right of his superior.

CHAPTER III

ON THE POWER OF MANKIND OVER THINGS

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| 1. A great part of law is concerned with things.
2. It is God's will that man make use of the other creatures.
3. Men's consumption of plants does not constitute an injury. | 4. Doubts as to the slaughter and eating of animals.
5. A defence of this.
6. The abuse of the right over beasts is to be reprov'd. |
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SUCH is the constitution of man's body that it cannot live from its own substance, but has need of substances gathered from outside, by which it is nourished and fortified against those things which would destroy its structure. Nay, nearly all nature serves man to the further end that he may live his life more advantageously and easily. Hesiod, *Works and Days*, Bk. II [686]: 'For wealth means life to poor mortals.' (E.-W.) It is in view of all this that so many transactions pass between men, and the way is opened to many controversies as well as contests. To see that these shall not disturb the peaceful association of mankind is the task of natural law, and the civil laws of most peoples are chiefly concerned with the same end. That all this shall be properly detailed, we must observe, first of all, by what right mankind dispose all things and animals to their own use, or advantage and pleasure, and on what principle that faculty rests, both in relation to God the Creator, and to the things themselves which man not only uses, but often wastes as well, and entirely consumes.

2. Without doubt the most Good and Great God, since He is the creator and preserver of this universe has, as it were, complete dominion over all things, which therefore belong so strictly to Him that no man against His will can pretend to any right over them. This dominion of God is treated at length by Philo Judaeus, *On the Cherubim*, who, in view of it, calls the right of men over things merely *usufruct*. But since He stands in need of nothing beyond His own person, and other things cannot add to His happiness, it follows that His goodness renders Him ready and willing to allow His creatures to secure mutual advantage from each other. But He has shown Himself so kind to man especially, that it is commonly said, all creatures have been created by God for the use of men. Yet the right of God over things is very different from that right which belongs to men over them, so that it is a bit of empty reasoning given by Diogenes the Cynic, in Diogenes Laertius [VI. 37]: 'Everything belongs to the gods; and wise men are the friends of the gods. All things are in common among

friends; therefore everything belongs to wise men.' (Y.) But those men claim too much for themselves, who maintain that, if things are of no use to man, it follows that they are vain; and that therefore from this, that all things are common for the entire human race, and so the entire human race can say, 'This is mine.' As even Aristotle, *Politics*, Bk. I, chap. v [I. viii], says: 'Now if nature makes nothing incomplete, and nothing in vain, the inference must be that she made all animals and plants for the sake of man.' (J.) Lucian, *Prometheus*, [xv]: 'Did not men exist, the glory of the universe would be without any to witness it, and our works would not be highly regarded even by ourselves.' But it surely seems that the order of the universe might have been framed on a smaller scale, if nothing was created but to serve the use of man. And Seneca, *On Anger*, Bk. II, chap. xxvii, well says: 'We think too much of ourselves, when we imagine that we are worthy to have such prodigious revolutions effected for our sake.' (S.) Add Charron, *De la Sagesse*, Bk. I, chap. xl, n. 3-5.

But however that may be, this much at least is certain, that man makes use of other created things by the will of God, which is gathered from the fact that man cannot maintain himself without the use of them, and some of them, apparently of their own accord, give themselves to his service. And since God has given life to man, He is understood also to have granted him the use of those things, without which His gift cannot be maintained. Add Arrian, *Epictetus*, Bk. I, chap. xvi [I ff.]. There is, furthermore, the authority of the Sacred Scriptures, which expressly declare that God gave man power, not merely over plants, but also over animate things produced in heaven, earth, and sea. *Genesis*, i. 28-9. This concession, however, has not the force of a command, but is only the indulgence of a privilege, which a person can use, so far as he pleases, but is not bound to its exercise on every occasion. For otherwise man would sin against the divine law, if he let any animal whatsoever go free, or missed any opportunity to bring it under his control. And this surely no sane man would maintain. Yet that authority of man over the brute creation is very different from the sovereignty exercised over men, since the former has, in the case of animals, no corresponding obedience, arising from a kind of obligation, and it is at the same time far more absolute than the sovereignty over men. The fact that the Jews were forbidden by God to eat of some animals has no relation whatsoever to limiting the right of men over animals, since the reason for that law seems to have been based on medical considerations. Yet Selden, Bk. VII, chap. i, states, on the authority of ancient Hebrew teachers, that Adam was forbidden to eat flesh, being commanded by God to live upon the fruits of the field, but that the concession was afterwards given to Noah, *Genesis*, ix. 3, yet upon condition that he refrain from blood, and from any part of

an animal taken from it while still alive. Add *Deuteronomy*, xii. 20. But the same author adds that an exception was made in the case of the blood of fishes, and that they could even be eaten alive, as is done with oysters, and even when they died a natural death; neither of which was lawful with land animals, which were not to be eaten alive, or when they died a natural death.

3. Now if we consider this faculty of mankind in its relation to things and animals which man uses and misuses, the proof that such use carries with it no injury to the animals can be found both in the nature 358 of man, and in the concession of the Creator. For it is not likely that a most Good and Wise Creator should lay upon man, the first of earthly creatures, such a necessity that he cannot preserve his life without doing another creature an injury, which cannot avoid being associated with sin. There is the further express concession of God, which leaves no scruple that might arise in any way from the slaughter of animals. If this seems to raise any question of humanity that can be entirely removed by the mere consideration that God has assigned to them such a condition, and has given the race of men that faculty; and man in using this right, whether reposing in him by the act of God or conceded him, works no injury. Regarding plants and such other things as lack sense, there seems to be no difficulty, since it cannot be seen how they suffer any ill in being consumed by man; especially since they would be destroyed in any event by beasts or in the early change of seasons, while many of them would not flourish at all without the aid of man. We will not pause over the superstition of the Egyptians regarding abstinence from certain herbs. See Diodorus Siculus, Bk. I, chap. lxxxix.

4. Now regarding animate beings endowed with consciousness, to which loss of life is attended with suffering, many who have considered the licence of men over brutes from the point of pure reason, feel that some question may be raised. For it does not at once and without question follow that, because the Creator gave the first of men dominion over animals, He thereby granted him full licence so that he could even kill them for unnecessary uses. Add Grotius on *Genesis*, ix. 3; Selden, *De Jure Naturali et Gentium*, Bk. VII, chap. i. Man has also dominion over man, yet he can exercise no such licence as that over his fellow man. Nor would men have had grounds to complain that the divine indulgence had been niggardly towards them, or that their necessities had been scantily provided for, if they had been denied power over the lives of animals, at least of such as offer no danger to human existence. For the labour performed by animals in cultivating the field, and the other things that come from them, such as milk, eggs, that are not necessary to continue the species, wool, and the like, would have been enough to support men after a fashion. Nor did man receive the power to use them at his pleasure for food, because of the fact that

God commanded him to sacrifice them in His worship. For what is allowed men by a special command of God can still be unlawful except in that case. And this is the reason why many ancient philosophers disapproved of such slaughter. For why should man for the sake of superfluous pleasure take from a harmless animal the life given it by the Creator of them both, especially since men cannot excuse themselves by the example even of lions, wolves, or other carnivores? For nature has so formed these last that they cannot exist upon other than bloody food, and they reject the products of the soil; while the very opposite is true of man, who is nourished by other food, meat having to be prepared by cooking and seasoning before it agrees with his stomach. Although some peoples are said to live on raw meat and fish, as Rochefort, *Descriptio Antillarum*, Pt. I, chap. xviii, recounts of some barbarians of Davis Straits. The same writer, in Pt. II, chap. xi, records that some inhabitants of the province of Pasto in Peru eat no meat at all, and when asked if they do not want to taste a little reply that they are not dogs.

Others have also observed that the front teeth of carnivores are by nature long, sharp, and separated from each other, so that they can sink deep into flesh and tear it apart, while the teeth of men are short and close together, arranged like those of animals that feed on herbs and
 359 fruits; that for this reason we must use knives to cut meat, while meat-eating animals have no such need; and also that children on their mere natural impulse love fruits above other foods, and prefer apples, cherries, and nuts to the finest cuts of meat, since their nature is not yet corrupted nor their appetite perverted by bad habits in eating. See Anton le Grand, *Institutio Philosophiae*, Pt. VI, art. iii. It is a recognized fact that the truculence of men, after it was incited and calloused, as it were, by the slaughter of animals, then broke forth against their own fellow-men; and for those who found delight in slaughtering harmless animals, it was but a short step to unsheathe the sword against weaker men who lay exposed to their injuries. Add the speech of Pythagoras in Ovid, *Metamorphoses*, Bk. XV, fab. ii; Grotius on *Genesis*, xlv. 34; Plato, *Timaeus*, towards the end. Diogenes Laertius, Bk. VIII [13], in his discussion of Pythagoras tells us that the philosopher forbade the killing of animals,

as having a right to live in common with mankind. And this was his pretext; but in reality he prohibited the eating of animals, because he wished to train and accustom men to simplicity of life, so that all their food should be easily procurable, as it would be if they ate only such things as required no fire to dress them, and if they drank plain water; for from this diet they would derive health of body and acuteness of intellect. (Y.)

Yet Lucian, *Somnium* [18], represents him as changed into a cock, and giving the following reason for his teaching: 'I perceived that if I made laws that were ordinary and just like those of the run of legislators I should not induce men to wonder at me, whereas the more I departed from precedent, the more of a figure I should cut, I thought, in their

eyes.' (H.) Add Johann Scheffer, *De Philosophia Italica*, chap. xiv. Plutarch, *Gryllus* [*Bruta animalia ratione uti*, viii, p. 991 c]:

But man, such is his voracity, falls upon all, to satisfy the pleasures of his appetite; tries all things, tastes all things; and as if he were yet to seek what was the most proper diet and most agreeable to his nature, among all the animals is the only all-devourer. And first he makes use of flesh, not for want, as having the liberty to take his choice of herbs and fruits, the plenty of which is inexhaustible; but out of luxury and being cloyed with necessaries, he seeks after inconvenient and impure diet, purchased by the slaughter of living creatures, by that means showing himself more cruel than the most savage of wild beasts. For blood, murder, and flesh are proper to nourish the kite, the wolf, and dragon; but to man they are delicious viands. (G.)

The same author in his *De Esu Carnium*, Oration II [iv, p. 998 B], has among other things this to say:

In the beginning some wild and mischievous beast was killed and eaten, and then some little bird or fish was entrapped. And the love of slaughter, being first experimented, and exercised in these, at last passed even to the labouring ox, and the sheep that clothe us, and to the poor cock that keeps the house; until by little and little, unsatiableness being strengthened by use, men came to the slaughter of men, to bloodshed and wars. (G.)

Aratus, *Phaenomena* [tr. by Germanicus, l. 136]: 'Even the ox, accustomed to the plough, pollutes the table.' Add Pliny, Bk. VIII, chap. xlv; Valerius Maximus, Bk. VIII, chap. i, *inter damnatos*, n. 8; Suetonius, *Domitian*, chap. ix; Aelian, *Varia Historia*, Bk. V, chap. xiv; Dio Chrysostom, *Orations*, lxiv, p. 592; Cicero, *On the Nature of the Gods*, Bk. II [lx ff.].

Nicolaus of Damascus reports of the Phrygians [frag. 103 i Jak.]: 'If any one among them kills a plough ox, or steals an instrument of agriculture, he is put to death.' Aloysius Cadamustus, *Navigatio*, chaps. lvii, lx, writes that the inhabitants of the kingdom of Calcut show also the same veneration for oxen; and according to Diodorus Siculus, Bk. III, 360 chap. xxxii, the Nomads give the name of parents to the bull and cow, as well as to the ram and ewe, because they are the source of their daily sustenance. Strabo, Bk. XV [i. 59], writes of the Brahmins: 'They eat the flesh only of those animals which do not help man in his work.' Much the same story about the Japanese is given by Bernhard Varenus, *Descriptio Japoniae*, chap. xxiii. They are said to avoid in their food blood as well as milk, because they think the latter is nothing other than white blood.

Notice should be taken in passing of the discussion in Plutarch, *Symposiacs*, Bk. IV, chap. iv:

That is most lawful meat which comes from the sea. For we can claim no great right over land creatures, which are nourished with the same food, draw the same air, wash in and drink the same water that we do ourselves; and when they are slaughtered, they make us ashamed of what we are doing, with their hideous cries; and then again, by living amongst us, they arrive at some degree of familiarity and intimacy with us. But sea creatures are altogether strangers to us, and are born and brought up, as it were, in another world; neither does their voice, look, nor any service they have done us plead for their life. For

this kind of creatures are of no use at all to us, nor is there any necessity that we should love them. But that place which we inhabit is hell to them, and as soon as ever they enter upon it they die. (G.)

On the other hand the Pythagoreans, while refraining from all animals as food, especially avoided fish, the reasons being discussed at length by the same author, *Symposiacs*, Bk. VIII, chap. viii. Thus Xiphilinus, *Epitome of Dio*, in the life of Severus, says of the Caledonians that they never tasted fish, although these were found in great abundance in their waters. Among other reasons offered this is given: That other animals in some way or other give men cause to kill them from the damage they do, while fishes neither can nor do injure us; that some, such as rabbits and chickens, should be destroyed lest they increase too rapidly and rob men of their food; while fishes, born as it were on another world, give no excuse to move against them, but men are incited against them by inability to control their appetite.

Porphry, *On Abstaining from Animal Food*, Bk. IV [iii ff.], indeed, goes to great lengths to show that abstinence from flesh is agreeable especially to philosophers, who base their happiness upon God and the imitation of Him. Among the many arguments, which have been presented already for the most part, he takes special pains to show that all souls, endowed with sensation and memory, also partake of reason, and since this last is to be found in other animals, they should also be the recipients of justice, which consists chiefly in doing no injury without just cause. And that the claim of brutes to reason is established by the fact that they are seized by madness and anger. Even to-day the Benjans of Cambay never injure any animal, because they believe that the souls of men at death pass into the bodies of animals, and they never think of eating them; indeed, they even have hospitals built for sick and injured¹ birds. Add Abraham Rogerius, *De Braminibus*, Pt. I, chaps. i and xviii. Phil. Baldaeus, *Descriptio Insulae Ceilon*, chap. xlvii, writes that the Brahmins, even when converted to Christianity, retain their old manner of life, and if met with the statement: 'To the pure all things are pure'; they reply that 'The kingdom of God does not consist of meat and drink', but that they have been accustomed to their light foods, and such a diet agrees with them. The Apalchitae never had tasted meat or fish until they learned it of the Europeans. Rochefort, *Descriptio Antillarum*, Pt. II, chap. viii.

5. Now although approval should very properly be given to everything in these arguments that tends to increase temperance and frugality, and to prevent the finer spirits from being clogged by too rich a fare, yet it can be sufficiently demonstrated by reasons that no scruple is to be admitted about the killing and eating of animals. Of these reasons the most weighty seems to be that no right of obligation

¹ [For *multilatis* read *mutilatis*.—Tr.]

passes mutually between men and beasts, nor should so pass by nature. For we do not understand that the law of nature by its absolute authority enjoins us to cultivate friendship and society with brutes, nor are they capable of sustaining an obligation arising from a pact with men. From this defect of a common right there follows a practical state of war between those who can mutually injure each other, and are understood on probable reasons to be able so to desire. In this state every one has the faculty to do to another, with whom he is at war, whatever will seem to his advantage. And yet this state of war with brutes is very different from that war in which men meet at times, the latter being neither universal nor perpetual, and not extending promiscuously to every kind of licence. This state is most clearly to be seen in the case of large animals which, as opportunity is offered, turn also even upon men; and the person who wishes to spare them requires that men live in a worse state than the beasts. But domestic animals give themselves to the service of men, not from any obligation, but because they are either captivated by the choice food offered them, or restrained by force, upon the removal of which they will soon return to their liberty, while some will even turn against man himself. Some also reproduce in such numbers that they must be exterminated, if men themselves are not to find their living-space circumscribed and inconvenient. See¹ *Exodus*, xxiii. 29; *Deuteronomy*, vii. 22. Add Gassendi, *Syntagma Philosophiæ Epicuri*, Pt. III, chap. xxvii.

But it is vain for some to deny that it follows from the lack of a common right between men and brutes, that a man may injure them and use them for food; and to maintain that even though no injury is done to the brutes, yet it is done to their Creator, unless there is certainty of His consent, or even to the owners of the animals. But surely that is an idle exception. For it is a safe conclusion from the fact that the Creator established no common right between man and brutes, that no injury is done brutes if they are hurt by man, since God himself made such a state to exist between man and brutes. It is, furthermore, one thing to question whether a man may injure a brute, and another whether a man may injure a second person by the use of a brute. Only the former is denied in our argument, and not the latter.

Another consideration of some importance is that, since harmless beasts are otherwise exposed to the forays and slaughters of voracious ones, their condition is made better rather than worse by the fact that men exercise the power which they do over them, since they are furnished with food as a kind of compensation for their slaughter, and are defended against the attacks of savage animals. That man is not bound together with brutes under a common right has already been shown by other writers. And this also, we may add in passing, is the reason why

¹ [For *Fid.* read *Vid.*—Tr.]

the right of ownership has effect only in relation to other men and not to brutes, since in grazing upon our possessions they do us no injury¹. Thus, in *Matthew*, vi. 26, we are told that God cares for birds, even when they eat the products of our labour. Yet the owner of herds sometimes causes us injury or loss when they eat up our harvest, because he did not guard them carefully enough. One right, however, we have in common, in that the right by which they enter our land we exercise in driving them out.

62. And yet there is no question that the abuse of this power, especially any that is combined with an insensate cruelty, deserves reproof. For just as it is to the interest of every State that no man make an improper use of his own property, so a useless and wanton destruction of animals tends to the hurt of all human society, and to the dishonour of the Creator and Author of such a gift. This is why God expressly commanded the Jews to allow a seventh day of rest to their cattle. *Exodus*, xx. 10, xxiii. 12; *Deuteronomy*, v. 14. Add *Deuteronomy*, xxv. 4; *1 Corinthians*, ix. 9; *Numbers*, xxii. 28, 32; *Proverbs*, xii. 10. 362 Cf. also *Deuteronomy*, xx. 19; *Romans*, viii. 19 ff. Plutarch, *De Esu Carnium*, Oration I, says that the Athenians punished a man who had flayed a ram while still alive. And the Pythagoreans 'made out of their gentleness towards animals a practice of love and pity towards men'. Porphyry, *On Abstaining from Animal Food*, Bk. III [xx. 9]. Nor was it for nothing that Mentius, the Chinese philosopher, as we are told by Martinius, *Historia Sinica*, Bk. V, advised: 'The king should not permit the use of fine mesh nets in fishing, in order that only the large fish should be caught, while the smaller fish allowed in this way to escape might increase in size in the course of years, and thus always be sufficient for everyone.' And likewise, 'that no one should be allowed to kill chickens, pigs, and other animals before they were grown. In this way men will have a sufficient supply of meat for their use. From this command came the custom of the Chinese not to kill animals until they had arrived at the growth allotted each by nature.' Cf. *Deuteronomy*, xxii. 6-7. This agrees with the statement of Phocylides [84 f.]: 'And let no man take all the birds at once from the nest, but leave the mother bird, that you may have chicks from her again.' The act of Alexander Severus is also worthy of record, as given us by Lampridius, *Severus Alexander* [xxii]:

Once, when the population of Rome petitioned him for a reduction of prices, he had a herald ask them what kinds of food they considered too dear, and when they cried out immediately, 'beef and pork,' he refused to proclaim a general reduction but gave orders that no one should slaughter a sow or a suckling-pig, cow or a calf. As a result, in two years or, in fact, a little more than one year, there was such an abundance of pork and beef that, whereas a pound had previously cost eight minutuli, the price of both these meats was reduced to two and even one per pound. (M.)

¹ [For *injuram* read *injuriam*.—Tr.]

² [For '§ 7' read '§ 6'.—Tr.]

CHAPTER IV

ON THE ORIGIN OF DOMINION

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| <ol style="list-style-type: none"> 1. Proprietorship and community are moral qualities. 2. What are community and proprietorship. 3. They can exist only between more than one. 4. They arise immediately from an agreement of men. 5. On primitive community. 6. The steps of departure from it. 7. That it was of use to mankind. | <ol style="list-style-type: none"> 8. Ideas of the ancients on the origin of dominion. 9. An exposition of the position of Grotius. 10-13. The arguments of those who attack the idea of primitive community. 14. In what sense dominion is said to belong to natural law. 15. How far children are capable of dominion. |
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Now that this power of mankind over things began to secure effect in relation to other men (for the ownership of men should not be set against the most eminent right of God; see Euripides, *Phoenician Maidens*, line 558; add *Leviticus*, xxv. 23); or, in other words, that dominion arose from the indefinite right according to which one thing belongs to one particular man and not to another—all this is due to another principle. Before we treat of this, we should say, by way of introduction, that proprietorship and community are moral qualities which have no physical and intrinsic effect upon things themselves, but only produce a moral effect in relation to other men; and that these qualities, like the rest of the same kind, owe their birth¹ to imposition. Therefore, it is idle to raise the question whether proprietorship in things is due to nature or to institution. For it is clear that it arises from the imposition of men, and there is no change in the physical substance of things, whether proprietorship is added to or taken away from them.

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2. We must in the next place carefully consider and weigh the question, what community is, and what proprietorship or dominion. The term community is taken either *negatively* or *positively*. In the former case things are said to be common, according as they are considered before the interposition of any human act, as a result of which they are held to belong in a special way to this man rather than to that. In the same sense such things are said to be nobody's, more in a negative than a positive sense; that is, that they are not yet assigned to a particular person, not that they cannot be assigned to a particular person. They are, furthermore, called 'things that lie open to any and every person'. But common things, by the second and positive meaning, differ from things owned, only in the respect that the latter belong to one person

¹ [For in *cunabula* read *incunabula*.—Tr.]

while the former belong to several in the same manner. Furthermore, proprietorship or dominion is a right whereby the substance, as it were, of something belongs to a person in such a way that it does not belong in its entirety to another person in the same manner. For dominion and proprietorship mean to us one and the same thing. Although some say that proprietorship is a right dis severed and separated from usufruct, while it is dominion if usufruct is joined with it; this distinction, however, is not consistently observed. Just as others are over-subtle, who, by the term proprietorship, understand a thing under that quality whereby it belongs to me and not to another, but by dominion the right to dispose at one's will of that thing, such right coming from proprietorship as its effect; and so dominion lies in the person, while proprietorship seems rather to lie in the thing. See Ziegler on Grotius, Bk. II, chap. ii, § 1.

But it is wrong to say that dominion is a kind of effect of proprietorship, since if a person wishes to distinguish them so clearly, just the opposite is the case. For it is in the man that that right lies, from which the things themselves receive some kind of extrinsic denomination. And this is understood clearly enough from the fact that, when that right expires together with the man in whom it was vested, things cease to belong to any one, and this without any change in their substance or physical qualities.

Now such is the force of dominion that we are able to dispose of things, which belong to us as our own, at our pleasure, and to keep all others from using them, unless they have acquired for themselves a special right from us by pacts; and so, as long as such things are ours, they cannot in their entirety belong to another in the same way. I say 'in the same way', for nothing prevents, and, indeed, it very often happens, that the same thing belongs to different persons according to different ways of their holding it. Thus, over the same land a State has eminent, the owner, direct, and the emphyteuticary, useful dominion. It was also added 'in their entirety'. For also several persons can possess the same thing in the same way of holding, but each one for his share and not in its entirety. This is true of those possessions which are held undivided by several persons who have the same claim on a thing by virtue of the same kind of dominion.

But proprietorship is sometimes understood to be divided into several parts, as it were, or, if one prefers to state it thus, is understood to have several steps. Thus dominion is commonly divided into plenary and diminished. The former is either combined with 'eminent' dominion, as it is called, in which fashion States or their heads hold their property, or separated from that, and hence called 'common', whereby a man has full power to dispose of his possessions, except in so far as their use is directed by civil laws. Diminution of dominion can take place in such

a way that something is taken either from the *emolument* of dominion, or even from the very *propriety* itself. The first takes place when, by
 364 a pact, or will, or the authority of law, and in this either because of the condition of the persons, or the nature of the things, or for other just causes, the alienation of things is forbidden, or fixed within certain limits, so that no right to the thing in any way may pass thereby to others. Add the will of Theophrastus in Diogenes Laertius, Bk. V [53]. Something is taken from the emolument of dominion, either if the usufruct of our property belongs to another without a contract of loan or hire, or if in some other way my property must return some use to another after the manner of service.

Finally, propriety itself is restricted when another person, along with the full right of using and enjoying a thing, is in some way allowed the right of hiring it, such right being in a way perpetual. In this case he who holds propriety thus restricted and a superior power over the thing, is said to have direct dominion, while he who, with the right of use and enjoyment allowed in the manner stated, shares in the propriety, is said to have useful dominion of the thing thus allowed him. Cf. Struvius, *Syntagma, Exercitationes*, XI. lv. Seneca, *On Benefits*, Bk. VII, chap. xii: 'The fact that you cannot sell a thing, or consume it, or exchange it for the better or the worse, does not prove that it is not yours. For that which is yours under certain conditions is yours nevertheless.' (S.) In this connexion it may be noted, in passing, what limitation should be made to the common axiom of lawyers: 'What belongs to a man cannot be made any more his own.' From this they conclude that neither a pledge, nor deposit, nor purchase, nor sale of a thing made to him who already owns it, can stand. Likewise, that a legacy is of no value if a man wills to a legatee what was already his; that no one can to any purpose bargain for a thing that will in any event be his, and the like. That is, unless it so happen that the diminished form of possession may change into a more plenary. And so Lucilius, in the *Anthology*, Bk. II [IX. clxxi], wittily jests at a certain Hermocrates, a miser, because in his will he entered himself as the heir of his possessions.

Furthermore, since the same thing can be held in its entirety by one man, or by several in undivided manner, in such a way that each one has an equal right in it according to his share, it follows that in this respect things are divided into proper, and common, as in the second sense, whereby the same thing, without being divided, belongs to several persons after the same manner of dominion. Such community differs from propriety, not in the manner and force of dominion (for several persons may have the same right over a common thing that one man has over a proper thing; and just as the propriety of a thing which concerns but one man excludes every other man from an equal right in that thing, so from a common thing all are excluded but those

for whom the thing is said to be common), but it differs only in the subject in which it terminates, because a proper thing belongs to one man, a common thing to several. And since none of these has a right extending, as it were, over the whole thing, but having power only over a part of the thing, such part still remaining undivided, it is obvious that one person cannot of his own right dispose of the entire thing, but only of his share; and that if any decision is to be reached on the whole thing, the consent and authority of each person concerned in it must be secured. But Ziegler on Grotius, Bk. II, chap. ii, § 1, at the beginning, Felden on Grotius, *loc. cit.*, § 2, and Boecler on Grotius, *loc. cit.*, p. 47, have confused negative community with positive, for which reason many of the arguments brought forward in the discussion of this subject are scattered to the winds, as will appear hereafter.

The comments of Seneca, *On Benefits*, Bk. VII, chap. xii, on the different kinds of community are not irrelevant to our subject:

365 For I have not everything in common with a friend in the same manner as with a partner, where one part belongs to him, and another to me, but rather as a father and a mother possess their children in common, when they have two, not each parent possessing one child, but each possessing both [. . .]. The knights' seats in the theatre belong to all the Roman knights; yet of these the seat which I occupy becomes my own, and if I yield it up to any one, although I only yield him a thing which we own in common, still I appear to have given him something. Some things belong to certain persons under particular conditions. I have a place among the knights, not to sell, or to let, or to live in, but simply to see the spectacle from; wherefore I do not tell an untruth when I say that I have a place among the knights' seats. Yet if, when I come into the theatre, the knights' seats are full, I both have a seat there by right, because I have the privilege of sitting there, and I have not a seat there, because my seat is occupied by those who share my right to those places. (S.)

3. Now it is clear, from what has been said, that both positive community as well as proprietorship imply an exclusion of others from the thing which is said to be common or proper, and therefore presuppose more men than one in the world. Therefore, just as things could not be said to be proper to a man, if he were the only being in the world, so the things from the use of which no man is excluded, or which, in other words, belong to one man no more than to another, should be called common in the former and not in the latter meaning of the term. It is clear, now, from this, to what extent Adam, so long as he was the only man on earth, may have been given dominion over things. That is, although, due to the great extent of the earth and his scant requirements, he had occasion to take for his uses but a small portion of things, yet there was no other man's right to prevent him, if he so wished, or could do so conveniently, from taking for his own use whatever was available. Therefore, the right of Adam to things was different from that dominion, which is now established among men; one may call it indefinite dominion not formally established, but only conceded, not actually, but potentially so. It has the same effect as dominion now has,

that, namely, of using things at one's own pleasure; but it was not, properly speaking, dominion, because no other man was then on earth to whom it could oppose its effect; although, upon the increase of men, it could pass into dominion. Therefore, so long as Adam was the only man, things to him were neither common nor proper. For community implies a sharer in the possession, and proprietorship connotes the exclusion of another's right to the same thing, and so neither is intelligible before more than one man has come into being.

4. The further point should be carefully observed, that the grant of God, by which He allowed men the use of the products of the earth, is not the immediate cause of dominion, as it has its effect in relation to other men (a proof of which is to be found in the fact that brute creatures use and consume things as if it were God's will, although no dominion is recognized among them); but that dominion presupposes absolutely an act of man and an agreement, whether tacit or express. It is true that God allowed man to turn the earth, its products, and its creatures, to his own use and convenience, that is, He gave men an indefinite right to them, yet the manner, intensity, and extent of this power were left to the judgement and disposition of men; whether, in other words, they would confine it within certain limits, or within none at all, and whether they wanted every man to have a right to everything, or only to a certain and fixed part of things, or to be assigned his definite portion with which he should rest content and claim no right to anything else. Ambrose, *On Duties*, Bk. I, chap. xxviii:

Nature has poured forth all things for all men for common use. God has ordered all things to be produced, so that there should be food in common to all, and that the earth should be a common possession of all. Nature, therefore, has produced a common right for all, but greed has made it a right for a few. (R.)

Add Selden, *De Jure Naturali et Gentium*, Bk. VI, chap. i.

It is idle, therefore, to discuss the question whether God gave 366 dominion over things to the first pair, as personifying the whole race of men, or assigned it to them in a special way and as individuals, so that they were masters of the whole world on their own proper right, to whom the rest of mankind owe their possessions by receiving it from their hands. For that divine gift only rendered men more certain of the mercy of God towards them, and assured them that it was with His approval that they turned other creatures to their use and service. But it was left to men themselves, to determine by the forethought of sane reason what measures must be taken to prevent discord from arising among mankind from the use of that right. Yet it was far from God to prescribe a universal manner of possessing things, which all men were bound to observe. And so things were created neither proper nor common (in positive community) by any express command of God, but these distinctions were later created by men as the peace of human

society demanded. Therefore, those writers err who make such crude statements as the following: 'It belongs to the law of nature to divide things, that is, the division of things does not take its origin from nature in such a way that it becomes law, or takes on the aspect of law by the decision of nations, but nature herself frames this law and brings it to completion.' And again: 'To divide things is a precept of the Decalogue, that is, one category of natural law. For he who said: "Thou shalt not steal," by the pronouncement said: "Let there be property and a distinction among things; let each man keep his own and not covet what is another's".' See Boecler on the preface of Grotius, p. 9.

And yet there is no precept of natural law whereby all things are commanded to be proper to men in such a way, that every man should be allotted his own separate and distinct portion. Although natural law clearly advised that men should by convention introduce the assignment of such things to individuals, according as it might be of advantage to human society, yet on the condition that it would rest with the judgement of men, whether they wanted all things to be proper or only some, or would hold some things indivisible and leave the rest open to all, yet in such a way that no one might claim them for himself alone. From this it is further understood, that the law of nature approves all conventions which have been introduced about things by men, provided they involve no contradiction or do not overturn society. Therefore, the proprietorship of things has resulted immediately from the convention of men, either tacit or express. For although after God had made the gift, nothing remained to prevent man from appropriating things to himself, yet there was need of some sort of convention if it was to be understood that by such appropriation or seizure the right of others to that thing was excluded. But the fact that right reason suggested the introduction of separate dominions does not prevent them from going back to a human pact.

5. From such remarks as these it is clear that before any conventions of men existed there was a community of all things, not, indeed, such as we have called positive, but a negative one, that is, that all things lay open to all men, and belonged no more to one than to another. But since things are of no use to men unless at least their fruits may be appropriated, and this is impossible if others as well can take what we have already by our own act selected for our uses, it follows that the first convention between men was about these very concerns, to the effect that whatever one of these things which were left open to all, and of their fruits, a man had laid his hands upon, with intent to turn it to his uses, could not be taken from him by another. It is this point that is concerned in *Digest*, XLI. ii. 1, § 1. This can be illustrated by the case of animals, no one of which, of course, can claim a special right above others to anything, but every one takes for his own nourishment

every thing he first happens upon. And even if any one of them 367 has stored up some things for his future use, others are not prevented from seizing them, for the reason that there is no convention among animals which confers a special right over a thing to the one that first got it.

These principles can be illustrated by the conclusions of the author of *De Principiis Justi et Decori*, pp. 100 ff. [Velthuysen], where he lays down the following premises: Man is permitted to use creatures which lack the power of reason and to possess them. But since all men are by nature equal, their power over creatures is likewise equal, nor with respect to creatures has one part of them been assigned to my neighbour and another to me. The only conclusion, therefore, is that the distinction between possessions is derived from a pact. But since all the institutions of men allow an exception in the case of supreme necessity, when this last arises the original right to all things revives, since it is understood that whenever any man in the division of things renounced his right to such things as are assigned others he did so with this reservation: Provided he cannot otherwise secure his own safety. For a calamity to me does not make for me a right to such things as I had none to previously, but my serious peril puts an end to that condition under which I made over my right. It is in this way, also, that the property of an enemy is lawfully acquired in war, because at the termination of pacts there is a return of primitive right.

Furthermore, he continues, first occupancy of itself, before the existence of pacts, does not confer any right. And this is true, because, no matter in what particular necessity I may be, such property can return to me on that occasion by no right, since this is only possible in the case of property which I made over to my neighbour of my own accord, while there are few persons who would concede such a prerogative over property secured on that score.

All that may be set forth more clearly in this way. If first occupancy of itself granted a right coupled with the exclusion of all the rest of mankind, it would follow that in a case of necessity a second person could not use the property acquired in that way, because that right of necessity springs from an exception, added to a pact on the division of things, and no such pact (as is presupposed) exists touching property secured by occupancy. And it is absurd that in extreme necessity one person cannot use things which a second has acquired by virtue of occupancy. Therefore, it is likewise due to a pact that occupancy gives dominion. Yet there is not much bone and sinew in this argument. Cf. above, Bk. II, chap. vii, § 6.

In the second place, he adds: There is no natural reason for one receiving a right by first occupancy any more than by first laying eye upon a thing. Therefore, this difference arises from the institution of

nations, which willed that a right to that land should fall to the one who first occupied it, and not to the one who first saw it.

In the third place, he says: Imagine two men, one swift of foot and the other slow; it is obvious that in such a case the pair is ill-matched in the race to secure property. Therefore, the right whereby what is seized belongs to the first one to occupy it, is founded not upon nature but upon an implicit pact and institution of men.

It might have been stated more briefly that, assuming an original equal faculty of men over things, it is impossible to conceive how the mere corporal act of one person can prejudice the faculty of others, unless their consent is given, that is, unless the pact intervenes. The further claim of the same writer in the passage quoted (cf. also p. 266), that a single man in the primitive state could have subdued the entire world, is baseless, and is refuted even by Hobbes, *De Cive*, chap. i, § 11.

6. Now men left this original negative community of things and by a pact established separate dominions over things, not, indeed, all at once and for all time, but successively, and as the state of things, or the nature and number of men, seemed to require. Thus, the Scythians used to allow property in flocks and household goods, but their fields were held in original community. Justin, Bk. II, chap. ii. And truly the
 368 peace and tranquillity of mankind, the maintenance of which is the first concern of the law of nature, made no uncertain suggestion as to what might be the most salutary arrangement by men in this regard. For after the human race had multiplied and acquired a cultured mode of life, the peace of men did not suffer that there should remain for every man an equal power over all things, that is, that all things should lie open to all for the promiscuous use of every man. *Digest*, VIII. ii. 26. Since innumerable conflicts could not avoid arising from the rivalry of many persons over the same thing, which could not suffice for all of them at one time, especially in view of the fact that such is the nature of the vast majority of things, that they can be of service to but one person at one time.

The causes for things passing into proprietorship, and the order which they followed can, I think, be understood on these considerations: Most things which are of use to men immediately and are employed to nourish¹ them and protect their bodies, are not produced everywhere by nature and without cultivation in such abundance that they fully suffice for every one. Therefore, an occasion for quarrels and wars lay ready at hand, if two or more men needed the same thing, and individuals tried to appropriate for themselves the same thing, when it was not enough for all. See Hobbes, *De Cive*, chap. i, § 6. Moreover, most things require labour and cultivation by men to produce them

¹ [For *in utrimmentum* read *in nutrimentum*.—Tr.]

and make them fit for use. But in such cases it was improper that a man who had contributed no labour should have right to things equal to his by whose industry a thing had been raised or rendered fit for service. Therefore, it was advantageous to peace among men that, as soon as men multiplied, there should be introduced dominion of mobile things, especially such as require labour and cultivation by men, and, among immobile things, dominion of those which are of immediate use to men, such as places for dwelling; that, in other words, the substance of these objects might belong separately to individuals, or, when several were concerned, to those who by special convention had agreed to a positive community in such things. Furthermore, although there appears to be some reason why such things should belong to some men rather than to others, yet the dominion of the one group, involving, as it does, the exclusion¹ of the rest, had to be confirmed at least by a tacit pact, which contained at the same time a tacit renunciation on the part of the rest; because, when things have been assigned one person, the rest of mankind do not care to advance any claim to them on the alleged ground that the earth, as the common home of men, has contributed to those same things their substance and nourishment.

But² regarding the immobile things produced by nature without the labour of man, such as fields, they were so extensive that they abundantly provided for the small number of early men, and for that reason at first only so much of them was occupied as men judged to be suitable for their uses, while the rest was left in a state of original negative community, so that every man who wished to was free in the future to take it. And hence it is understood that a pact was agreed upon, to the effect that such fields as had been assigned to one person by the express convention of the rest of men, or such as the rest could be held tacitly to have withdrawn from, in view of the fact that one man alone had been allowed to enjoy them in peace, while they had claimed for themselves other fields on the same basis—that such fields should belong to those who cultivated them. And finally, that what was left should pass to those who would hereafter occupy the fields. Add Ziegler on Grotius, Bk. II, chap. ii, § 2, p. 224.

At this point it should be observed, in passing, that when Josephus, *Antiquities*, Bk. I, chap. iv, says that 'Cain set bounds to land', he can merit no more confidence than when he relates in the same passage that Cain 'injured and vented his passion upon his fellow inhabitants, increased his dwelling by his hoards of money, gathered by rapine and violence, and incited his companions to all kinds of robbery'. For I do not comprehend how such deeds can be attributed to the first-born son of him, who with his consort was created by God as the first and only human being.

¹ [For *exclusionem* read *exclusionem*.—Tr.]

² [For *autem* read *aulem*.—Tr.]

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7. That it was advantageous to mankind, when it had grown numerous, to introduce distinct dominions of things, can be shown by the arguments with which Aristotle, *Politics*, Bk. II, chap. ii [5], undertakes to refute the Platonic community of property. Although he is undertaking to overthrow positive community, we are inquiring into the reason for the departure from negative community. Add also Aristophanes, *Ecclesiazusae*, pp. 746 ff.

His meaning is: If all men should labour in common and should lay up their earnings in common, and should they be maintained from a common store, quarrels could not help arising by reason of the inequality of their toil and its product. He well says: 'There is always a difficulty in men living together and having things in common.' (J.) That is the reason why we are so greatly incensed at the members of our household with whom we are associated every day. But the introduction of property does away with such quarrels and every man takes greater interest in his own portion, while an opportunity is given him to show liberality to others out of his own store. Therefore, 'It is clearly better that property should be in private, but the use of it common.' Again: 'How immeasurably greater is the pleasure when a man feels a thing to be his own.' (Juvenal, *Satires III* [230-1]: 'It is something to be able in any spot, in any retreat whatever, to have made oneself proprietor even of a single lizard.' (E.)) Again: 'There is the greatest pleasure in doing a kindness or service to friends or guests or companions which can only be rendered when a man has private property.' (J.) Furthermore, since the use of most things is not enough to meet the desires of all men whenever they choose, they could not avoid quarrelling with each other; for they would turn their attention to the same thing and it would not suffice them for all, were such things not made over to distinct owners.

I confess, however, that these arguments have not prevented Thomas More and Thomas Campanella from introducing community of property, the former among the inhabitants of his *Utopia* and the latter in his *City of the Sun*, probably I suppose because perfect men are more easily imagined than found. But this also shows the falsity of the old saying: 'Mine and thine are the causes of all wars.' Rather it is that 'mine and thine' were introduced to avoid wars. For this reason Plato, *Laws*, Bk. VIII [p. 843 A], designates a boundary stone as 'the stone which is the sworn arbiter of friendship and hatred between neighbours.' (J.) On their sacredness see also *Deuteronomy*, xix. 14; *Job*, xxiv. 2; the whole chapter in the *Digest*, XLVII. xxi; *Collatio Legum¹ Mosaicarum cum [et] Romanarum*, tit. 13; Paulus, *Sententiae*, Bk. II, chap. xvi; Bk. V, chap. xxii. Frontinus, *De Re Agraria* [p. 277, ed. Keuchen]: 'Let every individual keep his own boundaries and not trespass on another's. For the boundary was set up in the land for the

¹ [For LI read LL.—Tr.]

specific purpose of ending strife about the fields.¹ But the infinite crop of wars arises from the fact that the avarice of men burns to overleap the bounds of 'mine and thine', that have been established by a pact or by laws. Lysias, *Orations*, xvii [xviii. 17]: 'Men fall out with one another principally, when some set their hearts upon what belongs to others, and others lose what was really theirs.'

8. Although these facts are plain enough, I wish to examine at some pains the opinions of some ancient and modern writers on this point. Of the ancient writers Diodorus Siculus, Bk. I [viii], says: 'The first men to spring forth from the earth lived a wild life, like that of beasts, roamed forth in herds to places where food was to be found, and lived off the juiciest of herbs and whatever fruits the trees happened to produce. (Pliny, *Natural History*, Bk. XXIII, pr. [XXIII. i], on trees: 'Man's first food came from the trees, and in that way they were led to turn their gaze toward heaven; in fact, even at this time they could not get their living from the same source without recourse to the products of the soil.' (B. and R.) 'Since they did not know how to store up food and lay it away for future needs, they perished in great numbers from exposure and in winter from lack of nourishment; until they were slowly led by experience to seek shelter in caves in the winter and to lay up stores of food for their preservation, their life, in this way, becoming 370 more and more refined.' (B.*)

Accepting this hypothesis on the origin of men, even though it be false, the conclusion is that men in the beginning lived on things open to all; and that only after pacts introduced property in the shape of houses and of stores collected for future uses, did property in the form of fields gradually come to be recognized. In this connexion is often urged the passage of Justin, Bk. XLIII, chap. i, where it is related that Saturnus, king of the Aborigines, was so just that 'no one was a slave in his reign or had any private property, but all things were common to all, and undivided, as one estate for the use of every one.' (W.)

Passages from the poets on the state of things in the happy Golden Age are also adduced in great numbers. Vergil, *Georgics*, Bk. I [125 ff.]: 'Before Jove, no husbandmen subdued the fields; nor was it even lawful to mark out ground, or by limits to divide the plain; men acquired all for the common good, and earth of herself produced everything very freely without compulsion.' (B.) Illustrations of this passage are furnished by Seneca, *Letters*, xc. Tibullus, *Elegies*, Bk. I, el. iii [41 ff.]: 'That was a time when the sturdy bull had not bent his neck to the yoke, nor the tamed horse champed the bit. No house had doors; no stone was planted on the land to set fixed boundaries to men's estates.' (P.) Seneca, *Octavia*, Act II [395 ff.]:

¹ [This citation we have not found in Frontinus, or in any other of the Roman Surveyors. The last part of it is a quotation from Vergil, *Aeneid*, XII. 898.—Tr.]

Not yet were cities hedged
 With ponderous walls; the way was free to all,
 And free to all the use of everything.
 The earth, untilled, spread wide her fertile lap. (M.)

Idem, Hippolytus, Act II, sc. ii [525 ff.]:

Those primal men who mingled with the gods.
 They were not blinded by the love of gold;
 No sacred stone divided off the fields
 And lotted each his own in judgement there. (M.)

Ovid, *Metamorphoses*, Bk. I [135 ff.], on the Iron Age: 'And the ground, which had hitherto been a common possession like the sunlight and the air, the careful surveyor now marked out with long-drawn boundary-line.' (M.) Macrobius, *Saturnalia*, Bk. I, chap. viii: 'The Romans wanted the temple of Saturn to be their treasury, because, when he lived in Italy, no theft was committed in his kingdom; or because no man had any private property then. "It was not even allowed to mark out the soil or to divide the plain with a boundary; men sought all things in common" [Vergil, *Georgics*, I. 126 f.]. Therefore, they would have the common funds of the people stored away in the house of that God, under whose reign all things had once been common to all men.' These and similar passages from the poets are thus explained by Lactantius, *Divine Institutes*, Bk. V, chap. v:

'It was not even allowed to mark out or to divide the plain with a boundary: men sought all things in common' [Vergil, *Georgics*, I. 126 f.]; since God had given the earth in common to all, that they might pass their life in common, not that fierce and raging avarice might claim¹ all things for itself, and that that which was produced for all might not be wanting to any. And this saying of the poet ought so to be taken, not as suggesting the idea that individuals at that time had no private property, but it must be regarded as a poetical figure; that we may understand that men were so liberal, that they did not shut up the fruits of the earth produced for them, nor did they in solitude brood over the things stored up, but admitted the poor to share the fruits of their labour. (C.)

Now just as the poet can persuade no sensible person that early men acquired all things for the common use, or that there was a positive community, so the explanation advanced by Lactantius for their statements does not satisfy us. For they were probably not as yet so given over to avarice, because they were still unacquainted with wealth, and the earth furnished them, still ignorant of the enticements of the appetite, an easy living, while there do not appear to have been any resources for liberality, when there was no occasion to collect wealth. Some quite aptly point out that, to understand this tradition of a Golden Age, we should bear in mind the disposition of unlettered and agricultural peoples, which is so clearly inclined to ease and sluggishness, and averse to labour. And that the more unrefined and

¹ [For *vendicaret* read *vindicaret*.—Tr.]

simple the life of any people, the less place they hold, while a richer and more refined manner of life requires great industry and extended endeavour. Add Michel Montaigne, *Essais*, Bk. I, chap. xxx. Finally, that it is a common failing of old men to be 'praisers of the past time when they were young' [Horace, *Art of Poetry*, 173 f.], almost consistently scorning the present and praising what is old and time-worn, and that, therefore, it seems likely that when those simple folk 371 were forced by legislators to labour and a more refined life, they took such a change of habits very hard, and many a time longed for their nuts and their idleness. From this complaint of their forbears later generations then created those dreams about a Golden Age. This is borne out by the fact that Sallust, *Catiline* [vi], calls the Aborigines¹, who lived in that age, 'a rustic folk, without laws or government, free and unrestrained.' (R.) Add Dionysius of Halicarnassus, Bk. I [x], on the same people. Likewise Ovid, *Metamorphoses*, Bk. I [89 ff.], says that the happiness of the Golden Age consisted in this: Men cherished fidelity and right of their own accord and 'without law', being safe from punishment because as yet there were no civil governments. 'And men, content with food that came from no one's seeking, gathered the arbut fruit, strawberries from the mountain-sides, cornel-cherries, berries hanging thick upon the prickly bramble, and acorns falling from the spreading tree of Jove.' (M.)

But the further descriptions by Ovid of the perpetual spring, the choice fruits produced spontaneously, and rivers running over with nectar and milk, are no more true than the following effusions of Pherecrates [in Athenaeus, VI. xcvi, p. 268 E F]:

There were rivers
With tender pulse and blackest soup o'erflowing,
Which ran down brawling through the narrow dishes,
Bearing the crusts and spoons away in the flood.
Then there were dainty closely kneaded cakes;

There were black-puddings and large boiling slices
Of well mixed sausages, which hissed within
The smoking streamlet in the stead of oysters.

For roasted thrushes nicely browned and hot
Flew to the mouths of the guests, entreating them
To deign to swallow them. (Y.*)

There is also the famous passage in Cicero, *On Duties*, Bk. I [vii]:

The province of justice is that public property be appropriated to public, and private to individual, use. Now, by nature no property is private, but dependent either on ancient possession (as when men formerly came into unoccupied territories); or victory (as when they have taken possession of it in war); or public constitution, contract, terms, or lot. By those, the land of Arpinum is regarded as belonging to the Arpinates; the Tusculan, to the

¹ [For *Aborigenes* read *Aborigines*.—Tr.]

Tusculans. The like division holds with regard to matters of private property. Thus, as every man holds his own, each should possess that portion which fell to his share of those things that by nature were common; and it follows, that no man can covet another's property without violating the laws of human society. (E.)

Some also adduce the following passage of Horace, *Satires*, Bk. II, sat. ii [129 ff.]:

For nature makes neither him nor me nor any one else in a true sense owner of the land. He turned us out: he will be turned out by the villainy of some other, or by his own ignorance of the subtleties of the law; and if he is not, in the end he will be turned out by an heir whose life is a better one than his own. The land goes now by the name of Umbrenus: a few years ago it went by that of Ofellus: but it will never belong to anybody. It will yield its use now to me, now to some one else. (W.*)

Idem, *Epistles*, Bk. II, ep. ii [111 ff.]:

As though anything were a man's own, which in a moment of flying time, now by request, now by purchase, now by force, now, if not before, by death, changes owners and becomes the property of another. Inasmuch then as to no one is given perpetual occupation—heir follows heir as wave follows wave—what is the profit of estates or store-houses? (W.)

Lucian [really anonymous], *Anthology*, IX. 74: 'I was once the field of Achaemenides and am now Menippus', and I shall continue to pass from one man to another. For Achaemenides once thought he possessed me, and Menippus again thinks he does; but I belong to no man, only to Fortune.' (P.) *Idem*, *Nigrinus* [xxvi]:

We are not 'owners' of any of these things by natural law, but we take over the use of them for an indefinite period by custom and inheritance and are considered their proprietors for a brief space; and when our allotted days of grace are past, another takes them over and enjoys the title. (H.)

But such remarks apply more to the instability of fortune and of human possessions than to the origin of separate dominions; just as for the same reason Cicero, *For Balbus* [xxv, towards the end], says: '... Lands do not belong to any particular family.' (Y.)

9. Let us now set forth the position of Grotius, Bk. II, chap. ii, § 2, passing over, however, what he adds against the accepted doctrines of our churches, which have been already censured enough by others. He says: 'Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature.' (K.) This we accept in the sense that God allowed men a right to use the things of this earth 'in a general way', that is, He did not determine at that same time what things should be held individually, and what in common, but this He left to the judgement of men, that they should dispose of the matter according as it seemed to work for peace. But no credit should be given to any such idea as that God at the beginning instituted a positive community, from which men later withdrew on their own initiative, but rather, so far as it

concerned God, such things were left open to the uses of men. Now so long as the actual bodies of things were not yet assigned to certain individuals, there was a tacit convention that each man could appropriate for his own use, primarily of the fruits of things, what he wanted, and could consume what was consumable. And such a universal use of things in some way took the place of proprietorship, while, what a man had taken in this way, another could not take from him without doing him an injury.

Now just as the example taken from the theatre meets the need of illustrating this fact (see Arrian, *Epictetus*, Bk. II, chap. iv, towards the end), so the example of the Aborigines, as Justin describes them, is not to the point. For the words of that author picture some positive community, such as that primitive state was not, as if that entire country belonged to a people, but had not yet been divided into private estates, because those men were content with fruits that grew of themselves, which the expanse of forests and fields brought forth in profusion for a small population. But it does not seem likely that those fruits were collected unto a common store. Yet Grotius rightly maintains that if this negative community was to continue without disturbance to the common peace, men had to live in great simplicity, content to subsist upon natural fruits, to live in caves, and to go about with bodies either bare or else covered with the bark of trees and the skins of animals; while if they wanted a more refined kind of life, the advantages of which had to be secured by industry, property in things was necessary. But when he adds that community could have endured 'if men had lived on terms of mutual affection such as rarely appears', he confuses negative community with positive, such as was practised formerly among the Essenes (on whom see especially Philo Judaeus, *That Every Virtuous Man is Free*), the early Christians in Jerusalem, and among those who follow an ascetic life. Add Martinus, *Historia Sinica*, Bk. V, chap. xxiv. For such a community can be instituted and maintained only by a small group, which is also endowed with singular humility of mind. When men are scattered to distant places it would be a labour of folly to gather products into one place, and then distribute them from a common store; while among a large number of men many must necessarily be found who from a defective sense of justice and from *πλεονεξία* [greediness] would be unwilling to maintain due equality either in labour or in consumption of food. And Plato, *Laws*, Bk. V [p. 739 D E], suggests this very thing in assigning to the gods¹ and their offspring this same state where there is a community of all things. But it is foolish to believe that after men had separated into several families, they ever established or wanted to establish such a community. Add Iohannes Strauchius, *Dissertatio de Imperio Maris*, chap. i, § 8.

¹ [For *iis* read *deis*.—Tr.]

Finally, this point of Grotius is well taken: 'Things at the first passed into proprietorship not by a mere act of will' [II. ii. 5], in other words, upon deliberation. For others were not able to know what a man wished to be his own, that they might refrain from it, and several were in a position to want the same thing. Therefore, there was need of an external act or seizure, and for this to produce a moral effect, that is, an obligation on the part of others to refrain from a thing already seized by some one else, an antecedent pact was required and an express pact, indeed, when several men divided among themselves things open to all; but a tacit pact sufficed when the things occupied at that time had been
 373 left unpossessed by the first dividers of things. For it is understood that these men agreed that those things which in the first division had not been assigned to a definite individual should pass to him who was the first to take possession¹ of them.

10. Most recent writers differ entirely from us on the origin of dominion. Let us see what force there is in their arguments. Now they acknowledge that community is taken in a double sense, either as that which, while undivided and proper to several, furnishes a common use to each person; or as that which acknowledges no proprietorship whatsoever, and serves the general use of all. But they deny things not only the first kind of community at the beginning, as we also do, but also the second; and so they deny that at the beginning, when proprietorship was entirely lacking, all things lay open to common use, denying as well the consequence of this, namely, that individual dominions arose originally from division and occupation. Their reason is as follows: 'The nature and amount of right over things, held by the first man, he received in its entirety from the Creator. Now if he received the mere faculty of using without proprietorship, his descendants could not have exercised proprietorship without incurring the censure of *πλεονεξία* [greediness] and laying hands upon that which the Creator had forbidden men to use.'

This can easily be answered from what has just been said. It is true that man received from God's hands a right over things, but such as was indefinite, general, indifferent, unrestricted to proprietorship or community, which men could also reduce into a special form, as it were, according to the dictates of reason and necessity. And so primitive community does not signify a mere usufruct,² to the exclusion of proprietorship, but it could pass by a convention of men as well into proprietorship as into positive community.

Neither does the further statement of theirs properly follow: The first man did not receive or seize a right over things on the formal basis or reason of proprietorship; therefore, his descendants were unable to exercise it on that formal claim. That donation of God, described in the Sacred Scriptures, sets forth not a definite form of dominion, but only

¹ [For *occupasset* read *occupasset*.—Tr.]

² [For *usum fructum* read *usumfructum*.—Tr.]

an indefinite right to apply things to uses which are reasonable and necessary, which right can be exercised as well in negative community as in proprietorship. But it is incorrect to infer that men received a right from the donation of God; therefore, proprietorship did not come from appropriation and division. For the donation of God only made man secure, on the assumption that God wished him to consume upon his necessities the things which He had created. But dominion in the proper sense of the word should have had the effect in relation to other men, that no one should trespass on what had already been assigned to another. In that case there was need of a human transaction, in order that others might know what belonged to another, so as to be able to keep their hands off it. A common theatre is erected by a State for the use of its citizens. But if one citizen rather than another is to secure a seat for a performance, from which he cannot rightfully be removed by another, there is need of a corporal act, that is, of his occupying the seat. Nay, more, individual citizens, with the consent of the State, can secure seats for themselves for all time. In the same way it is understood that, before the occurrence of a human act sufficient to cause dominion, anything is public property, negatively common to all, that is, belonging no more to one man than to another. But when division has been made by express agreement, or occupancy has been granted by tacit agreement, the thing passes over from negative community into proprietorship.

But if some, however, want to draw from this premise the conclusion that, 'by the dominion, which God Himself conferred upon men before any preceding act on their part, is understood only potential dominion, or the power of taking and possessing, and dominion of the first instance [*in actu primo*], through which they pass into possession, and from possession into dominion of the second instance [*in¹ actu secundo*],' they differ from our view only in terms, not in fact. Although they are scarcely accurate in calling the power of taking things dominion 374 of the first instance, and that, which follows² possession, dominion of the second instance. For the power to acquire some right, and the right itself inhering by habit, yet without operation or exercise, are different things; just as it is one thing to be a potential musician, and another thing not to sing when one has been musically trained. Nor does that potential dominion square in every respect with the illustration of inheritance, 'the dominion of which passes directly and immediately to the heir without seizure, upon the death of the testator, out of his habit or power.' For aside from the fact that 'out of habit' and 'out of power' are different things, a fiction of civil law intervenes in this case. It is a rule of nature that, in the transfer of dominion from one person to another, there is required not only an offer on the part of the former,

¹ [Supplying *in*, as above.—Tr.]

² [For *an regressa* read *antegressa*.—Tr.]

but also an acceptance on the part of the latter. But since it is the design of the laws that the desire of the testator be subject to change until his last breath, and that it be kept concealed until after his death, the law suspends, as it were, the will of the dead man on transferring his goods to the heir, until the time when the heir declares his acceptance; or, if one prefers it stated thus, it withholds the acceptance of the heir to the last breath of the testator, at which moment his will becomes fixed, so that the property is understood to have passed to the heir immediately, from hand to hand. Such a fiction gives rise to the effect of dominion in the heir, to the extent that he can lay claim to his legacy even before he has actually come into possession of it. Were it not for a fiction of this kind dominion would no more belong in an inheritance to an heir before his actual entrance into it than it does in a donation before acceptance. Therefore, also for those who live under natural law, in which the fictions of civil law are in general lacking, no potential, as opposed to actual, possession will be admitted, nor will possession be defined as the mere right and power of acquiring possession for oneself. Cf. Iohannes Strauchius, *loc. cit.*, chap. i.

II. Many writers on this subject like to appeal to the authority of sacred history, by which they would establish that a community of this kind never existed.

The sum total of things passed at once to Adam through the gift of God, so that he held complete and sole possession of them. The force of this proprietorship was such that he not only excluded others from this sum total of things held by himself, but also no other person, if there had been any, had a right to appropriate any of them. So extensive was this force that even the children of Adam were entirely excluded from the dominion of things, so long as they were in the family circle of their father, unless they were given something by their parent as a special possession. They obtained dominion, after their emancipation, over whatever things their parent had allowed them, and upon the death of their parent his possessions were divided among them.

Cf. Ziegler on Grotius, Bk. II, chap. ii, § 2. Their meaning is this:

The formula of the gift made by God conferred a right only on the one pair of mankind, since the children of Adam were not yet born. Therefore, either property in things was given to Adam and Eve alone, from whom their children received their title of possession, or else the sum total of things was given to all mankind in the person of Adam. To the latter proposition is opposed, among other considerations, the right of occupancy, which is only allowable in a thing unpossessed. For, if the sum total of things had been given to all mankind, there appears no consideration by which individuals might by occupancy make any of these things their own, to the deprivation of all mankind, or so that all men could claim no further right over it. Since such is the nature of things in common, which have their parts not divided but undivided, that there is not even an atom of them in which the community is not indivisible, while if it is taken by an individual for his own use alone, it will be severed from the community, and an injury done the latter. Yet those who defend a primitive community confess that individuals upon occupancy acquired such a right over the things thus taken that the right of all others to any particular thing in question was excluded.

what has gone before. The gift of God conferred on man only a right to turn creatures to his own uses, which right is indifferent to positive community and property, that are rights having effect against other men. Therefore, when other authors add that 'the common dominion of mankind over things was given by God himself, on condition that they establish and divide among themselves private dominion, and so it neither can nor should be conceived without relation to private dominion, to be established along lines in agreement with rational and social nature', we can interpret such a statement entirely to the advantage of our own position. Surely the gift of God established things at the first in negative community. But since that was ill-adapted to the maintenance of the peace of society, after mankind had multiplied and life had begun to be refined through industry, it was easy for men to recognize it as God's will that distinct dominions over things be introduced. Before these could be set up, they had to be preceded by a human deed and convention. For there is no necessary opposition in the two statements, namely, that something was constituted by the divine will, and that it was an act introduced by a preceding convention of men. Just as these statements are not opposed: God wills that mankind shall not reproduce itself by indiscriminate licence, but by lawful marriage; and there is need of a preceding pact for marriages to exist in act between certain individuals. Furthermore, since positive community and property involve a relation to other men, it is not accurate to say that all created things were proper to Adam, but only that he was the owner of all things not formally but permissively, that is, in so far as no other person had a right which hindered him from turning all things to his own uses whenever he needed to. When God joined to him a dear companion they decided to use that indefinite right over things as undivided, in view of their being joined in that closest of all bonds, by reason of which even to this day, among many nations, between husband and wife there is a common ownership of property.

Nor was there any need of distinct dominions, so long as Adam's offspring, still of tender years, had to be supported by their parent, or were still under the fatherly authority. For it was due to the force of the father's authority, and not that of dominion, that for a time his children had to accommodate their use of things to the will of their father. Therefore, distinct dominions came into force only when, with the consent of their father, children commenced to set up separate establishments, which was undoubtedly caused by the ancient rivalry of the brothers, as well as by the consideration that each one's industry might be his own gain and his idleness his own burden. Yet it should not be held that the whole earth¹ was at once divided between that

¹ [For *orben* read *orbem*.—Tr.]

handful of mortals, or that all things once and for all passed under proprietorship. It was enough at first that those things should be made proper which are either immediately and indivisibly of use to several persons, such as clothing, habitations, and fruits gathered for food, or which require some labour and care, such as implements, household furnishings, herds, and fields. Little by little what remained came under proprietorship, according as the inclination of men or their increasing numbers directed. Thus for a long time pasture lands remained in primitive community, until, as herds multiplied and quarrels arose, it was to the interest of peace that they also be divided. But the further statement that 'there is no place for occupancy when the sum total of things belongs to an entire group', has force against those who try to foist upon the primitive state of things some positive community in which, of course, individuals cannot claim something as their own to the exclusion of the entire group. But the primitive state of things which we set forth is as different from positive community as from
 376 proprietorship, strictly speaking, and we maintain that a preceding pact, at least a tacit one, is required for occupancy to give rise to dominion.

12. Others give the following explanation of the origin of dominion according to the Sacred Writ: 'Now God, indeed, gave to our first parents the common dominion which men were to hold undivided, since our first parents represented the person of mankind. In this sense it can be said that the dominion of the earth or of the things on it, in so far as they can sustain property, belongs to mankind. But that common dominion does not exclude private dominion, since it neither can nor should be conceived without relation to private dominion, so constituted as was agreeable with rational and social nature. But in Adam there was a union with common dominion of private dominion, which excluded his children without any previous cession.' See Boecler on Grotius, *loc. cit.* Here we will have no quarrel with any one over mere terms, and will allow common dominion to be what is for us the right, belonging to men by virtue of the gift of God, to use creatures; provided that common dominion, considered by itself, has no effect in relation to men. On this point it has already been observed that men were able to be content with that right of using¹ things left in common, and that there was no need of introducing divided dominions, so long as mankind consisted of but few people, and was content with a simple and plain life. But as mankind multiplied and living conveniences were increased by industry, the necessity of preserving a social life led to the introduction of dominions, yet so that not all things passed into proprietorship at one time, but successively, according as considerations of concord seemed to require. But there is absolutely no authority for saying that to Adam, before his sons set about to establish different

¹ [For *utendi* read *utendi*.—Tr.]

families, belonged private dominion over all things. For private dominion first commences by some human act; therefore, Adam was unable to have dominion over those things which he had never taken possession of, nay, which he had never even formed any idea of.

The passage in *Digest*, XLI. ii. 3, § 1, has no place here, as if Adam, by setting foot on one part of the earth, is understood to have taken possession of the entire world. But if any one wishes to designate by the name of proprietorship that right, given men by the Creator, of using things, it might be admitted that 'proprietorship is the cause of division and occupancy', that is, men were allowed to claim things for themselves by occupancy and division, because God had allowed them to apply things to their use. But if we wish to take proprietorship in its proper sense, as denoting the exclusion of all others from a certain thing allowed one person, it is quite true that division and occupancy are the causes of proprietorship. Furthermore, the children of Adam, while still in the family circle of their father, had to suit their use of things to the will of their father, not, however, by reason of private dominion belonging to Adam, but by virtue of the force of paternal authority. For he was obligated to maintain them while young. When, then, their assistance could be of value, paternal authority brought it about that the children should both govern by the wishes of their father their use of things which were open to all, lest they should suffer some ill from their intemperance, and should turn over into the hands of their father to dispose of as he wished whatever natural products of the earth they had gathered, or that they had raised by their own labour. And so long as Adam availed himself of that right, he was obligated to supply his sons, even when they had arrived at maturity, with necessities as occasion demanded. Therefore if, for example, some son of Adam had privately gorged himself more greedily than was proper on some particular fruits against the command of his father, he would not have incurred the crime of thievery, but he would merely have violated his father's control. Or, if Adam had ordered an older brother to go out and gather some fruits for a younger, and he had either put them in his own stomach, or hidden them away for his future use, he would have deserved punishment, not for theft, but because of disobedience to his father. We conclude, therefore, that during this period, neither Adam nor his sons had private dominion, but his needs were met by the right of primitive community, while the latter, in the exercise of that right, followed the direction of their father. Therefore, the private dominion of Adam commenced at the time when he emancipated, as it were, his sons, and gave them the right to set up their own individual households.

13. Let us also examine the arguments of those who maintain that this primitive community was impossible. See Boecler, *loc. cit.* They say: 'Such a community neither should nor could have existed in the

state of innocence, because just as every order conforms to right reason, so the most comely order of possessing things, dominion over which was given mankind by God, accorded best of all with that state in which abstinence from what is another's should have merited a worthy name. Therefore, in the Decalogue abstinence is sanctioned, just as each man is assured of a fixed and individual possession of his property, but the former law was graven in the minds of men even before the fall.' The reply to this is, in the first place, that it is by no means clearly established what sort of a life, as regards those external things, men would have led if they had remained in that primitive state, free from sin, and whether, therefore, community of things would have suited that life better than proprietorship. In the next place, it is open to question, whether there is not greater perfection in the virtue of peacefully enjoying with others the things that are open to all, and of not seeking something for oneself alone to the exclusion of the rest of mankind than in abstaining from what is another's. And finally, whatever may be said upon the eternity of natural law, it is certainly not necessary for all the objects of that law to have existed from all time, for many of them make their appearance gradually out of the conventions and institutions of men. Thus, the law of homicide found no object, so long as Adam was the only living man, nor did the law of adultery, while he was the only male, nor the law of false witness, before the institution of trials, nor the law of not coveting a neighbour's house, when caves were still the homes of men, nor of coveting a servant and handmaid, before the institution of slavery, nor the law of honouring one's parents, before Eve had brought forth. See above, Bk. II, chap. iv, § 22 [II. iii. 24].

They continue: 'After the fall, likewise, that community was impossible, in the first place, because it is inconceivable. For the laws of that community are described by Grotius to the effect that every man could at once seize for his own uses what he wished, and consume what was consumable. And yet such a use of universal right took the place of proprietorship, for whatever each man took in this way for his own use another could not take from him without doing him an injury. But on this theory proprietorship is established in community'; and so a contradiction is involved, since only proprietorship can give rise to the effect that one man cannot take a thing from another.

Yet here a difficulty is uselessly created where there is none. For primitive community is one thing, before any deed of man and the use of any thing, when each thing merely belongs no more to one man than to another, and in this way belongs quite as well to neither; but it is another thing when men begin to make use of things open to all. For then, whatever each man has seized for his own uses becomes proper to him by a previous pact, since without such men would have to refrain

from the use of all things. Therefore, in this, as it were, limited community the bodies of things belong to no one, but their fruits after gathering are proper. Such a tempering of primitive community with proprietorship, I feel, is comprehensible even by men of ordinary intelligence. An oak-tree belonged to no man, but the acorns that fell to the ground were his who had gathered them. 378

With this posited, their next statement finds an equally easy reply, for they deny that 'such a community could have persisted even for the briefest period, but that it was opposed to human, that is, rational nature, appropriate only to animals, and unsocial. And so it serves no other use than merely to show, as by a purely imaginary hypothesis, the necessity in a commonwealth of distinct dominion.' Now that community, considered as thoroughgoing, could not persist, unless men were willing always to go hungry and to wander about naked; but, so long as men were not too numerous and led a simple life, nothing prevented its existence with a certain degree of proprietorship. Yet it is certain that the more the number of men increased, and the more refined life became, the greater necessity there was for things in increasing numbers to pass under proprietorship. Those people who to this day are but little removed from primitive community, are somewhat barbarous and simple; such, for instance, as exist on herbs, roots, the natural fruits of the earth, by hunting, and fishing, with no other property than a shed and some rude furniture.

Furthermore, when we assert that by nature all things were negatively common, we do not mean that the law of nature commands us to maintain that state of things for all time, but only that things considered without any preceding act of men were of such a nature that they belonged no more to one man than to another. Yet, on the other hand, when we say that reason suggested the departure from the community, we do not mean to imply that it was necessary for all things to pass under proprietorship at one moment, but only as considerations of men, of things, and of places required, and as the best means were found to remove causes of dispute. And so we have not sinned against the law of nature in entirely doing away with primitive community, nor have backward peoples in retaining to this day many of its features. And so the next point raised offers little difficulty, when they say: 'After the Fall men could never live without law, if they were to lead a social life; therefore, no more could they without the distinction of dominions, since community of things is inconsistent with law, the main purpose of which is to assign and distribute the possession of things.' And yet, since not all laws presuppose dominions of things, why could not those others be observed, so that a social life might be led in that limited community? Although it is true enough, that before the division of dominions men could be controlled by a simple code such as might be

included in a few headings. And so some limitations should be set upon the statement of Servius on the *Aeneid*, Bk. IV, line 58, where he maintains that Ceres was called the Lawgiver, and her rites Thesmophoria,¹ because she is said to have discovered laws, since before the discovery of grain, men wandered about here and there without law, which wild life was interrupted at the discovery of the use of grain, after laws had arisen from the dividing off of fields, that is, there was need of a more complicated legal apparatus, after the introduction of divided dominions of things, since mankind had been controlled before by few laws. Yet community itself only renders life simple and unadorned, but slightly organized, as it were, and not lawless and unsocial. The community advanced by Plato has no place here, since it is positive and embraces not merely things, but wives and children as well.

14. It can be gathered, from what has been said, in what sense we are to take the statement of some, that 'propriety and dominion belong to natural law taken in its strict sense, and as it is engraved upon the minds of men'. Here it should be observed that the expression, 'this or that belongs to natural law,' has a different meaning, according as it is applied either to some command, in the strict sense of the word, or to
379 some institution introduced into human life. In the former sense it means that the law of nature commands that this be or not be done; in the latter, that sane reason, upon a consideration of the general state of social life, advises that this be set up and established among men. For whatever institutions have been introduced, because of their special advantage to this or that state, are said to belong to civil or positive law. Therefore, when the question is raised, whether dominion traces its origin to natural law, the latter and not the former sense of the word is to be taken. That is, since the foundation of natural law is a social life, and the nature of man's mind shows clearly enough that among a great number of men, who are undertaking to advance life by various arts, a quiet and decorous society cannot exist without distinct dominions of things, therefore, such were introduced in accordance with the proper requirements of human affairs, and with the aim of natural law. After this was done, the same law enjoins the observance of whatever things work to the end of the dominion instituted. But it was needless for all things, immediately upon the creation of mankind, and wherever located, to come under propriety by some definite precept of natural law; propriety, on the other hand, has been introduced as the peace of men seemed to require it. But the precept of natural law about abstaining from what is another's first exerted its force when men defined by convention what each should hold to be another's, and what his own. Till that time it lay dormant, so far as its strength was concerned, in that general precept about the preservation of pacts and

¹ [That is, 'Bringing Laws'.—Tr.]

about not impairing another's right. Nor does it involve an absurdity to say that the obligation to observe the law of abstaining from what is another's is coeval with mankind, and yet the institution of 'one's own and another's' was introduced later. We are often obligated to obedience before we know what is to be commanded us; for instance, when we are in general obligated to obey what is later to be commanded us by some one, or when several special commands can be summed up under one general precept.

15. At this point something should be added on the subject of dominion, where the most important question is whether those who lack the use of reason, such as children and the insane, are capable of dominion. This much is certain, that a child and an insane person cannot acquire dominion over a thing originally, that is, make something theirs by immediate occupancy. The reason is that to acquire dominion in this way there is requisite intention, on the part of the one acquiring it, that he wishes to have this thing in future as his own, and that he understands at the same time, that this act of his may beget that right in him. But this is beyond the power of such persons.

Yet it is different regarding the acquisition of dominion over things which are passed to such persons from other men. For although in this case as well, if a thing passes to me from another I am as a rule required to have a mind that can understand the transaction, and can show by signs arising from intention, that I wish to have that thing as well as to accept it, yet it is established among all the more advanced nations that dominions of things can be transferred to children and even to those yet unborn, and can be held by them (see *Digest*, I. v. 7, 26; V. iv. 3). Natural reason and equity favoured the introduction of this, because things, which are subject to dominion, serve the uses of life and are necessary to children no less than to adults; nay, even more so to the former, because they are not so able, due to lack of strength and of judgement, to look out for themselves as adults. Therefore, in the case of children, a presumption of their consent is judged to be enough for acceptance, inasmuch as no one is supposed to reject what is to his advantage. But because of the lack of judgement consequent upon their age, it has been held possible for dominion to be conferred on children, only so far as *κτῆσις* [possession], not to the extent that they can exercise it of themselves. For the custom of nations, although 380 favouring children, was able to effect no more than that they might hold something but not use it of themselves. See *Galatians*, iv. 1.

But for fear this right of children should dwindle to nothing, humanity required further, that other adults should represent their person in the administration of their property, until such time as they could oversee their own affairs. This administration is either committed to a certain man by him who transfers his property to such persons, or,

in States, it is the concern of laws or of the magistrates; or else, in case both of these are failing, relatives, neighbours, or finally humanity alone gives it over to the care of suitable persons. In this connexion mention should be made, in passing, of the law of Charondas, Diodorus Siculus, Bk. XII, chap. xv: 'The estates of orphans he committed to the care and guardianship of the next of kin on their father's side, but their education, and the custody of their persons, to those on the mother's.' (B.*) His reason was that, since the latter could not inherit from the orphans, they would contrive no snares against them, while the former would have no opportunity to do them harm, and yet would probably give proper care to the inheritance, since the estate of the dead persons, whether they met a natural or violent death, would come to them. Publius [Publilius] Syrus [332]: 'A sick man does but ill for himself, if he makes his physician his heir.' The law of Solon, as given by Diogenes Laertius [I. 56], is not very different: 'A guardian of orphans should not live with their mother, and no one should be appointed a guardian, to whom the orphans' property would come, if they died.' (Y.*) But no matter in what way such an administration is turned over to a person, it will have to be managed with the utmost fidelity, out of regard for that tender age which is unable to protect itself. Therefore, Hesiod, *Works and Days*, Bk. I [330], holds equally guilty the man who has spurned a suppliant and the man who has wronged a guest, him who has polluted his brother's bed and the man who has treated harshly his aged sire: 'Or who infatuately offends against fatherless children.' (E.-W.) In Plato, *Laws* [XI, p. 927 c], where he has much to say on the duties of guardians, orphans are called 'the greatest and most sacred of deposits'. (J.) Yet equity and humanity do not always require that this duty should be undertaken gratis, or at some expense. Add Grotius, Bk. I, chap. iii, § 6, and the comments on the passage by Boecler, Ziegler, and Felden, where they show that dominion even in the second instance, that of management, is within the power of children, the reason being that to the guardians belongs only the mere administration of the right and property of another.

CHAPTER V

ON THE OBJECT OF DOMINION

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| <ol style="list-style-type: none">1. What is required in order for things to become proper ?2. It is idle for things of inexhaustible use to be made proper.3. A thing to be proper should in some way allow custody.4. The use of some things made proper is open to all. | <ol style="list-style-type: none">5. The gift of God is not opposed to dominion of the sea.6. Reasons advanced against a proprietary right over the sea.7. The nature of the use of the sea.8. What parts of the sea are occupied?9. The open ocean is free from dominion.10. How far are navigation and commerce on the ocean free ? |
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WE must now look into the object of dominion, that is, into what things are of such a character that they pass under proprietorship. Two things seem to be required for this: First, that the thing be able to afford some use to men mediately or immediately, and either of itself or in union with another thing; and second, that it should be such that in some way men can acquire it and keep it in their possession. For surely it is idle and foolish to lay claim to things of no service. And since proprietorship includes the right of warding off others from that thing, which right is useless unless it can be effectually employed, it will be idle for you to claim that right as yours, when you can with no reason prevent others from using that thing against your will. 381

2. But some things, although useful to men, are because of their extent inexhaustible, so that they can lie open to the uses of all and yet the use of no single man be any the worse. To subject such things to proprietorship would be malicious and inhuman. For this reason men commonly exempt from proprietorship the light and heat of the sun, the air, flowing water, and the like. Petronius [100]: 'Do we not enjoy in common all the most beautiful creations of nature? The sun shines upon everybody. The moon, with her cortege of innumerable stars, leads even the beasts to their pasture. Can a person mention anything more beautiful than waters? They run, however, for the good of all.' Latona speaks as follows, in Ovid, *Metamorphoses*, Bk. VI [349]: 'The enjoyment of water is a common right. Nature has not made the sun private to any, nor the air, nor soft water. This common right I seek.' (M.) Yet, since the use of the earth is necessary to dwellers on the earth, if they are to profit by the light and the air, since nature has denied them the power to fly, it follows that this free and unlimited use can be cut off from some, if, for instance, a man is thrown into a deep and dark dungeon. And since the air is clearer and purer in some spots, in this respect the value of a place may be increased, just as we

see in the case of buildings especially, and of estates, the highest value is put upon the outlook by men who cherish beauty. For this reason restrictions have been introduced on not building too high, on light, and on not cutting it off, on prospects and on not interfering with them. Thus, although no one would ordinarily lay claim to the wind, yet a restriction can be laid upon not cutting it off, so that our windmills be not rendered useless.

3. It should be observed, furthermore, that just as the substances of the things over which man may enjoy dominion are of different matter, so each of them is taken and held in the manner of which its nature admits. For the more closely a thing can be, as it were, shut in and surrounded, the more easily the effects of proprietorship are maintained against others. And so the more something admits the exclusion from it of the unjust hands of others, the more secure is the ownership we promise ourselves of it. Yet, just as a thing is not at once exempt from proprietorship, simply because the hands of other men cannot be so easily kept off from it, so, if anything is so widely scattered, that either it is morally impossible to gather it under any sort of protection, or else its protection will entail far greater expense than any returns to be got from it, one should not assume that any man wished to hold as his own a thing, the defence of which is so burdensome. Although it is not required for a thing to become proper, that it be included, or be capable of inclusion within artificial bounds, or such as differ from it in kind; but it is enough if its extent can be described within reason. And so Grotius, Bk. II, chap. iii, § 7, bothers himself to no purpose when he tries to show that rivers are capable of proprietorship, on the ground that, although rivers are bounded by no territory either at their source or at their outlet, yet it is enough that the greater part of them, that is, their sides, are enclosed in banks.

4. Finally we observe also that the use of some things is enclosed, as it were, in narrow limits and is not capable of being shared among several persons, it being to the highest interests of peace that they pass into proprietorship. Certain things also afford different uses by some
382 of which they are exhausted and by others are amply sufficient for all. Now although nothing prevents such things from being able to pass into proprietorship, yet the law of humanity commands that the inexhaustible use of such things be denied no one with whom you are at peace. Still, if there is something which would be inexhaustible under all uses, it would be absurd not to leave it in primitive community and open to all. Indeed, if in a positive community a common thing is sufficient for all when divided, nothing prevents its division; but if it is not sufficient, it is better that it be kept undivided. But it is surely contrary to reason that a thing which is open to all mankind and sufficient to meet any use of every man should be divided into shares. So great,

indeed, is the size of the earth, that it is sufficient for all people in every use, yet it would not be so if it were kept undivided by so great a multitude of men as now inhabit it. It could in no way sustain them without cultivation and improvement. This, therefore, is a further reason why the size of the earth is no obstacle to its being divided, and yet this reason would make a division of the ocean ridiculous. Cf. Ziegler on Grotius, Bk. II, chap. ii, § 3.

5. There is little difficulty here in connexion with other things, but the question as to whether the sea is capable of ownership has been a subject for debate in our day by the most distinguished minds. In connexion with this question it has been easy to observe that many of the disputants hold their zeal for their own country before their eyes rather than the truth. Yet these last and the others who had no relation to interested parties have so thoroughly canvassed all the ground that scarcely anything can be said which has not been said before. For this reason we can be more brief on this point, since the authors by whom this issue has been treated are in every one's hands.

Now it is obvious that the gift of God, whereby man was given the right to assume sovereignty over the land included also the sea. A twofold command was given: Have dominion over the fish of the sea and over the beasts of the land. But sovereignty over animals is inconceivable without the right as well of controlling the element which they inhabit, so far as its nature allows. Mention is made of the fowls of the heaven as well, yet since man has been denied the ability to be in the air to the extent that he rest¹ in it alone, and be separated from the earth, he has been unable to exercise sovereignty over the air, except in so far as men standing upon the earth can reach it. But it has been possible for sovereignty to be exercised more widely on the sea by means of ships, which are now brought to the highest degree of perfection, and not only serve for the transport of burdens but also carry on war over the domains of Neptune in a far more terrible form than it is waged upon land. Nor is there a person any more who entertains that scruple of Horace, *Odes*, Bk. I, ode iii [21 ff.]: 'Vain was the purpose of the god in severing the lands by the estranging main, if in spite of him² our impious ships³ dash across the depths he meant should not be touched.' (B.) Neither does any privilege appear to attach to the sea in comparison with the land, to prevent man's being able to turn it to his use and advantage. And yet, since the gift of God does not establish immediately a sovereignty which will be effective in relation to men, it was left to their judgement, whether they wanted to put the sea, like nearly all the land, under ownership, or to leave it in its original state, so that it should belong no more to one man than to another.

¹ [For *innixius* read *innixus*.—Tr.]

² [For *postquam* read *si tamen*.—Tr.]

³ [For *tangendarates* read *tangenda rates*.—Tr.]

6. The question is, therefore, whether certain reasons are to be found in the case of the sea to render it unable to pass under ownership. This some have undertaken to assert, partly on physical grounds, partly on moral. Among other reasons they advance the fluidity of the sea, which, according to the common nature of all liquids, has no proper bound, while possession can be held only over a thing that has limits. To this others reply that fluidity of itself is no obstacle to ownership, 383 that the sea does not lack its bounds, since it is held within shores, and that it is not so difficult to confine parts and tracts of the sea within certain bounds. It can be added, that, just as the fact that rivers are in perpetual flow does not prevent the right of property over them, neither is it true of the sea, because its water is driven this way and that by the force of the winds or by the tide. For a river is one thing, its current another; the sea is one thing, its water another. The vastness and extent of the sea in no way make the guarding of it entirely impossible, and therefore do obviously not destroy its use as property. For others can be kept from the use of the sea, either from land where an arm of the sea runs into our territory through a narrow strait, or by ships of war, which can serve the same end on the sea, as border forts on land. Although it cannot be denied that the custody of the entire ocean by one people would be morally impossible, nor would the return be worth the labour involved for any who would try with vessels of war to keep the rest of men from using it in all parts. And it is folly to yearn for what you cannot get, especially when the object of one's quest is not a necessity of life but the satisfaction of vain ambition or avarice. For, although the lack of a physical faculty does not immediately extinguish a moral one, yet, since the latter without the former is almost worthless among the base desires of men, it is an indication of good sense not to grasp at more than you can conveniently protect. Yet the restriction of Grotius, Bk. II, chap. iii, §§ 7-8, is of no value, when he would have rivers and parts of the sea pass into ownership, provided they are both relatively small in comparison with the land, or at least not so large, that, when compared with portions of the earth, they may not be able to appear a part of it. For if some people held a long but narrow strip along the bank of a river, the river in comparison with the land would not be small, and yet this fact, I imagine, will not prevent its coming into a state of ownership. So there are some kingdoms which are far surpassed in size by their own provinces and subject states.

The moral reason why ownership is not suitable to the sea is drawn from the consideration that its use is inexhaustible and therefore sufficient for the general service of all, so that it is idle to wish to assign parts of it to individuals. We would certainly consider this the final argument if it were established that the sea in all its use is sufficient for all men in every part; for the purpose of introducing the right of

property over things is to preserve peace in human society. Yet, since among the other effects of property, one was that he who makes an attempt upon a thing of mine, and seizes it against my will, does an injury that justifies war, it follows that, if any men try to make a thing their own, which lay open to all for their general use, and was not likely to induce men to quarrel over it, it should be concluded that they have not advanced peace but have sought out further occasions to break it. But whether the sea in every use is inexhaustible in all its parts, will appear more clearly, if we consider its uses a little more in detail.

7. The use of the sea for drawing water and bathing is of no great importance, is possible only for those dwelling upon its shores, and is in truth inexhaustible. Sea water serves also as a source for salt, but this use as well is enjoyed only by those who dwell upon the shores of the sea. Furthermore, the sea is also inexhaustible for the purposes of navigation, and is not prejudiced by that service. See *Digest*, VIII, iii. 23, § 1.

But there are other uses as well of the sea besides these, some of which are not entirely inexhaustible, while others are capable of giving occasion of loss to a people lying on it, so that for such a reason it is not true that all parts of the sea are open to the promiscuous use of every man. Into the former class fall fishing and the collection of things that grow in the sea. Now although fishing usually yields much more in the sea than in rivers and lakes, yet it is clear that fishing can be partially exhausted and become less profitable to maritime peoples, if any and every nation should want to fish along some particular shores; especially 384 since it often happens that fish or things of value, such as pearls, coral, and amber, are found in only one part, and that not very extensive, in the sea. In such cases nothing prevents the people dwelling along that shore or neighbouring sea from being able to lay a stronger claim to its felicity than those who dwell at a distance, nor can the rest of mankind rightfully hate or envy them for this, any more than because 'Not every land bears everything;¹ India sends us her ivory, the soft Sabaeans their frankincense.' (F.) [Vergil, *Georgics*, I. 57.] On the felicity of the shore about Byzantium see Pliny, Bk. IX, chap. xv.

Under the latter class belongs the consideration that the sea takes the place of a fortification for lands lying upon it. Therefore, the Duke of Somerset, Protector of England, writes in a letter to the Scotch, found in Sleidan, Bk. XX: 'We are enclosed on all sides by the ocean as if by the strongest walls and bulwark.' And the sea may enjoy with far better right than the Nile the name given the latter by Isocrates, *Busiris* [12], of 'immortal wall'. Yet there are two sides to this defence, for just as it shuts off any approach on foot, so it gives easy

¹ [The words 'non . . . tellus' are a slight modification of Vergil, *Eclogues*, iv. 39: 'omnis feret omnia tellus.'—Tr.]

access to ships. For this reason it is by no means to the advantage of maritime peoples to allow any other people to sail with ships of war upon the sea along their shores, without first securing their permission¹ and giving assurance of causing no offence. But it cannot be so accurately stated in general just how great an extent of such a sea serves the purpose of defence, in consideration of which a nation should have sovereignty over it. But it would surely be more than a just precaution to try to make this a basis for holding some hundreds of miles in dominion. This can be illustrated by what Caesar, *Gallic War*, Bk. VI [xxiii. 1-3], writes about the Germans:

Their States account it the highest praise by devastating their borders to have areas of wilderness as wide as possible around them. They think it the true sign of valour when their neighbours are driven to retire from their lands and no man dares to settle near, and at the same time they believe that they will be safer thereby, having removed all fear of a sudden inroad. (E.)

Therefore, there have been weighty reasons for a people making a certain part of the sea their own, to the extent that all other nations were obligated to recognize uses of it as a kindness on the part of its sovereigns.

8. Yet since any dominion which will produce effects against other men has arisen from an act of men, the extent to which the boundaries of any nation will stretch out into the sea will be settled by actual possession, or by pacts with its neighbours. Thus Isocrates, *Panegyric* [118], boasts that the Athenians in their treaty had commanded the king of Persia that 'no warship should pass beyond Phaselis'. (N.) But what is to be presumed in such matters when a doubt arises and there is no clear remembrance of acts that would prove the occupancy, can be learned from what follows.

In the first place, then, it is not likely that when sailing was still unknown, people who had acquired territories extended their dominion beyond the shore. For, since fishing without boats gave little return, and they were only able to collect shell-fish or to deceive with hooks and line, and, as they perched on a rock, 'to haul in the leaping fishes with a rod' [Ovid, *Metamorphoses*, III. 587], no one was afraid that neighbours would spoil his fishing, since those who might come up by land could be kept away. Indeed, even after the invention of boats most nations allowed free fishing in the sea for a long time, because it was not felt that so laborious an occupation would attract so many followers that tumults would have to be feared because of their altercations. So long as no hostile fleets sailed its waters, the sea itself served sufficiently the purpose of defence. Even after warships were invented, nations for a long time claimed scarcely anything other than some of its harbours as their own, all the rest of the sea being left in primitive community.

¹ [For *impetratavenia* read *impetrata venia*.—Tr.]

This was the reason for pirates making their forays with very great boldness, because they held that their violation of peace was less heinous in places subject to no jurisdiction. Then after the profits to be gained by maritime trade were recognized, some peoples located on straits claimed them as their own, so that by levying tolls they could share in the profit, or their cities would be thronged with merchants. Later on other parts as well of the sea were made subject to dominion, either because they were excellent for fishing, or because it increased the security of those regions. Yet scarcely any further right of dominion was exercised than that all who passed through were enjoined to refrain from harm, that no one could practise piracy there any more, or that warships could not enter those parts of the sea without permission. Therefore, in Thucydides, Bk. V [lvi], when the Lacedaemonians sent troops by sea to the aid of the Epidaurians, the Argives sent a commission to the Athenians and protested that, although they had promised by the treaty not to give passage through their territory to the enemies of the Argives, they had allowed them to sail around by sea. And the Athenians interpreted this act as a violation by the Lacedaemonians of the treaty. In order to acknowledge that dominion it has been customary in more recent years, as it appears, for foreign vessels, as they sail by a fort on the shore, or a warship belonging to him who asserts the mastery over that sea, to make some sign of respect.

It does not appear necessary for individual nations to point out the exact time when they took dominion over certain parts of the sea, but since the exercise of that dominion is not of use at any and all moments, it is enough if they performed acts of sovereignty at a time when the advantage of the State seemed to have demanded it. Nay, I should feel that it involves no absurdity to say that parts of the sea, in so far as they serve as a defence, and so as a part of the State, have begun to pass without any special corporal act under the dominion of that people whose shores they wash, as soon as nations learned the use of warships. (Cf. Ziegler on Grotius, Bk. II, chap. iii, § 11.) For upon this consideration the sea becomes a portion, as it were, of the land, like trenches, or even as the adjoining marshes and swamps are held to be a part of a city. Just as in the occupancy of immobile¹ objects there is no need to touch each part with the body, but when one part has been touched, that act is understood to bring the entire thing of which it is a part under the right of ownership; so one people, upon taking occupancy as a whole² of a certain region fixed within set³ bounds, may at the first have no intention of pushing and exercising dominion beyond those borders, because they see no advantage from that outlying portion. Yet when they recognize later that this vacant area should be added to their region, it

¹ [For *immobillium* read *immobilium*.—Tr.]

² [For the expression see below chap. vi, §§ 3-4.—Tr.]

³ [For *certes* read *certis*.—Tr.]

seems that by their bare intention they are able to claim dominion over that place as a part or dependency of their sway, especially after it has appeared that other peoples also have extended their sway from the land over a still unclaimed sea. In such a case it is proper to presume that the other nations did not want this people to be less favoured than they themselves are.

From what has been said it is clear that at this day, when all that pertains to the art of navigation has been brought to a very high degree of development, any maritime people which has any use of navigation is master of the sea which washes its shores, in so far as it is held to serve as a defence, and especially of ports or places where an easy landing can be made. (Bodin, *On the Republic*, Bk. I, the last chapter, states on the authority of Baldus: 'By a kind of right common to all rulers whose territories border upon the sea, it has been agreed that a ruler can impose his law upon those who approach within sixty miles of his shore.') Bays also regularly belong to that nation whose territory encloses any particular one, the same being true also of straits. But if several people live upon a strait or bay, their several dominions are understood to extend straight out from their territories
 386 to its centre, unless either by convention they decide to exercise that dominion as a unity against foreigners but to use those waters promiscuously among themselves; or some single one of them has acquired dominion over the entire bay or strait, by pact, by the tacit consent of the rest, by right of victory, or else because it was the first to make a settlement upon that sea, had seized at once all of it, and had exercised acts of sovereignty against the people of the opposite shore. Yet, in this last case, the rest of the dwellers upon that bay or strait will none the less¹ be understood to be rulers, each of his own ports and of a portion of the sea along the shore. On the effects of sea dominion so called, see Alberico Gentili, *Pleas of a Spanish Advocate*, Bk. I, chaps. viii and xiv; and Selden, *Mare Clausum*, Bk. II, chaps. xx-xxii. It should be added, in passing, that Edward Chamberlayne, *Present State of England*, Pt. I, chap. iv, records that whoever is born on board ship, on a sea subject to English sway, is held to be a native-born Englishman, and that he does not need to be 'naturalized', as they call it, like others who are born outside of England.

9. But what shall we say of the vast ocean, placed between great continents, Europe, Africa, Asia, America, the territory of Australia, and the unknown coast? Has this also passed under the right of property, or does it still abide in its primitive state, open to the use of all? Its great extent does not make it absolutely incapable of being regarded as property. Yet it must be confessed that dominion over it would be useless, nay, even unjust, if a people should try to claim the

¹ [For *nihilominus* read *nihilominus*.—Tr.]

whole of it for themselves, or a few, by dividing it into parts, to the exclusion of all others. Navigation or the use of sea passage is a matter of innocent utility, which is not enough, taken by itself, to produce ownership over the sea, since sails may be spread quite as advantageously over a sea that is common to all, as over one that is private property. Fishing over waters of such great extent is not a matter of great importance. And since it is idle to say a thing is yours from the promiscuous use of which it is impossible to keep off others, I do not believe a nation which wished to maintain fleets over all parts of the ocean so as to keep others from fishing, would find that they were repaid for the expense.

But what if some people, for a foolish ambition to be called the Master of the Ocean, or upon the urge of avarice, so that it alone might gather in the returns from navigation and maritime commerce, should try to claim for itself alone ownership of the ocean? Suppose it should go so far as to claim that it first seized the ocean by sailing over it, and that it now holds territory on all the continents between which the ocean lies; and that since the ocean was originally unoccupied space, the nation that was the first to undertake to occupy it was able to secure for itself ownership of it. To all this we reply that it is, indeed, within the power of men to make by occupancy unoccupied spaces their own, but on the condition that they bear in mind that God gave the world not to one man or another, but to all mankind, and that men are at the same time by nature equal. Therefore, that tacit pact between those who were the first to divide things, on granting to occupiers those things which did not fall under the first division, can by no means be extended to such a thing by the possession of which one man could oppress all others with a most unjust servitude, or secure the most important advantages, which would otherwise belong to them. And this, especially because such a circumstance could not have occurred to the makers of that tacit pact. Therefore, just as no man should be held to be at fault, if he should take from a store of things, open to all, quite enough for his needs even in the future; so the man is not to be tolerated who, in his absurd greediness, wants to lay claim to more than he can take, and thus to extend his domains infinitely for no other purpose than to prevent others from enjoying the abundance of nature's blessings. Therefore, no good excuse can be advanced for any one nation wishing to claim dominion over the entire ocean, with the effect that it also desires to prevent all others from sailing upon it. 387

Not a single one of those reasons which led to the introduction of proprietorship in things can be applied to the open ocean. It needs no labour and industry of men, so far as concerns its open stretches, to make it fit for navigation. The winds drive on every vessel upon its waters with the same effort as they drive any single one. Nor do the

furrows which vessels make render the way any harder for those that follow. The passage that leads to a continent lies open to you and is not more difficult, although others have taken and still use the same course. The fact that others have journeyed through an area in no wise gives them dominion over it, or bars the same way to the rest of mankind. It is impudence to maintain that when a nation has cut off the rest from navigation, it alone can secure the profit accruing¹ therefrom, a thing upon which every people should be intent. As if, indeed, all other peoples should suffer from a most unjust monopoly, in order to minister to the insatiable avarice of one; or as if all the rest of mankind should voluntarily submit to the yoke, because the ambition of one State conceives the base desire to hold the sovereignty of the entire world. Such was the generosity of God towards men that He supplied them abundantly with what serves their needs. But reason prescribed to men such bounds of possession, as would leave them content upon acquiring what would be likely to meet the needs of themselves and of their dependants. Nor yet does it want them to take no thought for the future, provided their envy and craving for more than they need do not prevent others from providing² for their own necessities. If any person ranges too far afield and heaps up superfluous wealth by the oppression of others, the rest will not be blamed³ if, when opportunity affords, they undertake promptly to bring him into line.

10. It is clear from all this that peaceful navigation of the ocean belongs to all men and is free; the former because no one has yet had such a right established over it that he can preclude all others from it; the latter because it should be so by the law of humanity. And so no one can prevent nations bordering upon the ocean, not subject to him, from trading with one another; unless by a pact he has acquired such a right, that either one nation out of favour to him is obligated to prevent some other people from trading with them, or that some one has yielded to him the freedom to sail to that people. An instance of the former kind of pact is that between the Dutch East India Company and the Emperor of Ceylon; see Philip Baldaeus, *Descriptio Orae Malabar et Coromandel*, chaps. x and xxii. For since I am able at my pleasure to keep for my own use or to alienate my goods, especially such as minister more to superfluous pleasures than to the necessities of life, nothing prevents me, for certain reasons, from binding myself by a pact with some one else, to give them to him alone. Furthermore, it is a mark of liberty for a man to be able to withdraw by a pact from his right in favour of another, provided that no such pact work injury to a third party. Therefore, as a prince can forbid commodities grown or manufactured in his country from being exported by foreigners, unless

¹ [For *proveintie* read *proveniente*.—Tr.]

² [For *prospisere* read *prospicere*.—Tr.]

³ [For *vito* read *vitio*.—Tr.]

they have secured that faculty by a pact, or a generous concession (although he is in no way bound by the law of nature to enter into such a pact, or to grant this favour, unless so great necessity be laid upon some nation that it would perish without such commodities), so if, for instance, a European nation should make some portion of Africa or India its own, after the fashion which the nations usually recognize as imparting dominion, it has the right, if it shall see fit, to exclude all others from any access to it for purposes of trade, or to allow access only on a fixed condition or burden. This is precisely what we see observed in everyday practice, and there is nothing in it contrary to natural reason. For that liberty of trade, which is so strongly urged, does not prevent¹ a State from favouring its own citizens above foreigners.

¹ [For *opstat* read *obstat*.—Tr.]

CHAPTER VI

ON OCCUPANCY

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| <ol style="list-style-type: none"> 1. The different ways of acquiring it. 2. The original ways of acquiring it. 3. Occupancy takes place as a whole or by sections. 4. The occupancy of movables depends on the will of the supreme authority. 5. In some places the capture of wild animals is permitted to every one; 6. In some places it is allowed to princes alone. 7. Whether he who hunts against the laws makes the captured animal his own. | <ol style="list-style-type: none"> 8. When immovable things are understood to be occupied; 9. When movable things. 10. Whether an animal wounded by me thereby becomes mine. 11. Whether fishes in a lake of mine belong to me. 12. Things abandoned belong at once to any person that takes them. 13. On treasures. 14. On occupancy in war. |
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It is our next task to examine the ways of securing dominion, which according to the pronouncement of Grotius are divided into *original* and *derivative*. The former are those whereby ownership is introduced into a thing for the first time; the latter, whereby dominion already set up by one man passes over to another. The original manner of acquisition is again either simple, whereby dominion is acquired over the body of some thing, or secondary, whereby some increase is added to what is already ours.

2. It has been sufficiently set forth above that, after men decided to depart from primitive community, they assigned by a previous pact to each person his portion of the things open to all, and this by the authority of the head of the family, by general consent, by lot, or sometimes at the choice of the several parties. As regards the things which did not come under that first division it was agreed that they shall pass to him who occupied them, that is, to him who was the first to take bodily possession of them with the intention of keeping them for himself. Therefore, the statement of Grotius, Bk. II, chap. iii, § 1, that 'Formerly, when the human race could assemble together, primary acquisition could take place also through division; now it takes place through occupation only,' (K.), must be taken in the sense that, when mankind first commenced to be divided into several families, distinct dominions of things arose from that division, but after that division, whoever has occupied an unpossessed object has acquired it originally, that is, whoever has seized it before any one else, or has anticipated them in laying claim to it. It is in this sense that the word is used in Seneca, *Thyestes*, 204:

There lies the crime between us two,
Who leaps to grasp it first, the crime shall do. (M.)

Tacitus, *Histories*, Bk. V, chap. i: 'Many persons had come from Rome and Italy, each impelled by the hopes he had of preoccupying the favour of a prince who had not yet chosen his friends.' (O.) Pliny, *Letters*, Bk. IV, ep. xv: 'In a state where everything is seized upon by the man who can get hold of it, it is staying much too late to wait till precisely the proper time.' (B.)

3. Regarding occupancy of immovable objects, and especially of lands, it must be carefully considered whether it is made by one person, or by several at the same time. Any single individual is held to have occupied land when he undertakes to cultivate it, or marks out its boundaries. Yet it is understood that he will not embrace more than what one family, even though it includes many members, can probably defend. For if, for example, a single man together with his wife should be cast upon an unoccupied island which would support myriads of inhabitants, it would be impudent of him to claim it all upon the plea of occupancy, and to attempt to expel all others who might have landed on another part of the island.

But when a group of men have together occupied some portion of land, this has usually been done either as a whole or by sections. It is 389 an instance of the former kind of occupancy, when a group of men take under possession some desert tract of land, the bounds of which have been fixed either by nature or by the decision of men. Portions of this are then allowed each member of the group to occupy as he pleases (a method rarely followed) or they are assigned to each person of the group by the whole body, which is the best way to avoid quarrels and confusion. For that a promiscuous occupancy gives rise to confusion is suggested by Livy, Bk. V [lv], where he describes Rome as 'more like a city taken up by individuals, than regularly portioned out by commissioners'. (S.) Another illustration is found in the account given by Tacitus, *Germany*, chap. xxvi, of the ancient Germans: 'The lands are occupied by townships (so Grotius for *vices*), in allotments proportional to the number of cultivators; and are afterwards parcelled out among the individuals of the district, in shares according to the rank and condition of each person. The wide extent of plain facilitates this partition. The arable lands are annually changed and a part left fallow.' (O.) In the same vein Caesar, *Gallie War*, Bk. IV, chap. i [4-7], writes of the Suebi:

They have a hundred cantons, from each of which they draw one thousand men yearly for the purpose of war outside their borders. The remainder, who have stayed at home, support themselves and the absent warriors; and again, in turn, are under arms the following year, while the others remain at home. By this means neither husbandry nor the theory and practice of war is interrupted. They have no private or separate holding of land, nor are they allowed to abide longer than a year in one place for their habitation. (E.)

And of the Germans as a whole he writes, *Ibid.*, Bk. VI [xxii. 2]:

No man has a definite quantity of land or estate of his own: the magistrates and chiefs every year assign to tribes and clans that have assembled together as much land and in such places as seems good to them, and compel the tenants after a year to pass on elsewhere. (E.)

That is, in order to maintain the simplicity of their life, and avoid avarice and luxury. Horace, *Odes*, Bk. III, ode xxiv [9 ff.], refers to the same thing:

Far better live the Scythians of the steppes; far better live the Getae stern, whose unallotted acres bring forth fruits and corn for all in common; nor with them is tillage binding longer than a year; another then on like conditions takes the place of him whose task is done. (B.)

On the inhabitants of the island of Lipara see Diodorus Siculus, Bk. V, chap. ix. The same writer ascribes even a closer kind of community to the inhabitants of Vacca, Bk. V, chap. xxiv:

The Vaccae every year divide the land among them, and thus till and plough it, and after the harvest distribute the fruits, allotting to every one his share. And therefore it is death to steal, or underhandedly to convey away anything from the husbandmen. (B.*)

Add *Idem*, *loc. cit.*, xlv, on the State of the Panchaeans. In the same way the Apalchitae labour in common, and every full moon there is a distribution from the common store to the heads of families according to the number of their household. See Rochefort, *Descriptio Antillarum*, Pt. II, chap. viii, § 8; cf. Grotius, Bk. II, chap. ii, § 4.

4. Regarding 'occupancy as a whole', moreover, it is to be observed that it establishes dominion for the whole group, as such, over all things in that district, not merely immovables, but also movables and animal life, or at least the right to use the last named to the exclusion of all others. This universal dominion is so different from the dominion of individuals that the latter can pass even to some one outside of the State, while universal dominion is preserved only in the State. Dio Chrysostom, *Orations* [xxxi. 47]: 'For the lands belong to the city no less than every possessor controls his own property.' (M.*) But it is not necessary that all things which are occupied in this universal manner should be divided among individuals and pass into private hands. Therefore, if anything be discovered in such an area that is still without a private owner, it should not at once be regarded as unoccupied, and free to be taken by any man as his own, but it will be understood to belong to the whole people. This principle, we feel, should be extended to desert islands lying in a sea, dominion over which belongs to some State, or to such islands as rise in that place thereafter, examples of which are given

390 by Pliny, *Natural History*, Bk. IV, chap. xii.

Such things the people often settle in different ways. Sometimes the proceeds or fruits of them are paid into the public store to be turned later to the uses of the State; sometimes foreigners as well are allowed to use such things; sometimes merely all the citizens, or those of a certain station. Yet whatever right any individual possesses over such

things depends on the decision of the popular will. However, in these matters some distinction is observable between immovable and movable things. For since the former are exposed to view and cannot be moved from their place they are understood, in view of that universal occupancy, to belong to the people, so far as concerns their bodies, as it were. But some mobile things are so constituted that the territory in question furnishes, it is true, a home or place for them, yet they require either some hunting out and gathering, such as metals lying in the bowels of the earth, gems, pearls, and the like scattered over the shores or elsewhere, or else a special effort to catch and secure, that they do not get out of our hands again, such as wild animals, fish, and birds. Since such things, while not yet secured or captured, are not in the power of men for them to be able to use at their pleasure, it follows that while a people has occupied as a whole the home of such things, it has not actually secured dominion over them, but only a right of securing dominion over them by their actual apprehension. Therefore, it is not proper to say, for example, that animals still at large in natural liberty actually belong to a prince. But the prince has the right to capture them, for the reason that he has dominion over the ground on which they roam, while he may also limit the degree to which individuals may employ this right. And so he who maintains sovereignty over lands and waters will be able to grant the right of taking such areas and of making them over as his own possession either promiscuously to all mankind, or to all his own citizens, or to those of a certain rank, or he may keep the privilege for himself alone. For although the things themselves may not yet be under dominion, still, in view of the fact that for them to pass under ownership another thing already subject to dominion must necessarily be used, such as earth or water, it follows that he who has sovereignty over these last, may by a decree prevent another from using the sovereign's property to acquire the former. Cf. Grotius, Bk. II, chap. iii, §§ 5, 19.

5. It is clear from all this that it depends not on some natural and necessary law, but on the will of him who holds the supreme sovereignty, what right may belong to individuals in a State regarding the gathering of movables not yet possessed, regarding hunting, fowling, fishing, and the like. This power extends even to the occupation of desert places which the supreme powers of the State may prohibit any one of their subjects from taking up. But they do not by this restraint prevent foreigners from occupying such regions, and thus making them their own; only their own subjects are prevented, to the end that no others among them shall take such lands than those who were granted the right. Thus in some places individuals are granted more, in other places less, according as the governors of the States have seen fit. Selden, Bk. VI, chap. iv, recounts concerning the customs of the Jews, that

'Anything found in desert places or not owned and cultivated by private persons, or in rivers and torrents, belonged to the person who occupied it, such as grass, fruits of trees, forests, and the like. The same was true of fish in the sea or rivers, birds or wild beasts. Yet one could not hunt or fowl in another's field. But even there what any one had seized he made his own. It was forbidden to take animals or fish in enclosures.' With all this the Roman Jurisconsults are in practical agreement. For Gaius,¹ Bk. II, *Rerum quotidianarum* [*Institutes*, II. i. 12], says:

Wild animals, birds and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor; for natural reason admits the title of the first occupant to that which previously had no owner.² (M.)

391 There is an excellent passage about fish in Plautus, *Rudens*, Act IV, sc. iii [971-4]:

Which fish in the sea will you say is 'my own'? When I catch them, if indeed I do catch them, they are my own; as my own I keep them. They are not claimed as having a right to freedom, nor does any person demand a share in them. In the market I sell them all openly as my own. (R.)

Yet the fisherman was wrong in applying this principle to the discovery of a travelling-trunk.

On these and similar passages the expositors of the Roman law observe that by wild animals [*ferae*] are understood all animals which are endowed by nature with a limitless power of wandering about in the earth, sea, and air, and that even those are included which have been tamed by association with men. Although the distinction between wild and tame beasts is better expressed, perhaps, thus: That the former are more averse to association with men, delight more in unfettered liberty, and become accustomed to live among us only with difficulty and scarcely ever without the need of our watching them, while of the latter the opposite is true. Yet from the fact that in very remote places, where man scarcely ever sets foot, birds are to be found which do not avoid the touch of men, Grotius, *Historia Belgica*, Bk. V, remarks³ that 'the reason we are avoided by other animals is the lack of gentleness, not on their part, but on ours'. Although you may prefer to say that wild animals are merely harder to teach and more stubborn than tame.

Here we should observe, in passing, that it is incorrect to group doves and peacocks among wild birds, as is done in *Institutes*, II. i, § 15, and *Digest*, XLI. i. 5, § 5. This has already been noted with regard to peacocks by Godefroy on this passage of the *Institutes*, while the same reason applies also to doves that is advanced in § 16 following, because there are also wild doves. The Hebrew laws did not allow them to be

¹ [A similar remark of Gaius is in *Digest*, XLI. i. 3.—Tr.]

² [The quotation differs in several details, but not in the general sense, from the original.—Tr.]

³ [For *pronunciet* read *pronunciat*.—Tr.]

caught within thirty stades from a dove-cote. See Constantin l'Empereur, *Baba Kama*, chap. vii, sect. 7; add also Selden, *De Jure Naturali et Gentium*, Bk. VI, chap. xi. Yet the nature of bees is clearly wild, since the habit of returning to their hives comes not from training by men but from their own natural instinct; moreover they are quite unteachable. Yet Plato, *Laws*, Bk. VIII [p. 843 D], rules: 'If any one, by decoying the bees, gets possession of another's swarms and draws them to himself by making noises, he shall pay the damage.' (J.) Here he seems to assume that the man from whose hives they flew did not follow them any further. Cf. *Institutes*, II. 1, § 14. Pliny, Bk. XI, chap. v, says: 'Since they are neither domesticated nor wild'; yet others divide them into wild or wood bees and quasi-domesticated bees. See *Digest*, XLVII. ii. 26; XLI. i. 5, § 3. Yet Quintilian, *Declamations*, xiii, entitled *Apes pauperis* (cf. *Digest*, X. ii. 8, § 1), is at pains to show that so long as they return to our hives they belong to us, and any injury to them constitutes damage. Also, according to Roman law, it makes no difference whether a man catches a wild animal on his own property or another's, since so long as they are in natural liberty they belong to no one, no matter where they are. Yet the owner of a farm can forbid entrance to any one to fowl or hunt. Still, whatever a man captures, although against the orders of the owner, he makes his own. Cujas, Bk. IV, obs. ii, however, differs from us about this point, on the basis of *Digest*, XLI. i. 55.

6. But in most places hunting is left to the governors of States, who in some countries allow their leading citizens to share in it, although every one is usually allowed to kill savage animals wherever they may be found. Various reasons can be advanced for this. It did not seem wise for peasants and artisans to leave their work and wander about through the forests, such practices tending to entice them gradually to the life of highwaymen. See *Constitutio Frederici II* [*Constitutiones in Sicilia Friderici*], Bk. II, tit. xxvii § *Si quis rusticus*. Sometimes it is considered dangerous for the common sort to be allowed arms. See Cicero, *Against Verres*, Bk. V [VI. iii], where L. Domitius crucified a slave for killing a large boar with a hunting spear, since, after the slave war in Sicily, it was forbidden 'that any slave should appear with a weapon'. Also for princes and nobles, whose arms must secure the safety of citizens, hunting seemed to be appropriate as a kind of counterpart of war, so that they might be made fit for the hardships of campaigning. This was the reason that of old the Medes, Persians, and Parthians paid so much attention to the art of hunting, as appears from Xenophon, *Training of Cyrus* [I. ii. 10]; Cornelius Nepos, *Alcibiades*, chap. xi; *Justin*, Bk. XLI, chap. iii; Tacitus, *Annals*, Bk. II, chap. i; Suetonius, *Caligula*, chap. v. In Laonicus¹ Chalcocondylas, Bk. III, the story is told that Bajazet had

¹ [For *Laonicus* read *Laonicus*.—Tr.]

seven thousand men to look after his hawks, and maintained six thousand¹ dogs. When he was taken captive by Tamerlane, was upbraided by him for this, and had had all his dogs and hawks sent away, he haughtily replied: 'For me who owe my birth and rearing to Amurath the son of Orchan, both of them kings, an interest in dogs and hawks is fitting. Not so for you, a Scythian, robber, and inveterate highwayman.' It was also right to allow that manly exercise to princes on whose devotion and care rests the public safety, and especially since hunting in thickly populated districts can bring little return to individuals, if it is allowed to every one promiscuously. Pliny, *Panegyric* [lxxxix]:

Future leaders were instructed in the arts of matching fugitive beasts in running, bold beasts in valour, crafty beasts in skill; and it was regarded as no mean glory in times of peace to free the fields from the incursions of wild beasts, and to release the activities of the farmers from a kind of siege.

Therefore, for these and similar reasons a prince has been able to take away the freedom to hunt from the common sort, even against their will, yet without doing them any injury, if it seemed advantageous to the State. For he does not take from them what is actually theirs, but he only forbids them to use a certain manner of acquisition, which the mere law of nature would otherwise grant them, if it were in force, without civil enactments. For the position of some less instructed authors, namely, that the prohibition of hunting is unlawful, because God gave men dominion over beasts, and peasants are likewise men, or the fact that in general in the writings of the Roman Jurisconsults hunting is called free by the law of nature and of nations, has long ago been met by learned men, who have drawn a distinction between a preceptive and a permissive law of nature, and pointed out a different meaning of the expression 'law of nations'. See Grotius, Bk. II, chap. viii, § 1. But it is also likely that in many places this right was transferred to princes on the initiative of the people. For since some property had to be assigned them wherewith they could maintain a station and court worthy of their high position, wisdom counselled that it would be most advantageous to assign them those things which could be given without injuring any one. Such are all things which have not yet passed into the dominion of another person. On hunting among the Peruvians under the Incas see Garcilaso de la Vega, *Comentarios Reales*, Bk. VI, chap. vi.

7. Yet by such laws princes were given not a dominion, properly speaking, but only a right over wild animals, to the effect that they alone could make them theirs by seizing them. But that right has this effect in common with dominion, namely, that after such animals have been seized by others, they can be claimed from him who unlawfully holds them. For it apparently is not to be admitted, as some maintain,

¹ [For *mililia* read *millia*.—Tr.]

that a law could assign dominion of these things even before occupancy, since a law suffices to create dominion. Civil law can, it is true, bring it about that a dominion already established over things may pass from one citizen to another without any antecedent deed of the two parties. But a mere law cannot bring it about that dominion shall for the first time be established over a thing which has not yet actually passed under the power of men; rather a corporal act is required, especially on living things. To establish dominion for the first time, and to pass it on when once established, are different things. 393

There are some, on the other hand, who maintain that civil laws prohibiting freedom to hunt take away not the acquisition of the animal once caught, but only the right of hunting. For, as they say, two concessions were made by the law of nations with regard to hunting: First, that all men were given the right to hunt; and second, that dominion over wild animals could be acquired by occupancy. It is to be understood that the former has been done away with, but not the latter. Therefore, if a person who has been forbidden to hunt has nevertheless caught a beast in the chase, it can be taken from him, if found in his possession, not because it has not been made his, but because he is unworthy to hold it and should be punished. It is for this very reason that nets, spears, and weapons for hunting are taken from such men, although they undeniably are their property. Therefore, if game taken in this way be given to another, who receives it in good faith, it cannot be taken from him, or be subject to claim, which would, however, be allowable if the animals had really belonged to another and been stolen from him. For a prince cannot be called the owner of wild animals before he has seized them, and so a man who has hunted despite a decree to the contrary has not committed theft nor taken away what is another's; but he has acquired a thing which another person had the sole and private right to acquire: he is punished, but the taint of theft does not attach itself to the thing thus acquired. See Gudelinus, *De Jure Novissimo*, Bk. II, chap. ii; and after him Arnold Vinn, on *Institutes*, II. i, § 13.

Ziegler, on Grotius, Bk. II, chap. ii, § 5, has much the same point of view: 'The capture of wild animals can be prevented by law, but not their acquisition after they have been captured. For the right of prohibiting can exist along with such acquisition. Whether a man can acquire by capturing, and whether he can use this manner of acquiring, are different questions. On the first question the sovereign has no power. Just as he cannot make things belonging to no one belong to some one, or what is not possessed pass into possession (*Digest*, XLI. ii. 3, § 14), so he cannot forbid acquisition, nor make things unacquired which have been already acquired. But on the second question the prince has free power.'

Yet it strongly savours of simplicity to believe that a person who is the first to lay hands on a thing by some natural necessity becomes its possessor, since possession or dominion, as we have shown above, arises from a previous pact. Therefore, if a prince regarding certain things has forbidden to his subjects this method of acquisition, the first seizure of them has no effect upon acquiring dominion. And this law has so far the same effect as dominion, that a subject should not lay hands upon wild beasts, or, if he does so, in fact, he does not make them his own. And even if decaying meat is usually not claimed, especially¹ by a third party, that does not constitute a reason for the furtive hunter having a clear title to it. Nor is capturing the same as acquiring, since the former is a mere physical act, while the latter involves a moral effect. Nay, it is plainly contradictory to say: 'Princes alone have the right to hunt, and if any private citizen captures some game, he acquires dominion over it.' In other words, only princes can use that method by which legitimate dominion is established over wild animals, and nevertheless, he who is not permitted to use that method acquires dominion.

But suppose some one asks: With whom, then, lies the dominion over an animal taken against the laws? We deny that it lies with the captor; and yet the prince did not take it. Apparently the reply to this should be that the hunter himself has performed a voluntary, though far from pleasing, service for the prince, and so, like any other hunter authorized by the prince, he has by his capture made the game the property of the prince.

Yet it is above all certain that a foreigner is also bound by such laws, although it may happen that hunting in his own State is free to all. For it is a law of all States and one absolutely necessary for the pre-
 394 servation of internal peace, that whoever enters the territory of a prince, even for a time, shall conduct himself for that stay in accordance with the ruler's laws, at least in accordance with those which reason also holds good against him, and from which the lawgiver has not exempted foreigners. See Grotius, Bk. II, chap. ii, § 5. But writers of judgement wisely urge moderation in the exercise of such laws, provided the particular maliciousness of poachers does not urge harsh measures. See Boecler on Grotius, *loc. cit.*, § 4.

8. We are said to have occupied a thing, only when we actually take possession of it, and this begins with the joining of body to body immediately or through a proper instrument. Therefore it is the customary thing, that occupancy of movables be effected by the hands, of land by the feet, along with the intention of cultivating it and of establishing boundaries either exact or with some latitude. But merely to have seen a thing, or to know its location, is not held to be sufficient to establish

¹ [For *comprimus* read *comprimis*.—Tr.]

possession. Ceres says, in Ovid, *Metamorphoses*, Bk. V [518-19]: 'See, my daughter, sought so long, has at last been found, [. . .] if you call it finding merely to know where she is.' (M.)

But whether the possession of an immovable thing can be acquired by an instrument, may be understood by the famous story of Plutarch, *Greek Questions*, xxx, where he gives this account:

The Andrians and Chalcidians sailing into Thrace to get them a seat, the city Sane being betrayed was delivered up to them both in common; and being told that Acanthus was deserted by the barbarians, they sent two spies thither. These approaching the city and perceiving all the enemies to be fled, the Chalcidian outruns the other, intending to seize the city for the Chalcidians; but the Andrian, finding himself not able to overtake him, darts his lance and fixes it exactly in the gates, and says that he first seized the city for the Andrians. Hence a great contention arising, they agreed together without a war to make the Erythraeans¹, Samians, and Parians umpires in all matters of controversy between them. The Erythraeans and Samians brought in the verdict for the Andrians, but the Parians for the Chalcidians; hence the Andrians about this place bound themselves under a curse that they would not give wives in marriage to the Parians nor take wives of them. (G.)

Surely a spear does not appear to be a proper instrument with which to occupy an immovable thing, since we can strike with a spear many things which we cannot approach with our body.

9. But it is generally held that if movable things are to become ours they must be seized bodily, in such a way, moreover, that they are moved from that spot where they had been placed, and are transferred into some place of our own, or into our keeping. Thus I may touch the fledglings of birds while still in their nest, but I have not yet² made them mine until I have brought them home. Likewise, if I catch some cubs in a cave, I will make them mine only when I either move them from that place to my own cages, or for so long as I guard them that they do not escape. But this seizure may be effected not only by our hand, but also by instruments of ours, such as snares, traps, nets, seines, hooks, and the like, provided the instruments are in our power, that is, laid in a place where we have a right to capture wild animals, and not yet broken by the beast, and provided the game is so securely fastened in them that it cannot get away, at least till such time as we may come to it.

On these principles can be settled the question, set forth in *Digest*, XLI. i. 55, of the boar caught in a snare. Now if the boar was so caught in the snare that he could not get out, and the snare was set either on public property, or your own land, where you had a right to hunt, it was yours; and if I had set him loose so that he got back into his natural liberty, I was liable for his value, no matter on what grounds the action was brought. But if the snare was set on my land, just as I could have forbidden you entrance when you wished it, so if I break the snare set there against my will, you have no grounds of complaint against me.

¹ [For the erroneous reading *Eretrienses*, 'Eretrians', in Pufendorf.—Tr.]

² [For *nundum* read *nondum*, and for *in de* read *inde*.—Tr.]

395 10. The question is also raised whether, by wounding a wild animal, we seem to make it at once our own. Trebatius once said that we did, supposing that we pursue it, while if we do not do so, it ceases to be ours, and goes to him who first secures it. Others take the opposite position, namely, that it is not ours unless we have caught it, since many things can happen that may keep us from catching it. *Digest*, XLI. i. 5. On this Godefroy, quoting from Radevicus, *De Gestis Friderici*, Bk. I, chap. xxvi, observes that Frederick [Barbarossa] drew some distinctions in cases like this, to wit: 'If a man has discovered an animal with large deer hounds, or Molossian dogs, and was pursuing it, the animal goes to him rather than to the one who seizes it; and likewise if he wounds or kills it with spear or sword. If he pursued it with beagles or Spartan dogs, it falls to the seizer. If he slew it with dart, stone, or arrow, it belongs to him and not to the seizer, provided he is pursuing it.' According to a law of the Lombards, Bk. I, tit. xxii, laws 4 and 6, he who killed or found an animal wounded by another, may carry off the fore-quarter with seven ribs, the rest belonging to him who had wounded it, though his right endured only twenty-four hours. Although in my opinion the general statement should be that, if an animal has received a mortal wound or been seriously crippled, it cannot be taken by another so long as we keep up the pursuit of it, and provided we have the right to be in that place; while this is not true, in case the wound be not mortal, nor such as seriously to hinder its flight. Therefore, it was more from affection than right that Meleager allowed Atalanta to share in the glory of the slaying of the Caledonian boar, as the story is given by Ovid, *Metamorphoses*, Bk. VIII [427]. But the game which my dogs have killed without any urging is not mine until I seize it. Add Alberico Gentili, *Pleas of a Spanish Advocate*, Bk. I, chap. iv.

11. According to Selden, Bk. VI, chap. iv, these and similar questions were dealt with by Jewish law as follows: 'Fish and wild animals in preserves should not be taken. But fish may be taken from another's net while it is in the sea, and an animal taken from another's net which is set in a desert place. If a man sets a net on another's land to catch game, the game belongs to him, unless the owner of the field should have found it, and claim his right to it because of his ownership of the field. Fish¹ that have leaped into a ship belong to the owner of the vessel, since a ship as regards custody is considered sufficiently fixed and enclosed, not something that is called movable, or, for this reason, transient. For it is to the waters that it owes its motion, or the ship moves about because of the sea and not of its own nature.'

We should in this connexion evaluate the opinion of Nerva in *Digest*, XLI. ii. 3, § 14: 'The fish in our pond we do possess, but not those in our lake; and so likewise the wild animals that are shut up in a closed

¹ [For *pisses* read *pisces*.—Tr.]

park, but not those which wander at will in enclosed forests.⁷ Exception is taken to this by Grotius, Bk. II, chap. viii, § 2, on the ground that fishes are preserved just as much in a private lake as in a fish pond, and woods that are enclosed, hem in wild animals just as well as parks. Yet there is reason for the statement of Nerva. For ownership over animals and fishes begins with their seizure. Now the fish preserved in a pond, and the wild animals preserved in a park, have been captured once, while the fish to be found in a lake of ours, or the animals to be found in our woods have not yet been stripped of their natural liberty, even though they have been so limited in their movements that they cannot wander any place they will. For it is one thing to capture an animal, and another to set up an enclosure so that one can be caught more easily. Yet because I alone have the right to capture them, and therefore to keep all others from doing so,¹ I am also able to claim them from their captors, and so, as concerns this effect, I am considered their owner. Therefore, enclosed animals enjoy natural liberty only in so far as they have not yet been seized by man, not that they can be seized by any one.

12. Occupancy is also used to acquire things which were formerly under a dominion which is now lapsed. This takes place if a man either openly throws aside a thing, with a clear indication that he no longer wishes to hold it among his possessions, but to let it lie for any one to 396 seize, and this with no intention of gratifying another; or if a man loses possession of a thing unwillingly at first, but later lets it go as a thing without ownership, either because he despairs of recovering it, or because its recovery is not worth the effort. For otherwise no man ever loses against his will dominion over a thing, even though its actual possession is lost (unless it is taken from him as a punishment, or in war), but he keeps the right to recover it so long as he has not actually given up the intention of recovering it, or is not thought to have done so. Therefore, it will not be possible to acquire dominion over such things by occupancy, so long as the right of the former owner is still in force. See 1 *Samuel*, ix. 3; *Digest*, XLI. ii. 13; XIV. ii. 2, § 8; XIV. ii. 8. But since there are two requirements in order for a thing to be held derelict: first, that a man be unwilling to be any longer its owner; and second, that he give up possession, either by throwing it away, or by leaving it; if either of these be lacking, dominion is not lost. Suppose, then, that a thing has been thrown away by its owner, yet without the intention that he no longer wants it to be his, nothing will be lost in such a case. Suppose, on the other hand, that the owner of a thing no longer wishes it to be his, still he will not cease to be its owner unless he throws it away. See *Digest*, XLI. ii. 17, § 1. Add Boecler on Grotius, Bk. II, chap. iv, § 4, where there is a discussion of the case cited by Cicero, *On Invention*, Bk. II, chap. v.

¹ [For *illarem* read *illarum*.—Tr.]

It is in this manner that wild beasts pass again under dominion, when they have escaped from our hand and returned into natural liberty. Yet on this point Grotius, Bk. II, chap. viii, § 3, does not agree with the statement of *Digest*, XLI. i. 3, § 2, that an animal ceases to be ours when it has escaped from our hands and returned to natural liberty. For, he maintains, dominion is lost over wild beasts, not because they have escaped from keeping, but from the reasonable assumption that we are believed to consider them derelict, because of the great difficulty of pursuing them. This very fact is suggested by *Digest*, XLI. i. 5 pr.: 'A wild beast is understood to recover its natural liberty, when it has either become lost to our sight, or else, even though it be in sight, can scarcely be recovered.' And it says again, *Digest*, XLI. i. 44, that what is stolen by a wolf remains ours so long as it may be recovered. See *Digest*, X. ii. 8, § 2. For this reason some reservations must be made in the views of Ziegler upon Grotius, *loc. cit.* He remarks that because wild animals become ours through the loss of their liberty, they therefore cease to be ours upon the recovery of their liberty, and for that reason dominion over them is held to consist in actual possession. Yet a wild animal is not yet held to have gained natural liberty, while some one is pursuing it with the probable hope of recovering it, just as a prisoner who has broken jail has not yet escaped, so long as the officers are on his trail, and he is in a place where there is a chance of his being found. But the opinion of Grotius in the same passage, namely, that by the use of *γυωρίσματα* [tokens] attached to wild animals, or bells, and other marks dominion can be maintained over such animals as have escaped from our custody, and that therefore they do not go to the first person who secures them, can, in my opinion, be accepted only for such as have been domesticated by men, and have lost their native wildness, and which for that reason properly enjoy the right of tame beasts. Therefore, if that deer of Tyrrhus in Vergil, *Aeneid*, Bk. VII [483 ff.], carried such marks, Ascanius surely gave good cause for the consequent commotion. Add *Salic Law*, tit. xxxv. We may also cite here what Pliny, Bk. IX, chap. lix, relates of the fish called anthias, which can be trained by fishermen to lead the rest of its kind into nets:

It is important to know which has been the betrayer of the others, and not to take it, otherwise the shoal will take to flight, and appear no more for the future. There is a story that a fisherman, having quarrelled once with his mate, threw out a hook to one of these leading fishes, which he easily recognized, and so captured it with malicious intent. The fish, however, was recognized in the market by the other fishermen, against whom he had conceived this malice; who accordingly brought an action against him for damage; and, as Mucianus adds, he was condemned to pay ten pounds on the hearing of the case. (B. & R.*)

397 But when a mark has been put upon animals that are merely kept in a park, and they afterwards escape into natural liberty, it is nearer

the truth to say that they go to the man who secures them. For a strict guard or a perpetual occupancy, at it were, is needed, if an animal is to be retained which has by nature an unlimited power to wander, and which always frets at restraint, there being no mark that can bridle such a nature. See Ziegler, *loc. cit.* Therefore, it is a statement appropriate to their character, but in itself untrue, which Juvenal, *Satires*, iv [50 ff.], attributed to informers: 'Ready to affirm that the fish was a runaway that had long feasted in Caesar's fish-ponds; escaped from thence he must needs be returned to his former master.' (R.) Regarding escaped slaves the Roman laws had this special pronouncement, namely, that their masters were understood to retain (civil) possession over them, the reason being that the slaves might not at their will deprive their masters of the advantage of possessing them. *Digest*, XLI. ii. 1, § 14; XLI. ii. 13.

It is obvious that, if we lose possession of some other thing against our will, if, for instance, something falls from us on the road, its ownership does not pass from us, nor is it acquired by the finder until after it has been established that it is treated as derelict by us, such conclusion being in general taken for granted if we fail to inquire for it. Therefore, if a man has found something which no one has reason to think was purposely thrown away by its owner, he should acknowledge his discovery, so that the owner may receive it again. But if the owner is not discovered, the article may be kept by the finder. Aelian, *Varia Historia*, Bk. III, chap. xlv [xlvi], reports the following law of the Stagiritae: 'Do not take up what you did not lay down.' *Idem*, Bk. IV, chap. i: 'A citizen of Byblus, if he finds anything in the street which he did not put there himself, does not pick it up, for he looks upon it not so much as a find, but as a theft.' A similar law of Solon is given by Diogenes Laertius, Bk. I [57]: 'No one should claim what he has not deposited.' (Y.) Add Plato, *Laws*, Bk. X, towards the beginning. In accordance with a law of Confucius no Chinaman picked up things in the street unless he was the one who had dropped them. Martinius, *Historia Sinica*, Bk. IV, chap. xxi. Add *Edict of Theodoric*, chap. lviii. According to Selden, Bk. VI, chap. iv, the ancient Hebrews held that the law of *Deuteronomy*, xxii. 1, concerned not the Gentiles but only the Israelites, yet in this respect, namely, that if it appeared that the owner gave up his claim to the beast, it should go to the man who seized it. Yet they drew a distinction between things that were marked and unmarked. Regarding the recovery of the latter, they assumed that the owner had given them up, but not so regarding the former, unless it had been openly announced. The former could not be kept without public proclamation made two or three times, but the latter could. For this purpose there was a platform outside the walls of Jerusalem from which a crier announced lost property. But they denied that property of

apostates need be restored. Lost goods of Gentiles, however, they said should be restored, but on the consideration that, in return for such humanity, they also should receive kindlier treatment at the hands of the Gentiles. To sum up, they felt that the dominion over lost things ended at once by natural law with their loss, but that their restitution depended on civil law. This false idea, of course, like many others, came from the avarice of the race and the hostility and hatred which they bore towards all the rest of mankind.

13. A treasure or money the owner of which is unknown is also brought under things which have lost their owner. See *Digest*, XLI. i. 31; VI. i. 67; XLI. ii. 3, § 3. Therefore, if a man out of fear, or for the purpose of safeguarding his money, has hid it in the ground, it is not treasure, and he who takes it away is guilty of theft. An example is the slave in Plautus, *The Pot of Gold*, who carried off Euclio's pot of gold.

A treasure naturally, and unless civil laws dispose otherwise, belongs to the finder, that is, to him who laid hands¹ on it and carried it off. For a thing the owner of which is unknown, and so long as he is unknown, is rated morally as if it had no owner and belonged to no one, and so passes to the first occupant. Although the question may be
398 raised at this point, whether the man who lives in countries where the civil laws grant such things to the finder, is altogether bound, in order to clear his title to the find before his own conscience, to make public announcement that he has found a treasure, even when it appears that the money had been left there long ago; for there can be no question about the necessity of such an announcement, if the treasure evidently had been but recently left. Now it seems most reasonable in such a case that if a man has unearthed a treasure on his own grounds, he is not in conscience bound to announce it, but he can keep what he has found, until another man inquires after it and adduces good reasons for his hiding it and saying nothing about it until that moment. For it is presumed that the man from whom a field or a house has come to the present owner,² the finder of the treasure, did not knowingly leave behind him any money buried by himself when he sold the property. Nor is the man who hid such a thing in another's field without the knowledge of its owner believed to have lost the opportunity to claim his property, since there was a reasonable fear that it would fall into the other's hands. But when a man discovers a treasure in another's field, he is in conscience bound to inquire of the owner, at least in a roundabout way, whether he himself had left it there. For unless this is done it cannot be clearly established whether it was not left in that place only for safekeeping, either by the owner, or by some other man with the owner's knowledge.

But on this matter different laws are to be found among different

¹ [For *adprehen erit* read *adprehenderit*.—Tr.]

² [For *dominium* read *dominum*.—Tr.]

peoples. See Grotius, Bk. II, chap. viii, § 7. Plato, *Laws*, Bk. XI [p. 913 A ff.], would not allow either a treasure or any other lost articles to pass to the finder, even though their owner is not known, but would have an oracle consulted as to what should be done with them. This was surely too great caution, as was that of the Chinese philosopher Chiungai, who, according to Martinius, *Historia Sinica*, Bk. V,

laid down the rule that one could touch nothing which was evil or suspected of being from an evil person. For this reason he neither used his father's house, because he believed it had been erected by evil men, nor received food of his parents or brothers, for fear it had been secured unjustly.

It seems to have been a law among the Jews, as is inferred from *Matthew*, xiii. 44, that treasure passed to the owner of a field. Add Plautus, *Trinummus*, Act I, sc. ii, line 138¹ [175 ff.]; Philostratus, *Life of Apollonius of Tyana*, Bk. VI, chap. xvi. According to Spartianus, Hadrian laid down the following laws on treasures: [*Hadrian*, xviii]: 'That if any one made a find on his own property he might keep it, if on another's land, he should turn over half² to the proprietor thereof, if on the State's, he should share the find equally with the privy-purse.' (M.) In Philostratus, *Lives of the Sophists*, Bk. II on Herodes, and Zonaras, Bk. II, Atticus, the father of Herodes, on finding a valuable treasure in his house, wrote to the emperor Nerva asking 'what orders he had to give as to its disposal'. Nerva replied, 'Use what you have found.' And when Atticus wrote again that he was overwhelmed by its size, he replied again, 'Misuse it, for it is yours.' Add *Constitutions of Sicily*, Bk. III, tit. xxi. In Philostratus, *Life of Apollonius of Tyana*, Bk. II, chap. xv, when a quarrel arose between the seller and the purchaser of a plot of ground, Apollonius ordered that they should see which was the better man, although such a method cannot be taken for a general rule.

14. Among those things acquired by occupancy the Roman lawyers also include enemy property. See *Digest*, XLI. ii. 1, § 1. For the proper understanding of this it should be recognized that, just as a state of war breaks off other rights of peace, so also it destroys the effect of dominion with regard to a foe, so that a man is no longer bound to keep his hands off that foe's property, except upon the persuasion of humanity. In war, therefore, the property of enemies in relation to another enemy are made, as it were, void of dominion, not because enemies through war cease to be masters of their own things in their own right, but because their dominion does not stand in the way of an enemy being able to carry off such things and keep them for himself, just as mere seizure is enough to acquire dominion over a thing unoccupied. And yet those who undertake to seize enemy property in war

¹ [For 188 read 138.—*Tr.*]

² [Supplying *dimidium*, 'half', which was erroneously omitted by Pufendorf.—*Tr.*]

may be and usually are repelled with all alacrity. It should, however, be observed that dominions over things taken in war acquire full validity only when he, from whom they were taken, renounces his claim to them by concluding peace.

War has this further feature peculiar to it, namely, that in it even sovereignty can be secured over men. Since otherwise men do not fall under the head of an object of occupancy, whether they are already under another's sovereignty, or enjoy natural liberty, save in the sole case of infants that are exposed by their parents. See Hobbes, *De Cive*, chap. ix, § 4. For liberty, as well as all other rights, is attended with this effect, that it cannot, except with my consent, pass from me to another man not an enemy. For occupancy supposes no consent in an object capable of it, but is brought to completion only upon seizure by the occupier and in the absence of a right in the object that prevents occupancy. Therefore, upon the death of a person with no heir to succeed him either by his will or in law, all the rights which he had over things or persons are extinguished, and his things pass to whoever occupies them, while his subjects pass into natural liberty. For I can scarcely believe that there ever was a man of such humble spirit that he would voluntarily give up his liberty and leave it for any one to seize. Even if a man may feel no disgrace in serving another, he will at least reserve to himself the choice of his master.

Grotius, Bk. II, chap. iii, § 4, appears to include also sovereignty among the objects of occupancy, since he maintains that in things which belong to no one, two rights can be acquired, namely, sovereignty and dominion, in so far as the latter is distinguished from sovereignty. But this requires a subtle interpretation. For the term sovereignty is properly used only as over men, and cannot be acquired by occupancy, except in war and in the case mentioned above; since he who is not another's is his own, and not no one's. But sovereignty is improperly spoken of as existing over a place or territory, the effect of which is that no one can take that place for himself without the consent of him who is said to hold sovereignty over it, and whoever enters that place for a time only is forced for so long to recognize his jurisdiction. Yet this sovereignty is properly the effect of dominion that has been established over that place, and involves some sovereignty over men only as a consequence. For no one will, without my consent, take what is mine. Yet he who enters a place belonging to me is to this extent, at least, subjected to my direction, namely, that my dominion over that place may not suffer because of him.

CHAPTER VII

ON THE ACQUISITION OF ACCESSIONS

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| <ol style="list-style-type: none"> 1. The different kinds of accessions. 2. Accessions regularly belong to the owner of a thing. 3. The different kinds of fruits. 4. The young of animals belong to the owner of the dam. 5. Things planted go with the ground. 6. How far buildings go with the ground. | <ol style="list-style-type: none"> 7. The paper goes with the writing; 8. The canvas with the picture; 9. The purple with the garment. 10. On specification. 11. On the alteration by water of whole regions, 12. And of private fields. |
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Most of the things subject to the dominion of men have this characteristic, that they do not remain in the same state, but abound in different increases. For some of them by their own nature swell their own substance; to some are added improvements from without; still others abound in fruits and products differing from their own nature; many are wrought into new form by the hands of men and increased in value. All these can be gathered under the one term *accessions*, and they fall into two main classes; for some of them come from the mere nature of those things without the agency of man, while others are produced entirely or in part by the agency and labour of men. 400

2. With regard to the former the general rule is that, to the owner of a thing, no matter who he is, belong also its accessions. This principle, of course, is clearly derived from the very nature of dominion and the purpose for which it was first introduced, since there are many things, the possession of which is all in vain if their fruits belong to others, and the peace of men would be not at all advanced, if others could lay claim to the accessions of a thing with as much right as he who is called the owner of its substance. Therefore, there is no need of deriving the dominion of accessions from the title of a feigned occupancy, whereby we appear to possess an accession to a thing of ours through the mediacy, as it were, of that thing; or whereby one thing of ours is understood by its pre-eminence to attract another thing to itself.

3. Under the term *fruits* usually fall the increments, multiplications, and emoluments of all things whatsoever, except that the animals born of other animals are given the special name of *offspring*. Fruits are most commonly divided into those which come from the thing itself, and those for which the thing is but the occasion. The former are called *natural*, the latter *legitimate* or *civil* fruits. Of natural fruits some are due to the sole operation of nature without human cultivation and labour; in other things their natural fecundity or aptitude must be procured by the labour of men in making it more fruitful or productive.

Therefore, these are usually called the fruits of *industry*. Instances of civil fruits are to be found in usury, rent, transport charges, and the like. But fruits of the former kind, so long as they are not separated, are considered to be a part of the thing from which they come. *Digest*, VI. i. 44. When these are separated, they are understood to exist, as it were, separately. Both kinds, however, naturally belong to whatever person is the owner of the thing from which they are derived.

4. Regarding the young of animals most men have agreed that they follow the womb, and belong to the owner of the dam and not to the owner of the sire. See *Digest*, VI. i. 5, § 2. The reason for this is not so much that the sire is usually unknown, but because the young was at one time a part of the dam, but never of the sire, and because the part contributed by the former is far greater than that by the latter. Although if consideration is given to the physical cause, the contribution of each is the same, for it is not a question whether the existence of the calf can be ascribed more to the cow than to the bull, but whether it belongs more to the owner¹ of the former than to the owner of the latter. And the sire performs his part with little trouble, so that little or nothing is lost to his owner, but the dam, while carrying her burden, is of practically no service for anything else, and requires careful tending. Therefore, the owner of the former can surely lay no claim to equal shares with the owner of the latter, especially since one male may impregnate many females. Yet if a man keeps studs for that end, something is certainly due him for their use. Add Ziegler on Grotius, Bk. II, chap. viii, § 18; Felden, *ibid*.

5. Things planted and sown are also said to go with the soil, and plantings together with the roots with which they are set, because such things are not only nourished by the soil but they join with it as into one body and become a part of it. And so it is further required that they have taken root, for before that time they belong to their former
 401 owner. But Grotius, Bk. II, chap. viii, § 22, thinks this to be an ordinance of positive and not of natural law, since the nourishment of a thing already existing is but a part of it. Therefore, he says, the owner of the soil can claim a right² merely to a part of that thing, nor does the owner of the seed, plant, or tree naturally lose his right; in fact the place will be held in a common ownership. Yet notwithstanding this, reason sides with the Roman laws. For it is not their design that the owner of seed, a plant, or a tree, provided he acted in good faith, should suffer the loss of the thing that was his, nor do they forbid the owners of the soil and the plant, if they so wish, from holding the object afterwards in common, according as the use of the soil or the value of the plant fixed for each³ his proper share. But because they are unwilling to

¹ [For *dominium* read *dominus*.—Tr.]

² [For *pretentore* read *prattendere*.—Tr.]

³ [For *urrique* read *utrique*.—Tr.]

compel a person to abide in community of ownership against his will, and since such things do not allow division¹, the question, therefore, is raised whether it is not fairer for the whole thing to be assigned to one of the parties, on the consideration that he pays the other, whether this latter be the owner of the ground or the owner of the seed, the value of what was his. And since it often happens in such a case that such things, being already united with the ground, cannot conveniently be transplanted, and cannot be kept alive without the ground, and since it appears absurd that the stable earth should yield in importance to a temporary plant, it has, therefore, been the universal custom that things planted should go with the ground, on the condition, however, that the owner of the ground should pay the value of the seed or plant to the other, when the transaction has been made in good faith. Yet if a man has sown poor seed on some ground of mine which I had reserved² for a better sowing, it does not appear that I am obligated to pay him even for the seed, since I am damaged in having my field occupied by a poor crop. But if the plants will bear moving, especially if they are of more value than the use of the ground, it would no doubt be the part of equity for the owner of the plant to be allowed to take it somewhere else, after paying for the use of the ground. In this connexion we should note a law of Solon, given in Plutarch, *Solon* [xxiii]:

He ordered that no one could set out a tree within five feet of his neighbour's field, or, in case it was a fig-tree or an olive-tree, within nine. For these reach out farther with their roots, and injure some trees by their proximity, taking away their nourishment, and emitting an exhalation which is sometimes noxious. (P.)

Cf. *Digest*, XLI. i. 7, § 13.³

6. Practically the same principles can be applied to buildings which are constructed on another's ground, or on one's own ground out of another's materials. If, indeed, the building is movable, there is no doubt that the owner of the ground has no right over it, provided it is moved, and a sum paid for the amount to which the ground was damaged by it. See *Digest*, VI. i. 38; XLI. i. 60. If a man builds a house for himself out of material belonging to me, the regular course is for me to receive its value instead of the material, since what is once worked into one building is unsuited for another. But if the material was not made worse in its use for building, and if I have need of it and cannot conveniently secure more like it, it is just for me to be allowed to take back my material. The Laws of the Twelve Tables forbid this, although they look after the interests of the owner of the material in another way by allowing him an action 'for joined timber' [*de tigno iuncto*] to the amount of twice its value.

But if a man has constructed a building of his own material on

¹ [For *devisionem* read *divisionem*.—Tr.]

² [For *distinaveram* read *destinaveram*.—Tr.]

³ [For *adquier* read *adquir*.—Tr.]

another's ground, provided he did this with full knowledge, it hardly appears that he can be clear of guile, and since it was his plan to steal that ground from the owner, it does not appear that the owner of the ground need recompense him for the value of his material and the wages of the workmen, or allow¹ him to take back his material after the building has been torn down. *Law of the Lombards*, Bk. I, tit. xxvii, § 1. When there was no guile, and when the building cannot be removed without being totally destroyed,² the Roman laws provided that the building goes with the ground, on the condition, however, that, if the builder be in possession, the owner of the land shall pay for the wages
 402 of the workmen and the value of the material. *Edict of King Theodoric*, chap. cxxxvii. For although a building is usually of greater value than the ground and surface on which it stands, yet they thought it improper that an immovable thing should be attracted by something which can be moved, at least in pieces. Yet if the owner of the ground can easily do without that part of his land on which the building is erected, and it is not convenient for him to purchase the building, it seems the fairest thing for him to accept the value of the ground and leave the building to the other. Cf. *Digest*, XLI. i. 7, §§ 10, 11, 12.

7. But when the Roman Jurisconsults extended the rule, that buildings and things planted go with the ground, to include papers and parchments, their action meets with scant approval. See *Digest*, XLI. i. 9, § 1. It would mean that, if I in good faith wrote something on paper belonging to another, I should have to give the whole thing to him in return for the price of the composition. But it should rather be, that, since the writing is regularly worth more than the paper, the most just procedure is for the other to be satisfied with a payment for the paper. Especially since some add pertinently that the paper upon being used perishes and is consumed in a way, and so writing is by nature different from building. For the essence, as it were, of paper remains unaltered only so long as it is undefiled, so that something may be written upon it. When once it has been written upon it takes the name of book, letter, or journal, &c. Therefore, paper written upon is lost for me, in so far as it is no longer possible for me to write upon it. And so when I have been paid for it, I shall have no cause for complaint, since another sheet can serve me just as well.

8. The same Jurisconsults are more correct in their deliverance upon a picture, namely, that the canvas goes with it, since the former is regularly of far greater value than the latter, and since it is perfectly easy for a person to do without a canvas when he has been paid its value, for it is a common thing and to be secured practically everywhere. Yet this very consideration shows that in equity there is sometimes occasion for the opposite decision. If, for instance, some common

¹ [For *consedat* read *concedat*.—Tr.]

² [For *duri* read *dirui*.—Tr.]

dauber whose skill extends no further than to imitate a cypress-tree [Horace, *Art of Poetry*, 19 f.], should cover over a precious background with something that would better be erased, or carve something on a gold or silver plaque, or on a gem. So also it would be the height of impudence for a man to paint a little on another's wall, and then wish to claim that the house should go to him with the painting. Nay, since the expense that the artist incurred was to suit his own fancy, he will scarcely be able to ask from the owner of the building pay for his painting, unless it happens that the latter's resources are such that it appears he would have incurred that expense of his own accord. Add *Digest*, VI. i. 38.

9. In the same way the Roman Jurisconsults lay down the ruling that purple worked into another's garment goes with the latter, even though it excels it in value. This can be understood in two ways: A man may weave into a cheap warp of his a woof of purple threads belonging to another, or he may fit another's purple cloth to his own garment. In the former case there is hardly any doubt that the cloth should go to the owner of the purple. For a thing without which another cannot exist, and which is physically, as it were, put beneath something else to be supported by it, cannot in every case be held an accession to it; but we must always take into consideration the value, so that, in other words, the more valuable shall, other things being equal, draw to it the cheaper. It is, indeed, necessary that a thing which cannot exist without another should go with it, that is, that whatever is of the nature of an adjunct follows its subject, as we express it of the physical concomitancy of things. But in assigning the dominions of things, especially when it is a question of their values and uses, and of how well a person can do without a thing, this consideration cannot always prevail.

But as for the statement of Grotius, *loc. cit.*, § 21: 'That a lesser thing should be taken over by a greater one is naturally consistent with the facts but not with right,' we agree to it in this sense: In fact what is stronger may draw to itself what is weaker, but it is not always lawful for a stronger to seize for himself the property of a weaker, or for a man to lose a possession of his own that is weaker, if it has been joined with a stronger. Thus, whoever is the owner of the twentieth part of a field is as much an owner as he who holds the other nineteen parts. Indeed, the real question in this connexion is not whether he who holds the greater part should acquire the less as well, but in what way the business should be conducted, if two men join in dominion over one thing which they cannot or will not either divide or hold in common. Under such circumstances the entire thing will have to be awarded to one of them, on the condition that he pays the other the value of his part. To which one of them the thing should be awarded will have to be decided on the superiority of one part to the other, the need of the owner, and

similar circumstances. Thus, when another has fitted my purple cloth to his garment, even if the purple may be of greater value, it is preferable that I receive its price and leave to him the entire garment. For if the garment is to be ripped open, the other will suffer loss, but what advantage is it to me for my cloth to be returned to me mutilated? And garments fitted to another are entirely useless for me, or at least less suited. And, indeed, in all this matter what is right can be judged better from a consideration of individual cases than from any universal definition.

10. With regard to specification¹ it should be observed, at the outset, that it cannot properly be included among the original methods of acquisition. For since nothing comes into being naturally, but out of pre-existent matter, therefore it must be seen to whom that matter belongs. For if the matter was ours, the dominion will persist after the introduction of the new form. If it belonged to no one, dominion over it will be acquired by occupancy. But if it belonged to another, it must be decided whether it shall be awarded to the owner of the matter, or to him who made the form. Since the ancient Roman Jurisconsults disagreed on this point, they finally chose a middle ground, namely, that, if a form could be brought back to its earlier and simple matter, it should pass to the owner of the matter, but if it could not, to him who introduced the new form into the matter. Some feel that this decision is based upon the very evident reason that, when a form cannot be reduced to the original material, the latter seems in some way to have perished, and some new effect to have arisen; therefore, in such a case, the thing should go to him who was responsible for its existing under that new form; but when the form can be brought back to its original matter, the latter should be understood as still existent, and not to have perished because of the introduction of the new form; and so it has not passed from its former owner. Others hold that the only point to bear in mind is whether the matter or the form is of the greater value. See Connan, *Commentaria Juris Civilis*, Bk. III, chap. vi.

It is my own judgement that neither of these opinions can with entire equity be applied to all cases, but that consideration must be given to other circumstances as well. Thus, if a man makes wine, oil, or bread from my grapes,² olives, or grain, or mead from my honey and wine, why should he have any more right over these forms than I, simply because they cannot be resolved into their former matter? Therefore, if things of this general kind can be divided, this should be done on the basis of the value of the matter, or of the work required in making the form. But if the owner of the matter stands in need of all of it, my judgement is that in every case he should be favoured in

¹ [Specification is here used in the sense of the introduction of a new form [*species*] in material or matter belonging to another.—*Tr.*]

² [For *ecuwis* read *ec uvis*.—*Tr.*]

preference to the man who changed it. Thus, if a man has fashioned an object from metal belonging to another, and the form is of more value than the matter, it is just that the object be left to the fashioner, even though it can be brought back to its original and crude mass, provided the same amount of metal, or its value, is given to the owner. But it appears that the opposite decision must be rendered, if I had intended that the metal in question be used for the same object which I greatly need, and similar metal cannot be secured. For under such circumstances equity favours the owner of the matter, although possibly the form may be of greater value than the matter.

Others think that the point to be considered is whether the power 404 of the matter to receive the form was near or remote. They feel that in the former case the owner of the matter is to be favoured, in the latter the fashioner, that is, if a ship be fashioned out of another's rough lumber, it belongs to him who made it, but if the lumber had been worked into planks intended for a ship, the vessel will belong to him who owned the planks. Likewise, if a man has made a garment from some raw wool of mine, it will be his, but if it has been made from some material of mine, it belongs to me. Likewise, a plaster, if made from powders already prepared and perfected, belongs to the owner of the ingredients, but if not prepared, to the maker of the plaster. Yet even this distinction does not in every instance square with equity. For if such matter, whether unworked or already worked up to receive a form, is in my possession, either for sale or in such quantities that it more than meets my necessities, there is no reason why it should not be turned over to a fashioner, if he pays for it. But if I had intended some matter for a special use of mine, and there is no convenient opportunity to get equivalent material anywhere else, my need adds weight to my plea, even though the matter is still in more remote power.¹ Add *Digest*, VI. i. 61. And even if a man had made a form partly from his matter and partly from another's, it is still not certain that in every such case the product should be assigned to the maker, on the ground that the form is due to his labour, and in addition he furnished part of the matter. For it is possible both that the labour is of little value, and that the part of the material which he furnished is likewise of so little consequence that the other's matter is greater than both contributions. Moreover, there are things which require a set amount of material, and when a man removes part of it he renders the rest of it useless, at least for that purpose. In such a case judgement must be pronounced in favour of him who needs most the thing thus formed.

But the statement of Grotius, *loc. cit.*, § 19, holds true in every case that, when things consist of material and form, as if of parts, if the material belongs to one and the form to another, it naturally follows

¹ [i.e. in a distinct capacity, not immediately fit for the work.—Tr.]

that the ownership becomes common, in proportion to the value that each element has. In the same way the whole body as well, which results from the working together or mixture of two portions of material of the same kind, is held in common by the owner of each. See *Digest*, VI. i. 3, § 2; VI. i. 5. But when the object cannot be held in common or divided, either equity or positive laws must decide which one should, upon receiving the value of his share, yield the entire object to the other. See *Digest*, VI. i. 23, §§ 2, 3.¹ Yet the inquiry should be made in every instance, as to whether a man gave form to the matter of another in good or bad faith. For when a man acts in bad faith, he cannot claim that the product belongs to him, rather than to the owner of the material, even though the form be of greater value than the material, and the material apparently has disappeared in the form, or though he be in very great need of the thing fashioned. For the greater thing does not of itself draw to it the less, but there must also lie in the owner of the greater thing a reasonable ground. Therefore, if a man, with wilful and evil design, puts a new form on matter of mine, with the purpose to make away with it on that score, he acquires no right over the matter, and he can no more demand of me pay for his services, than can a thief who digs through my wall, on the ground that he had at some trouble made a new entrance into my house, or an assassin who lanced an otherwise incurable tumour with a blow aimed at a man's life, or even Autolycus for the paint which he put on the horses which he stole. And this is not derived from positive laws, but from natural reason itself, although nature does not otherwise determine penalties. For to perform a wicked deed gratis is no punishment;² and surely it is most just that no man should be obliged to pay another for an endeavour to do him injury. Add *Law of the Visigoths*, Bk. X, tit. i, chap. 7.

405 II. What ancient and more modern lawyers set forth so laboriously about alluvial deposits is for the most part uncertain, and dependent not so much on natural reason as on the positive laws of individual nations. On that account we will be able to discuss this topic with greater brevity. Two questions are usually raised about alluvial deposits, or those unobserved increments whereby a river adds something to its banks, namely, whether they increase whole regions, and whether they increase also private fields.

The first question is of greater importance, in view of the fact that it can often be the occasion of great controversies between nations, since it frequently happens that a river is interposed as a boundary between two peoples. When, therefore, it has changed its course, the question is raised as to whether the boundary of the jurisdiction is at the same time changed, and whether the land added by the river passes to those to whose banks it has been added. Here we must draw, first of all,

¹ [For *re iudic.* read *rei iudic.*—Tr.]

² [For *paena* read *poena*.—Tr.]

a distinction between areas that are limited, that is, whose extent is marked off by boundaries laid down by hands, among which, for our present purpose, are to be included fields measured off and described as of so many acres, and between areas called *arcifinious*, the boundaries of which are formed for the special purpose of warding off enemies, and are for the most part natural, such as rivers and mountain ranges. We must then inquire whether the neighbouring nations left the river between them unoccupied, open to the general use of both peoples, or wished their boundaries to lie in the middle of the river, so that half of it should belong to one nation and half to the other. Or, finally, whether the entire river belongs to one nation, so that their boundary extends to the bank of the other nation.

Now if both nations have limited areas, that is, such as are marked off by a set measure, which adjoin each other directly without leaving a vacant space between them, there will be no change in their territory, even if the river has changed its course, nor will there be any chance of deposit from the stream, since no space is left that does not already belong to one or the other of them. But if the river is left between them as unoccupied, deposits on the banks, and islands arising therefrom will pass to those who seize them; although the most fitting thing is for the deposit to be taken by him on whose bank it is left, and an island by him whose bank is closer to it. If an entire river belongs to one nation, the islands arising in it will belong to that state alone, but it is more fitting that deposits on the opposite bank shall belong entirely to the other nation. And yet it is more common, and more agreeable as well, that lands extending on either side down to a river should have it as their boundary, and that, therefore, their boundaries should be understood to be in the centre of the river, for a river both serves to show the boundary without obscurity, and forms at the same time a natural defence for the region. Yet even in such a case it is required that it should not be the custom of the river to overflow its banks, leaving them thus uncertain, and every year find for itself new channels. So, when nations have *arcifinious* fields (as is presumed in case of doubt), a river by gradually changing its course changes also the borders of the domain, and whatever the river adds to one side belongs to that nation on whose bank it is left, provided, however, this change has come about gradually, and the river has not, by leaving its bed at one rush, broken a course for itself through an entirely different area. For the gain or loss of smaller portions, or such a change as leaves the old form to the region as a whole, allows it to remain practically the same, while the convenience of a natural frontier is too great for it to be desirable to change it over a negligible loss.

But if a river leaves its old bed and cuts a channel deep into other territory, and if the nation through whose fields it has cut a new course

does not regard the possession of a natural frontier worth as much to them as the loss of so great a part of their land, then the borders will be understood to lie in the middle of the deserted bed. For just as a stone serves as a boundary mark not because it is a stone but because it is set in that particular place, so a river is a boundary of nations, not because
406 it is water gathered from certain springs, rivulets, and other rivers, and designated by a special name, but as it flows in a certain channel and is enclosed within certain banks. Compare Grotius, Bk. II, chap. iii, § 16, and the remarks of Boecler and Ziegler on that passage.

12. Regarding the estates of individuals, it would be my judgment that we must inquire, in the first place, whether a river on which a private field borders, separates the territories of two states, or flows through but one of them, and secondly, whether it is a public or a private stream. In the former case it depends entirely on the will of the state, whether it leaves such additions of land to individuals, or claims them for the state. For in general nations have occupied some tract of land in its entirety, and then assigned parts of it to individuals as private estates, which have on the whole a set and definite measurement. Therefore, just as what has not been assigned of that territory to individuals remains the public property of the state, so whatever has been added to the boundary of an individual, is held to have been added to the public holding. Yet since fields bordering upon rivers often suffer great inconvenience from them by their floods, and since the river deposits, because of their slow accumulation, seem to be of little importance for the public income, many states have felt it only proper to grant the deposits in question to those persons to whose estates they have been added. And this is all the more fair, if they have been in the habit of strengthening the banks at their own expense. Furthermore, any land is presumed to enjoy this right, which has been assigned to an individual not by a definite measure, but bodily, as it were, although in the transfer some mention may have been made of a measure (see *Digest*, XIX. i. 13, § 14), and so, if, in the designation of the borders, mention has been made merely of the river. But if¹ the deposits are of great importance, and such as far exceed the measure of the private estate, they will be held to belong to the public. Yet private individuals will not be able to claim islands arising in a river, without the express concession of the state, because, in view of the fact that they are separated from the estate, they cannot be regarded as a part or addition to it. Men will have no more right to seize them on the mere ground that they are very close to their estates, than would any other man to lay claim to that part of a street or square that lies close to his own dwelling.

But if a river that carries deposits runs between the lands of subjects of the same state, in consideration of the fact that a river can

¹ [For *talem* read *tamen*.—Tr.]

carry down nothing but what it has washed away somewhere else, it is just in every case for the deposit to belong to him from whose estate¹ it has been taken. Therefore, the Roman laws very properly decided, that, if the violence of the current took a piece from your farm and added it to mine, it should still be yours. This principle applies all the more to movable fields such as in antiquity they built upon reed rafts in the marshes of the Euphrates,² as we are told by Strabo, Bk. XVI, which they used to shove back with poles to their former position, when they had been torn away by the current. But if the piece has clung for some time to my estate, and the trees carried with it have struck root in my soil, from that time it will appear to have become a part of my estate. *Digest*, VI. i. 7, § 2. From this it is clear that the owner of the piece torn away should have brought it back to its former position, before it became united to the land, if he wanted to retain dominion over it. But when it is not discoverable what and how much has been taken from another's estate, he from whose land something has been lost is prevented from claiming any deposit for himself, and it appears that by nature the deposit is acquired not by the owner of the estate on which it is deposited, but by the nation to which the river belongs. For it is entirely reasonable that not only the water of a public river and what it contains are understood to be public, but also its bed and the banks within which it flows, as well as what is added to them. Indeed, it seems improper to say that the bed as such is a part of the nearest estate, 407 but that it is considered public so long as it is filled up with a public river, yet when the river is removed, it returns to its private nature—as though an estate owes a service of passageway to a river.

But if a river has left its entire bed, or a part of it, and has cut a new channel, it would be but right, since the new bed has been cut from the opposite estate, to give the owner the old bed in compensation for the new; and in case the river leaves the new bed, for it to return to its former owner, and not to those who held land abutting on the new course. But whatever results from deposit or a change of bed, it is surely just that burdens laid upon a field should be reduced in proportion to what has been taken from it. Such a law Herodotus [II. cix] says was in force among the Egyptians.

But it is furthermore just, that, if a field has been covered by a flood, it still belongs to its former owner, either when the water has withdrawn at a single rush or gradually, or when the field has been drained by the owner's effort. But to whom shall this flood water belong, until the submerged land has become dry again? In this case I feel we must inquire whether the submerged land becomes a lake or swamp, or forms a part of the bed of a public river. In the former case the lake and swamp shall belong permanently to the owner of the land,

¹ [For *fondo* read *fundo*.—Tr.]

² [For *Euphartis* read *Euphratis*.—Tr.]

and in the latter case as well, so long as he shall intend to turn the river back into its former bed. In the case of private rivers which take land from me in one place and add it to me in another, the matter is clear. But what if my private river cut a new channel for itself through another's estate? Will that part of the river which has covered another's land remain mine, or will it belong to him over whose land it has broken? It is my feeling that we should decide for the second alternative, yet I shall still have the right to bring back the river to its former bed. But if I do not wish to bring back the river within my land, I shall not be able to demand payment for it from the other party, nor claim that it is common to us both in that part. For whatever things are ours simply because they are contained within an area belonging to us, being, therefore, accessions to that area or space, must, upon passing outside it, either be brought back by us within it, or else cease to belong to us, in which case they will be regarded a natural increment, as it were, of that other area.

Yet such cases positive laws can dispose of in different ways. The following rules are laid down in Aggenus [Agennius] Urbicus [*Gromatici Veteres*, I, p. 16, ll. 25 ff.]:

If this be done in lands title to which has been secured by occupancy, whatever the violence of the master has stolen away, no one has the right to have restored. This consideration makes it necessary for men to protect their own bank of a stream, in such a way, however, as not to do any damage to some one else. But if it shall be done in a district that has been divided and assigned, the owner will lose nothing, because a definite limit and shape was fixed for each man's holding in the hundreds.

Regarding the lands on the river Po, Cassius had given this pronouncement [*ibid.*, p. 17, ll. 9 ff.]:

Whatever the lapping waters carry away, let the possessor lose, because, forsooth, he ought to protect his own bank without doing damage to some one else. But if the river shall pour down with extreme violence and change its course, let each man regain his own measure of land, because in this case the loss was due not to the neglect of the possessor but to the violence of the storm. Now if the river form an island, let him own the island whose land went to make it; but if the island be composed of the property of several men, let each recover what was his own.

Compare Grotius, Bk. II, chap. viii, § 8 ff., with comments by Ziegler on the passage.

ON RIGHT OVER THE PROPERTY OF OTHERS

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| <ol style="list-style-type: none"> 1. A man may in various ways have a right in something belonging to another. 2. How many rights are there chiefly in such a thing? 3. Emphyteutic right. 4. Superficiary right. 5. The right of a possessor in good faith. | <ol style="list-style-type: none"> 6. The nature and number of servitudes. 7. Usufruct. 8. Use. 9. Habitation. 10. The labours of slaves. 11. Servitudes on city property; 12. And on country property. |
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SUCH is the force of dominion that only the owner may dispose of his own property, and all others are bound to keep their hands off. Yet since things were not divided among men with the purpose that there should be an end to all sharing together of property, it comes about that not merely are we obligated, by the law of humanity, often to allow another our goods and the use of them, but others, either by contract or in some other way, acquire a perfect or imperfect right in a thing of ours, and from it, therefore, gain for themselves by their own right some benefit or advantage. The different ways in which this can take place may be noticed by us at this time in a few words, inasmuch as the whole subject has been so thoroughly discussed by the expositors of the Roman law, to whom may be added Selden, *De Jure Naturali et Gentium*, Bk. VI, chap. ii.

2. The chief rights, not held by owners, over things, are usually classed by some writers under five heads: Emphyteutic right, superficiary right, the right of a possessor in good faith, a pledge or mortgage, and servitudes.

3. Emphyteutic right, which is granted to a person in an immovable thing by the owner, on the obligation of his returning a certain rent as recognition of the ownership, allows the emphyteuticary the power not merely to make full use of the thing, but also to dispose of it, although not with entire freedom in its alienation. The contract under which this right is immediately set up falls neither under buying and selling, nor under letting and hiring, since full dominion of the thing is not conferred upon the second party, and yet more is given him than in letting, especially since the rent is regularly far less than is otherwise customary in letting. The expositors of the Roman law give in all their works the rules which prevail in the renewal of such a contract, in the payment of the rent, in the alienation of emphyteutic property, and in its duration either by common law or by special agreement.

4. Whoever has secured a superficiary right by the payment of a single sum or a stipulated rent, can enjoy it like dominion and dispose

of it and alienate it, and so act as the owner of such things as lie above the ground, but not of the ground itself. In this he is different from an emphyteuticary, to whom belongs useful dominion also over the soil. The reason for the introduction of such a right was that some men wanted to get settlers for their great estates, on condition, however, that they remain undiminished. Therefore, they allowed them a superficiary right, in recognition of which a small annual rent had to be paid, while they reserved for themselves the ground. See Justin, Bk. XVIII, chap. v, n. 14. Moreover, if the things above the ground
409 perish, that is, if the buildings fall down or are burned, the right of the superficiary ends, so that the owner of the ground may again dispose of things above the ground as he pleases.

5. The right of a possessor in good faith, which belongs to those who in good faith received another's property from one who was not its real owner, by a title which was just and was otherwise able to transfer dominion, is equal to that of a true owner, in so far as he may claim all the fruits of the thing as his own, may dispose of it at his pleasure, may protect it against all men except its real owner, and is entitled to be defended in his possession by the laws. See *Digest*, XLI. i. 48. This possession after a certain lapse of time gives the possessor irrevocable dominion, which will prevail even against the owner, as will be shown at greater length below.

This right has been introduced to further commercial relations between men and the tranquillity of civil life, in order that he who undertakes to amass property for himself in good faith and on a just title may not meet with troublesome inconveniences. And these would beset him, if for so long a time he could be disturbed in his possession with impunity by any other person, or were he bound, upon the owner claiming the thing, to restore the fruits as well, or if, finally, his possession were in constant uncertainty. Just as it is not merely a rule of civil law, but a conclusion from natural reason, that every man is to be left in whatever possession he has secured in good faith, until the claimant has shown a right of his own equal to possession. For what trouble and nuisances might a man be subjected to daily, if he could be forced to relinquish possession of his property at any person's protest, and to bring suit against him so as to recover it again! See the expositors of the Roman law on *Digest*, VI. ii. Pledges will be discussed below.

6. Servitudes, considered from the position of him to whom they are owed, are rights of receiving a fixed profit or advantage from something belonging to another, or of preventing the owner from using his possessions in any way he chooses. Considered from the position of him who owes them, they are obligations to grant another a profit from one's own property, or to refrain from a certain use of one's own

property, to the advantage of another. According to the thing to which they are owed, servitudes are divided into *personal* and *real*, not because every advantage does not ultimately work to the favour of a person, but for the reason that some of them fall to a man for the sole reason that he is the holder of some estate. See Grotius, Bk. I, chap. i, § 4; add *Digest*, VIII. ii. 32, § 1. Others express the same thing in this way, namely, that an advantage comes to one from another's property either immediately, or by the mediation of a certain estate.

7. The following personal servitudes are usually listed: *usufruct*, *use*, *habitation*, and *the labours of servants*. *Usufruct* is the right to use and enjoy the things of another without impairing their substance, or, in other words, the right to receive from what is another's, every profit which can come from it without impairing its substance. For although whoever is the owner of a thing is regularly the owner of its fruits, yet nothing prevents the separation of these two, so that dominion lies with one, and the right to enjoy the fruits with another. This can be established either by civil law, although it is highly agreeable with natural reason for a father who still holds his son in his power, to enjoy the usufruct of the latter's adventitious acquisitions, or by the decision of a judge, when, for instance, a thing possessed in common cannot be divided conveniently in any other way, or by an act of men, be it by a will or by agreements. Yet it is clear that usufruct can properly be established only in those things which furnish some use beyond that of their substance, or, in other words, which are not exhausted by use, provided there is actually in them some use, ornament, or delight. On the other hand usufruct, in the strict sense of the term, is not to be found in a thing which is only of use when it is being consumed, since 410 the body of a thing, and so dominion over it, is understood to belong to him who can rightfully consume anything at his pleasure. Yet it is laid down by Roman law, that the usufruct of money and of other serviceable things can be established by will and be given a person in legacy, where the money or things are given the legatee to be his own, although he must give security to the heir that he will restore that sum of money or things of the same quality, or their value, upon the expiration of his usufruct, so that his security takes the place, as it were, of the bodily legacy for the real owner.¹ See *Digest*, VII. v. 1, 2, 7, 11.

Now all the profits and all the fruits or advantages, both natural as well as civil, which come from a thing, belong to the usufructuary. Yet the Roman laws excepted the child of a maid-servant, on the ground, apparently, that usufruct of slaves was introduced because of the labour they performed, not because of their power of reproduction. Natural fruits, however, become the property of the usufructuary by his taking, that is, when he has separated them

¹ [For *propritarium* read *proprietaryum*.—Tr.]

from the body and gathered them together. It follows from this that fruits not yet separated belong to the proprietor, and in case the usufructuary dies before their collection, they cannot be claimed by his heir. Yet if cultivation and labour have been spent on the fruits it would be but just for the heir to be admitted to a share in them, at least to the extent that the usufructuary may not have given his labour gratis. Civil fruits belong to the usufructuary for the length of time for which the grant was made.

Now just as a usufructuary owes it to play the honest man, that is, as becomes a diligent master of a household, and to make such a use of a thing as its nature and state demands and as the owner had intended, so he is also bound to guard it and preserve it safe and sound, as well as to pay taxes on it and levies and other ordinary and extraordinary burdens, at least as many as do not exceed the returns from it. See *Digest*, VII. i. 7, 9, 10, 11, 12, 13, § 4 ff., 15, 17, 18, 27, 44, 45, 59, 61, 62, 65, 68, 69, 70. For such things, quite as well as cultivation and care, fall to him who wishes to gain profit from a thing. Nor is it presumed that any one has laid such a burden on himself, that he not only wishes to grant the fruits of his property to another, but to shoulder its burdens as well.

Usufruct is said to terminate with the death of the usufructuary, because in such a concession the merit of the person is regularly considered, which does not pass over to others. Furthermore, since it is extremely onerous for the fruit of one's property to be in the power of others, such a concession is to be interpreted in all strictness, so that if the statement runs, 'I have granted usufruct to Seius and his heirs', that is not extended to his heirs' heirs. There is, indeed, no value in an ownership which is excluded for ever from the use of a thing. In this sense is to be taken the saying of Cicero, *Letters to Friends*, Bk. VII, letter xxx: 'That is a man's true possession which he himself enjoys and uses.' Therefore, if usufruct has been left in legacy to a state, which can ordinarily last for ever, the Roman laws decided that it should terminate after one hundred years (see *Digest*, VII. v. 56). Such a legacy also terminates if, in the meantime, that state or city is put under the plough of an enemy. *Digest*, VII. iv. 21.

It also follows from the same reasons that usufruct cannot be alienated, since in this way as well the owner could be circumvented for ever, and the grant turned over to one whom the owner would see only with great disgust on his property. According to Roman law it was lost with the forfeiture of civil rights, whether full or restricted. For they were unwilling that this right should restrict an owner any longer, after he could get no further profit from the one in whose favour it had been granted, nor did they hold it fitting for one who had
411 lost his citizenship, to have such a right in the property of a citizen.

It follows, also, from law or agreement, that it is lost within a certain time by non-use, since many things deteriorate if not used, by failure to observe the manner of use laid down, or by making the thing worse, either from malice or culpable negligence. Usufruct also terminates if the thing perishes (see *Digest*, VII. iv. 30); nor, in view of the strict interpretation required in such a matter, is it restored when the thing again comes into being. For instance, a house which I have just erected to take the place of one destroyed by fire, is surely not the same as the former; and since the replacement of the old one required a great expense, it would surely be a hardship for the owner to have erected a building which brought him no returns. See *Digest*, VII. iv. 5, §§ 2, 3; VII. iv. 8, 9, 10, 12, 23.

Finally, usufruct ceases by establishment of ownership [*consolidatio*], as well as when the usufructuary returns the right to the owner, since no man receives a servitude from what is his own (see *Digest*, VII. vi. 5 pr.); for usufruct and every servitude denote properly a right in a thing which belongs to another, while if a man uses what is his own and receives a profit from the same, it is due to the power of dominion. Add *Digest*, VII. iv. 28; VIII. ii. 26.

8. It is called *use*, when a man secures only a daily and necessary advantage from another's property without impairing its substance; and this involves less than usufruct, since he who has use of a thing can only take as much as will suffice for himself and his dependants, which is measured by the station and condition of the person to whom the use is granted. For instance, just as a man may properly have the use of a house, when his family can live there, so he will not be permitted to receive a guest for a long period of time nor a lodger who does not make his home with him as a part of the family, in case the proprietor must make his home in the same dwelling; although it is different, if the man has the use of the whole house. See *Digest*, VII. viii. 22, § 1. Nor will he be allowed, as a regular thing, to turn over that use to another, since it is a matter of the greatest importance, whom a man takes to live in the same house with him. Compare *Digest*, VII. viii. 2, 3, 4, 5, 6, 7, 9, 10, § 3; VII. viii. 11, 12, 15. Concerning the preservation and repair of the thing of which a man has use, it seems most equitable, that, if the owner gets no return from it other than the use received by the other party, the latter should keep it in perfect condition. When an equal return is made to both parties, it will be preserved and repaired at their common expense. *Digest*, VII. viii. 18. But if the use of a thing be inconsequential in comparison with the return which still remains to the owner, it is easy to presume that the use was granted without any burden.

9. *Habitation*, according to the Roman Jurisconsults, is the right whereby a man enjoys every return which usually comes from dwelling

in another's house. It is less inclusive than usufruct, because to the latter belongs the return from the collection of wares and from other causes. Yet it is more inclusive than mere use, because a man can let out such a house to others to use in his stead.

10. By the *right of the labours of servants* one receives every¹ return which comes from the labours of another's servant. The Roman laws say that this right is less inclusive than the usufruct of a servant, since a servant can be of profit in other ways than by his mere labour.

11. *Real servitudes*, which are owed a person because of some property in land, are in general called rights, by which a neighbour's property is obligated to furnish some utility to our own. In Roman law they are divided into *servitudes on urban property* and *servitudes on country property*. The designation 'country property' is given to fields and buildings which are concerned with agriculture and the keeping
412 of herds and flocks. The designation 'urban property' is given to all buildings erected for the dwelling of men, uses of business, and similar purposes, even when outside of cities and located in the country. Neighbourliness, which is not improperly regarded as next to friendship, furnished in general the occasion for the establishment of all such services. See *Digest*, VIII. ii. 38, 39; VIII. iii. 5. For since it was a matter of great advantage, as well as pleasure, for many men to live together and unite their dwellings, and this was scarcely possible, if a man decided to exclude his neighbour from every use of what was his own, neighbours came to agree that no man should always use his own things in such a way that another would thereby be reduced to serious straits; and that he should allow a limited use of his own possessions to another, without which the latter could not avoid suffering a very marked inconvenience. Add *Digest*, VII. vi. i, §§ 1, 2; VIII. i. 15; VIII. ii. 10, 20, § 2; VIII. ii. 31. Likewise also 'neighbourliness' without injury 'is regarded as next to friendship'. Terence, *The Self-Tormentor* [57]. Hesiod, *Works and Days*, Bk. I [343 ff.]:

And especially call him (to a feast) who lives near you: for if any mischief happen in the place, neighbours come ungirt, but kinsmen stay to gird themselves. A bad neighbour is as great a plague as a good one is a great blessing; he who enjoys a good neighbour, enjoys honour. (E. W.)

Socrates in Xenophon, *Memorabilia of Socrates*, Bk. II [ii. 12], mentions the following instances of a neighbour's favours: "That he may kindle a fire for you in your need, may prove himself a ready help in good fortune, or if you chance on evil and are stumbling, may friendly stand by your side and aid." (D.) Add also Plato, *Laws*, Bk. VIII, p. 915, ed. Frankf. 1602 [VIII, 842 E ff.] Yet it should be observed, regarding all servitudes, that they should not be extended too broadly and should

¹ [For *omnes* read *omnis*.—Tr.]

be used in moderation, lest they cause trouble and arouse disgust in a neighbour. See *Digest*, VIII. i. 8.

The following are usually numbered among the servitudes of city property:

The servitude of bearing a burden, whereby a neighbour's wall or column is obliged to support the burden of our house. A consequence of this is, that a neighbour who owes such servitudes is under obligation to keep that wall or column in repair, since otherwise the servitudes would be rendered void, upon the collapse of the wall. *Digest*, VIII. ii. 33.

The servitude of admitting a timber, whereby a beam, or something else that serves to bind a house together, may be let from one's house into the wall of a neighbour, so that it rests in the latter.

The servitude of projecting or extending over, whereby some structure is allowed to extend over another's house or land, yet in such a way that it does not rest upon his dwelling; such structures are balconies and eaves.

The servitude of raising higher, whereby a man is obligated even to his own disadvantage, to allow another to raise his building higher to his own advantage, although otherwise the former could prohibit and prevent it.

The servitude of not raising higher, whereby a man, for the advantage and convenience of his neighbour's house, is forced to keep his own low or not raise it above a certain height.

The servitude of lights, whereby a neighbour is forced to allow exception to our lights or our windows, by which we admit light.

The servitude of not hindering lights, whereby a neighbour can do nothing by which any lights of our dwelling may be cut off or diminished. An outstanding instance of a strict maintenance of this servitude under the emperor Theophilus is to be found in Zonaras, Bk. III, and Michael Glycas, Bk. IV.

The servitude of prospect, whereby a neighbour is bound to allow us a view into his estate and cannot prevent it.

The servitude of not cutting off prospect, whereby a man cannot do anything on his estate which will interfere with a free view in any direction and especially toward a pleasing vista.

The servitude of receiving roof water denotes the obligation resting upon one man to receive his neighbour's troublesome water on his land.

The servitude of not receiving roof water denotes the obligation not to 413 turn a neighbour's useful water to one's own advantage.

The servitude of receiving a flow of water, whereby a neighbour is bound to receive¹ the flow of water, that is, water that has been collected and that flows like a river from our dwelling through channels or pipes.

The servitude of not turning aside a flow of water, whereby a neighbour

¹ [For *suspiciere* read *suscipere*.—Tr.]

is not permitted to turn aside a flow of water coming from his house, from flowing over my estate, because of the advantage which my estate receives from it. To this servitude, finally, belongs that of allowing the passage of a drain, of pouring something on a neighbour's land, and the like.

12. *The servitudes of country property*, or those which are owed estates that are concerned with farming, are commonly listed as follows. *Passage*, which is the right for a man to go by foot through a neighbour's estate into mine, for the sake of the latter. *Carriage*, which is the right of driving a beast of burden or a vehicle. *Roadway*, which is the right to go, walk, drive, and to transport, lead, carry, and draw everything which concerns the advantage of our estate. *Water conveyance*, the right to lead water through another's estate for the benefit of our own, whether we use such water to irrigate our fields or to serve our flocks, or whether we thereby free our land from superfluous water. The nature of these servitudes is such that they cannot be granted in part, since they are of use only when unlimited. For, as it is stated in *Digest*, VIII. iii [38]: 'A complete road generally reaches as far as some town, or up to a high road; or to a river which is crossed by a ferry, or to some other land under the same ownership.' (M.) Therefore, it would be useless to have a passage through but half of another's estate, if it could go no farther. *Drawing of water*, the right to draw water from a spring or some other place belonging to another, in so far as it is needed for our estate. With this concession is understood to go also that of a passage to the spring or well. *Digest*, VIII. iii. 3, § 1. *Leading of herds to water*, the right to bring the herds of our estate to the water of a neighbour. Here belongs also the *right of pasturing* the herds of our estate on another's land. Regarding this right they observe that it does not prevent the owner of the land affording the servitude, from being able to pasture his own herds as well, provided he does not undertake to feed more than the land can support, so as to interfere with the other man's right. But whoever has the right of pasturage shall not bring in sick or scabby cattle, from which the others can be infected. Finally, they class under this head *the right of burning lime, of digging sand, of cutting stakes and wood, and of quarrying stone*, in so far as they make for the advantage of country property. Add *Digest*, VIII. iii. 3. All these servitudes others have treated at great length.

CHAPTER IX

ON THE TRANSFER OF DOMINION IN GENERAL

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| <p>1. A consequence of dominion is that one may alienate a thing.</p> <p>2. Alienation requires the consent of two parties.</p> <p>3. This consent must be expressed by signs.</p> <p>4. Alienation may take place absolutely or conditionally.</p> | <p>5. Is delivery of possession required for alienation?</p> <p>6. Dominion is either derived from or involves possession.</p> <p>7. The nature and kinds of possession.</p> <p>8. How far dominion is secured by pacts alone.</p> <p>9. True and fictitious delivery of possession.</p> |
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WE must now consider *derivative ways of acquisition*, by which dominion once established passes from one person to another. Before we undertake to explain them in detail, it will be well to make some 414 remarks, by way of introduction, on transfer of property in general. Now the power of a man to alienate a thing of his or to transfer it to another, comes from the nature of full dominion. For since this gives an owner the power to dispose of a thing as he pleases, it seems, indeed, the main feature of this power to be able, if he pleases, to transfer it to another, so that by this means he may secure a thing more agreeable to himself, or at least may have an opportunity to put another under obligation to him by an act of generosity.

2. Now just as in the transfer of rights and of things there are two parties to the transaction, the one who transfers and the one to whom they are transferred, so in those forms of acquisition which proceed from the force of dominion, there is required a meeting of two wills, namely, the will of the giver and the will of the receiver. For alienation means, first and foremost, that a thing passes from a willing owner, and that it is not taken from him against his will by mere violence. And if a thing is to receive one owner for another, the former must also agree to the transfer, since it is improper that a thing, the physical substance of which is something separate from me, should, as it were, be joined to me, when I have not embraced it with my own will and consent. But when dominion is said to pass of its own right to a man without his knowledge, as is the case with inheritances, in such instances the law is said to cause acceptance, as it were, by a certain legal fiction in favour of the heir. A proof of this is found in the fact that the heir can refuse a legacy, and unless he actually enters upon it, either in his own person or through another, he is not bound by obligations which arise from the thing inherited.

3. Now since alienations should take place with the will of each party concerned, and since it is not agreeable to human society to

assign to mere internal acts the power to produce rights which will be effective against other men, it is required of each party, the giver as well as the receiver, that he declare his agreement with fitting signs, so that all others may be entirely certain of it. Such signs are nods, gestures, words, and written documents, to which are added in some places declaration in the presence of a magistrate, public registry, and the like.

4. It is, furthermore, clear, that, when transfer or alienation has taken place perfectly and absolutely, there remains to him who makes the transfer no right or claim to the thing formerly his. Although this is inherent in every alienation by its very nature, yet it is often expressly stated in solemn cessions and renuncements, that no pretence or attempt is hereafter to be made on that thing by the party or his heirs, and that, if such is made, it is to be held null and void; and this for the reason that a man cannot effectually dispose of a thing which has already been made another's. Yet after a thing has been alienated, there often remains with the party disposing of it, a claim over it, and a kind of ultimate or eventual right which exerts its force upon a certain event taking place. And this is true for two reasons: Either because it has been expressly agreed upon in the alienation, as is the case of things which are sold with the right to withdraw from the sale, or which are alienated with the condition that the vendor may withdraw from the bargain, if the sum is not paid when agreed upon, or when only a limited dominion is transferred, as is the case in the granting of a fief and land held in emphyteusis; or because a tacit condition underlies the alienation, and when this asserts itself, the right of the former owner to the thing revives, whence arise formal claims for restitution of a thing not owed, or given for a cause which did not follow, of wedding presents when marriage did not take place, and of a dowry in case of divorce. Thus in Homer, *Odyssey*, Bk. VIII, line 318, Vulcan, upon taking his wife Venus in adultery, demands back the *ἑδνα* [gifts of wooing] which he had given his father-in-law in return for the hand of his daughter. The Koran lays down the law, that, when a man puts away his betrothed before he has known her, she may keep the half of what her suitor had given her, unless he choose to let her keep it all.

415 5. But the main question usually discussed in this connexion is, whether, by natural law, delivery of possession is required for transfer of dominion; for it has already been observed by others, that delivery of possession cannot properly be listed among the ways of acquiring dominion, since it is an act intervening in the transfer of dominion. Grotius, Bk. II, chap. viii, § 25, and elsewhere, feels that natural law allows the transfer of dominion by pacts alone, but that delivery of possession is only required by positive civil law, which, because it is followed by many nations, is improperly called the law of nations. On

the other hand the expositors of Roman law maintain that dominions of things are not transferred by pacts alone, even though it may be expressly so stated in the compact, but that delivery of possession is required. The reason they advance for this is, that dominions had their rise in natural possession, and, therefore, in their transfer, such an act is required as may make possible the immediate obtaining of the natural possession of the thing. In which connexion still others call attention to the fact, that, in original acquisition, such as occupancy, the title or cause, and the manner of acquisition, concur. But that in derivative acquisitions these two things are always distinguished; for delivery of possession and acceptance are a manner of transferring dominion, or rather acts intervening in the transfer of dominion, while donation, buying, selling, &c., are titles or causes by which dominion is transferred; although we have shown before, that bare occupancy is not enough to give title for dominion, but that it is preceded by a pact. Others steer a middle course on this question, and while they deny that delivery of possession is necessary by natural law, they maintain that it accords with reason, since dominion cannot be exercised in a thing, unless I have, as it were, taken it to my body, which can be done only by delivery of possession and seizure.

6. In our opinion the matter can be entirely cleared up, if it is observed that dominion may be considered, either as it denotes merely a moral quality, according to which a thing is understood to belong to some one and necessarily to be subject to his disposal, or as it is accompanied by some further physical faculty, so that what we have decided upon touching that thing, we can at once put into effect. Or, what amounts to the same thing, now and then dominion is considered as a thing separate from possession, and at times it is understood as joined with possession, which is the final complement, as it were, of property, the latter fully exerting its direct effects when the former is posited. And so, in this connexion, it will not be beside the point to make some general reflections on possession.

7. By possession we do not understand a mere retention of a thing, such as, for instance, a guardian, an administrator, a borrower, or a usufructuary, has over a thing which belongs to another, but such as is joined with an inclination and purpose to have it for oneself. Men divide it into *natural* and *civil*, which division is again taken, either of the manner of possessing or retaining it, or of the form of possession. Natural possession is of the former kind, when we settle upon a thing once appropriated by us, not only with our mind but, as it were, with our body also, and by very act. Civil possession in this sense is retained only in the mind, when a man has already cut such objects off from physical retention. The reason is that civil law still in certain cases allows those advantages which attend possession, even to such as have been cut off

from the physical possession or retention of a thing of theirs. Natural possession is of the latter kind, when there is, indeed, a mind and purpose to have a thing for oneself, without, however, a just conviction of dominion as might follow from legitimate title. But civil possession calls for both a desire and a probable cause for desire, such as is regularly understood when any favour is allowed possession in civil laws. See

416 Polybius, Bk. XII, chap. vii.

Now proper objects for possession are corporeal things, movable and immovable; objects less properly, or analogically, such, are incorporeal things or rights, which we possess by use and the power of use, as well as documents on which an action can be brought for some claim. For the establishment of possession it is always required that a man, acting either himself or through another acting in his name, have physical contact with a thing, or that symbol of it, or an instrument of custody, according as the nature of the things allows, and with the effect that the thing is so far under his power that he may actually dispose of it. And, indeed, if several bodies are unified and knit together, the seizure of one part of them with the intention of holding it entire, is held as the seizure of it all, so far as it is unoccupied. So, for example, whoever wants to possess an estate or a house, need not walk over every portion of the former, or explore every recess of the latter, but it is enough for him to enter some part of them. See *Digest*, XLI. ii. 3, § 1. A whole composed of separate bodies, as a flock, is held to have been seized as a whole, upon the seizure of one body, provided all the parts are present. But when the parts are scattered in place, as when one part of the flock is in this field, and one in another, each part must be seized separately. Incorporeal things, when connected with a corporeal, are understood to have been seized, when the latter has been seized. But if they are to be acquired in a thing belonging to another, they are seized, either when we are introduced to the thing in which, for instance, we wish a right or servitude established, or when we exercise acts flowing as from that right. Add *Digest*, XIX. i. 3, § 2.

In negative rights, it passes for possession, if I have forbidden another something or opposed¹ him, and he acquiesces in my refusal or opposition. Furthermore, seizure or exercise of an act is an absolute requirement to secure any possession of such kind, although civil laws can bring it about that dominion may pass of its own right to one, so that he can bring action for that thing against its holder with as great effectiveness as if he had taken physical possession of it. Here belongs what is advanced by Grotius, Bk. II, chap. viii, § 25.

Now just as it is required for the securing of dominion by occupancy, that a thing be unoccupied, so, if a thing is to pass from another to me with the effect that I may thereafter be able actually to dispose of

¹ [For *contradixero* read *contradixero*.—Tr.]

it, it is likewise necessary that he renounce possession of it and remove it from his custody, as it were, in order that I may have the opportunity at once of taking it. And this requirement is met, if it is merely said that he has handed it over, since it is not necessary for him to lay the thing in my hands. Just as for it to be said that a man has furnished food, there is no need of his chewing it beforehand and putting it in a person's mouth; it is enough for him to have put the food in such a place that the other can conveniently lay his hands on it. See *Digest*, XLI. ii. 1, § 21; XLI. ii. 51.

8. With these principles established, it appears that dominion, according as it is considered merely as a moral quality, and as it derives from possession, can in every case pass only by means of pacts, but that, as it is understood to contain a measure of physical power, whereby it can be exercised directly in an act, delivery of possession is also required in addition to pacts. This flows not from positive right, but from natural reason itself. Nor need it be admitted, however, on this account that before delivery the alienator still retains an imperfect dominion, unless you would use the word most *ἀκύρωτος* [improperly], and choose to call dominion a mere physical faculty of finally disposing of a thing, without a moral faculty. For after a pact is completed, or after a right has been transferred by a pact to another, the thing at once begins to belong to another and to serve his desire, while the alienator can legitimately commit no act regarding it save such as tends to give possession to another. If he does anything further touching that thing before the delivery of possession, he does it *de facto* and not as though from any right of possession. Indeed, delivery of possession itself is not, properly speaking, the final act of dominion, but an abdication of physical retention. For that is held an act of dominion which is exercised freely from the power of dominion, while delivery of possession does not take place freely but of necessity, or because of an obligation, just as resignation is not an act of a magistrate, in the sense that the latter signifies the power to command others.

But although a thing can no longer be considered mine when I have made over the full right to it to another, yet it is a question of some importance, whether I still have physical control over it, or another has already entered upon the possession of it. For in the former case he cannot as yet actually turn it to his own uses, and should I refuse to turn it over, he must use force in order to secure possession of it. Under such circumstances, in addition to your being compelled to do without it for so long a time, in a state you will have the further trouble of proving your right before the judge, and you will have to bow to his ruling, should he from corruptness or carelessness render an unjust decision, while in a state of natural liberty, you must try the uncertain issue of battle. This was the reason why the Roman laws

maintain that by those contracts which are concerned with the alienation of things, only a right to the thing is secured, as if before delivery of possession a man were as yet outside the thing, as it were, although he still has a right to join it with him. But when by seizing it physically the final complement¹ has been added to dominion, they say that a right has been established in the thing. Yet the laws sometimes supply this element that is lacking, in that, for example, they class among the rights in a thing also the right of inheritance, or the right belonging to heirs over the property of a dead person, though they have not yet entered upon possession. And the reason why the Roman laws allowed a *real* action from a right *in* a thing, and a *personal* action from a right *to* a thing, seems to be, because, when once a thing perfectly belongs to me, I have nothing else to do but to get it wherever I find it, nor is any peculiar and new obligation required in the other that it be delivered to me. But a right to a thing presupposes, that the thing on which the action is brought has not yet been fully united to me, and the other party is under a special obligation to make it possible for the thing to be so united. Therefore, stress must be put upon his person, that he lay the thing before me unoccupied, as it were, so that it may be taken by me.

As for what remains, although it is commonly said that it avails less to have an action than a thing, yet it is certain that our estate is made more valuable by a right to a thing and by personal actions, just as, on the other hand, there would be no use for a man to include in his estate the things which he owes another man without question, even if he still has physical possession of them. Therefore, he who possesses a thousand something or other and owes a thousand, has nothing, while he who owes more than he possesses has less than nothing. As it is expressed in *Digest*, III. v. 28 [III. v. 27, 28]: 'A man may be held to be already the poorer to the extent² of the obligation which he has incurred.' (M.)

9. It should be observed, further, that *delivery of possession* is either *true* or *fictitious*, of which the latter is said to be done [by long hand, or else]³ by short hand [*brevi manu*], when one wishes to avoid useless details and niceties. This takes place most commonly when I assign some one ownership of a thing of mine by donation, reserving for a time the usufruct. See *Digest*, XXXIX. v. 28. Although in some present-day donations of this kind keys are commonly presented by the donor to another, which the latter at once returns to his hands; likewise, when I desire that a thing of mine which another now possesses, shall hereafter be his very own. *Digest*, XLI. i. 21, § 1. So

¹ [For *complimentum* read *complementum*.—Tr.]

² [Reading *quod* with Mommsen instead of *quo*.—Tr.]

³ [These words are properly inserted at the suggestion of Barbeyrac, as is clear from what follows.—Tr.]

also when I sell you a thing that has been already lent, or rented, or deposited with you, make you a present of it, or give it by way of a dowry. *Digest*, XLI. i. 9, § 5. A fictitious delivery of possession also takes place between three persons by delegation, when, for instance, a man wishes to give me something, or owes it, and I order him to give it to another. For that is the same as if the thing had first been given 418 me, and then handed over by me to a third party.

Delivery of possession is said to take place by long hand [*manu longa*] when a thing is not immediately brought into contact with the body of another, but is pointed out to him, either from near at hand or at a distance. For so far as I can I have turned over a thing, when I have withdrawn from possession of it and have pointed it out to another, so that he may soon lay hands upon it. See *Digest*, XLVI. iii. 79; XLI. ii. 1, § 21, 18, § 2, 51. They also bring under this head the giving of a sign or instrument of custody, such as keys. See *Digest*, XLI. i. 9, § 6; *Code*, VIII. liii. 1; *Digest*, XVIII. i. 74. But the tossing and scattering of donations to the common people is not done that they may be considered as abandoned, and that they may be held on the title of occupancy by any person who shall afterward seize them. Such a largess is rather a kind of donation made to undefined members of a group, so that the thing thrown is understood to have been given to him who was first of the throng to seize it. Compare *Digest*, XLI. i. 9, § 7. Although in Lucan, Bk. VII [739-40], Caesar says of the booty allowed his soldiers: 'For I will not call it bestowing that which each one will give unto himself.' (R.) Sometimes also only tickets are scattered, upon the presentation of which that article is given which the tickets have written upon them. Thus the emperor Titus used to throw about at the games wooden disks on some of which was written an amount of food, on others clothing, on yet others money, horses, oxen, sheep, or slaves. Those who had snatched them up brought them to the stewards and received what was written upon them. Zonaras, Bk. II. Compare Boecler on Grotius, Bk. II, chap. vi, § 2.

CHAPTER X

ON WILLS

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| <ol style="list-style-type: none"> 1. The different derivative ways of acquisition. 2. An examination of Grotius' definition of a will. 3. Our definition of a will. 4. It may be questioned whether wills proceed from natural law. 5. The earliest men of whom we have knowledge used to distribute their | <ol style="list-style-type: none"> possessions during their lifetime among their heirs. 6. How far wills proceed from natural law and how far from positive. 7. One may¹ receive an inheritance from a will lacking in some formalities, provided no one opposes it. 8. But an heir may attack such a will as if none had been made. 9. Donations in case of death. |
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AMONG the derivative modes of acquisition some are followed *in case of death*, some transfer things as concerns both parties *among the living*. In both cases the things are passed from one to another either by the express will of the former owner, or by the intervention and disposal of some law. Varro, *On Farming*, Bk. II [i]: 'Something must necessarily intervene before a thing that was another's becomes mine.'

2. Because of death dominions are most frequently transferred by the agency of men through a *will*, the nature and origin of which should be considered with some care. In the view of Grotius, Bk. II, chap. vi, § 14, a will is 'an alienation of an entire estate only in the event of death. Up to that time it is recoverable, and the retention of the right of possession and enjoyment is meanwhile retained.' (K.) Here there is not wanting some question as to whether a will may properly be called an alienation, in the strict sense in which it denotes such an act by which an owner makes a thing of his belong to some one else. For inasmuch as an alienation in this sense is a transfer of dominion from one person to another, it presupposes the existence of the two persons at the time when the alienation takes place, so that a thing may thenceforth be called alien to him from whom it was transferred to the other. Yet so long as the testator draws breath he retains the fullest right, without any qualification, to all his possessions. Therefore, while he still lives 419² he has alienated nothing. But at the moment of death he loses at once all right which he had while alive, and is henceforth considered as no one. Therefore, it cannot be said that alienation takes place at that time when for the alienator nothing can be called any more another's or his.

Nor is the difficulty removed if we say that alienation takes place when the will is drawn up, but that it is held in suspense until the

¹ [For *licet* read *licet*.—Tr.]

² [For 415 read 419.—Tr.]

event of death. For in alienation there should be a union of the wills of two parties, the one to whom a thing is transferred and the other who does the transferring, and this in such a way that their wills are joined at the same time by their drawing together. Yet it very frequently happens that a person does not know that he was made an heir until the will has been opened at the death of the testator, while at its opening the heir is still at liberty to enter upon or reject his inheritance.

Furthermore, since the entire right of the designated heir begins only with the death of the testator, it follows that before the death of the testator no right of his existed which can be said to be held in suspense until the event of death. And again, when any kind of alienation takes place, even though revocable, such a right should be transferred to another in whose favour something is said to be alienated, that it should not be possible for such an act to be recalled at the mere pleasure of the alienator. For otherwise it cannot be understood that either the alienator incurred any obligation, or the other party acquired any right, if what was done amounted, for instance, to no more than this: 'Some day you will have a thing of mine, provided I do not change my mind in the meantime, but you will have no right to prevent me from being able to change my mind at any time and even for no reason.' Surely such an act cannot be called an alienation, since it is only a mere declaration of one's will as it stands at present, without any necessity of persevering in it, and such a declaration is incapable of producing either an obligation or a right. See above, Bk. III, chap. v, § 5. Yet a will is in fact such a declaration of one's desire, whereby no right is conferred upon another before the death of the testator, none, at least, that has an effect of full right against the testator himself. For even after the will has been drawn up, the testator retains not only the fullest right of possession and enjoyment, since the mere property has been transferred to the heir, but in fact there remains to the testator unimpaired dominion. A clear proof of this is to be found in the fact that even after the will is made he can alienate his property or strike out the heirs, however much they protest. Revocable alienations, however, always suppose some event or condition upon which they may be recalled, and which do not depend upon the mere pleasure of the alienator.

3. We shall portray the nature of a will more simply, and in accordance with the ideas of the Roman Jurisconsults, if we call it a declaration of our intention regarding the successors to our property after our death, which intention, however, is changeable and revocable before death at our pleasure, and from which a right arises for others only after our departure. Regarding this power of change the law of humanity demands that no man be deceived with empty hopes or held up to derision beyond his deserts. For this reason we find it hard to

censure the remark of Pliny, *Epistles*, Bk. VIII, ep. xviii, on Domitius Tullus, who had deceived some scoundrelly hangers-on and legacy hunters: 'Others, on the contrary, applaud him extremely for having disappointed the hopes of this infamous tribe of men, whom, considering the disposition of the times, it is but prudence to deceive.' (B.) Add Lucian, *Simylus et Polystratus*. And yet it is with justice that in Valerius Maximus, Bk. VII, chap. viii, Q. Caecilius and T. Barrulus are given a bad name because the former had made sport of L. Lucullus, the latter of Lentulus Spinther, from whom they had none the less received very great benefits.

4. Whether wills of this kind owe their origin to natural or to positive law, is still a subject for debate among scholars. The meaning of this question is not whether a man is obligated by the law of nature
420 to make the will, for that without question is within the disposal of every one, except in so far as it is necessary to prevent quarrels among his kinsmen (compare *Isaiah*, xxxviii. 1); but whether it follows from the very nature of the introduction of dominion over things, that a man may effectually make a will, or whether the power of doing so is allowed the owners of things by positive laws. It is the opinion of Grotius that a will, like other acts, may accept a particular form¹ from civil law, but that its substance is related to dominion and, granting dominion, it arises from natural law. That is, that the power of a man to dispose effectually of his property is derived from the law of nations which the Roman Jurisconsults called primary law, and the stipulation of the form of the disposal is derived from civil law.

On this statement there cannot help being some question. For since those things over which dominion was established serve men in this life and the dead have no further hold on the things of this world, it did not appear so necessary for dominion to contain within itself the faculty to dispose of what should become of a man's possessions after his death. It could have been enough for a man to hold the property subject to his control, so long as he lived, and be unable to control it beyond his lifetime, while the care for the disposal of the possessions of those who had passed beyond contact with men, might be left to the living. Moreover, it has seemed that, since the dead are removed from human affairs, it was possible with safety to disregard the decisions and arrangements made by them while still living. 'Think you that ashes and buried Manes care for that?' (B.) [Vergil, *Aeneid*, IV. 34.]

An argument in favour of this lies in the fact that the ancients were accustomed to bind their friends and kinsmen by an oath² to fulfil their final commands, as if no human bond were strong enough for that purpose. See *Genesis*, xxiv. 2-3; xlvii. 29; l. 25; Diodorus Siculus,

¹ [For *formam* read *formam*.—Tr.]

² [For *iur ejurando* read *jurejurando*.—Tr.]

Bk. II, chap. xxxiii, on the death of Parsodes. To the same effect is the incident in Sophocles, *Trachinian Women*, lines 1192 ff., where Hercules requires of Hyllus an oath to carry out his final commands. Likewise Constantinus Ducas bound his wife Eudocia by an oath that she would not marry again after his death. Yet as to the cleverness with which she recovered her written pledge from the patriarch to whose keeping it had been committed, and then, just as if thereby released from her promise, married Diogenes Romanus, we are informed in Zonaras, Bk. III, on Eudocia, and Michael Glycas, *Annals*, Bk. IV. Thus, in Josephus, *Antiquities*, Bk. XVII, chap. x, the orders of Herod to kill the chief men of the Jews are left unfulfilled by his sister and her husband. So [Sulpicius Severus, quoted by Donatus, *Virgilii Vita*, 143 ff. Diehl]: 'Vergil has ordered that this poetry of his which sang of the Phrygian leader, should be destroyed by swift flames. But Tucca and Varius forbid, and at the same time, thou, O most great Caesar, dost not allow it.' Dio Cassius, Bk. LIX [i], in telling how the will of Tiberius was declared void by Caligula and the senate, adds: 'No injunction can have weight against the intentional misunderstanding or the power of one's successor.' (F.) You may apply here the saying of Lucan, Bk. II [628]: 'There is no hope in the affairs that have been left behind.' (R.)

Therefore, it was left to the decision of the survivors, whether a man's intention should have any effect after his death; and they had to come to some decision among themselves on the question to what extent they were willing to comply with the pleasure of those who had now lost the rights of men. Without this any arrangement would have been useless which the maker could not safeguard, and those who could would not safeguard.

[But, to go further into the matter],¹ it is clear² that it did not meet with mankind's need for peace to introduce such a dominion of things as was capable of furnishing only a present and momentary use, but one rather which would continue into the future, since there belongs to man the right to preserve his life no less for the future, so far as nature allows, than for the present, and to canvass means to that end. When to this is added the consideration that a special care is laid upon us of those who are blood relatives of ours and whose line we hope will continue indefinitely, it has seemed conducive to the peace of mankind not to conclude the force of dominion at some mere span of time, since such a procedure would give rise to no less disorder than does primitive community in property, but to assign to it an indefinite 421 duration, as it were, by which it might pass on even to others and continue in them. How, then, this dominion can be maintained and continued, is decided by those who live in natural liberty, according to

¹ [Added, for the sake of connexion, by Barbeyrac.—Tr.] ² For *autum* read *autem*.—Tr.]

their own judgement. But in states, just as it is protected by the public strength, so for the most part it has been tempered and hedged about in different ways, as the interest of the state saw fit. But I question whether men of judgement will approve the theory advanced by the author [Leibnitz] of *Nova Methodus Jurisprudentiae*, p. 56. He says, 'Wills by mere law (that is, without the confirmation of civil laws) would be of no moment were not the soul immortal. But since the dead are in fact still alive, they remain for that reason owners of things, and the heirs they have left are to be considered as stewards over their property.' Compare *Luke*, xii. 20; *Ecclesiasticus*, xi. 20.

5. But just as no one would lightly maintain that it is opposed to the law of nature for a man to be able to dispose of his goods at the time when he is their owner, and to assign the effect to a time when he shall not be their owner, so it is by no means clear that this follows by any necessary reason from the nature of dominion. But this thing, indeed, does flow from the nature of dominion, namely, that a man while living may grant another living man a right to a thing of his, which right is not destroyed upon¹ the death of him who established it, since that right reposes in a living person. For inasmuch as the efficient cause and the effect are distinct entities, it is not necessary that the latter ceases to exist the same instant that the former does. Therefore, just as a man while living can fully transfer to another a piece of property of his own, and the latter does not lose dominion over it at the death of him from whom the dominion was received, so nothing prevents a man from being able to transfer to another dominion over a piece of property of his own, reserving to himself, however, a certain right over that thing for the rest of his lifetime. Consequently, we read that in the earliest ages the heads of families disposed of their possessions on the approach of death (although it appears from *Genesis*, xv. 3, that Abraham was not actually desirous that the son of his servant be his heir, but that he only decided² upon that course in case he died without offspring). Yet the effect of their act was that they proclaimed their desire among their sons, so that they, in agreeing to it, might seem to confirm it among themselves by a mutual pact. In this way a right was transferred from the living to the living, and the latter, as it were, were admitted at once into possession of the property. And it is likely that those ancients, accustomed to a frugal and simple life, did not usually die by such sudden and violent diseases as we in these days, but that they declined as the vital humour gradually failed, keeping, however, their reason to the very end, and were never struck by death suddenly and unawares. See *Genesis*, xxv. 5-6; xlviii. 22; *Deuteronomy*, xxi. 16-17; *1 Kings*, i. 35; *Ecclesiasticus*, xxxiii. 24.

In the same way Cyrus in Xenophon, *Training of Cyrus*, Bk. VIII

¹ [For *licet* read *licet*.—Tr.]

² [For *eo instituyendo* read *eo instituendo*.—Tr.]

[vii], assigns to his sons with his own voice what each one should receive from his father's fortune. Certainly such final disposals enjoy the greatest favour, and it is no little solace of mortality, if a man may see what he has acquired in his lifetime pass on to the single person of his choice. Quintilian, *Declamations*, cccviii:

It is fixed in the customs and laws of states, that, as often as it can be done, the testament of the deceased shall be observed; and this for no slight reason. For there appears to be no other consolation in death than to have a will which transcends it. Otherwise even an estate might seem a burden, if the owner is not to have the complete disposal of it, and when all the rights over it which are allowed to us in our lifetime are taken away at our death.

And there is point to the lines of Statius, *Silvae*, Bk. IV [vii.33-40]:

Childlessness we must shun with every effort. Close in pursuit presses the heir with hostile vows, and (fie upon him, fie!) prays that an early death may overtake his kind friend. The childless man is laid in earth without a tear, while his greedy survivor, the usurper of the home, stands ready to pounce upon the spoils of death, counting over the cost of the funeral fire. (S.)

6. Yet the question is not so much about ultimate disposals during one's life as about wills, by which a man disposes of his goods in such a way that he may keep the power of changing them down to his last breath, and that a right to his property may only upon his death come into force for the heir. Very weighty reasons have led many to prefer this method of disposal to that where men at the point of death were accustomed to distribute their property among heirs; for men often meet an unexpected end, or are separated from their friends and kinsmen, with the result that they have neither the time nor the opportunity to express their last wishes. Often also the man who thought that the Fates were spinning his final web of life is unexpectedly restored to health. It was also judged more fitting for a man to dispose of his goods at his leisure, and with serene and unimpaired mind, than when he was in fear at his approaching end, or when his mind was weakened by the force of his illness.

Furthermore, it was also most advantageous for a man to remain the master of his property until his last breath, and to allow no one such a right over it as he could not without inconvenience recall at any time, when the merits of his heirs had altered, or when his mind had changed. See *Ecclesiasticus*, xxxiii. 20 ff. (A French proverb calls it foolish for a man to put off his clothes before he is on his way to bed.) For although a transfer of right may be made revocably, that is, it may be withdrawn by the one transferring it, in case there exists a causal or potestative condition on the part of him in whose favour it was made, yet the doubts which must necessarily have arisen on the existence of a condition, or could have been advanced by either party, would have given rise to a mass of disputes. At any rate an heir, once selected,

would have felt the greatest resentment against the testator, if he had for some reason lost the inheritance which his hope had already seized upon. Nay, it has been a matter of danger to many to have named an heir openly and too soon. Thus Caligula 'accused such as had named him openly as heir among their children and had continued to live after such a declaration, of making game¹ of him, and to many of them he sent poisoned cakes'. (R.) Suetonius, *Caligula*, chap. xxxviii. Add *Idem*, *Galba*,² chap. ix; Livy, Bk. XL, chap. xxxiv. According to Josephus, *Antiquities*, Bk. XVI, chap. viii, Augustus forbade Herod when he wanted to divide his kingdom among his sons to do so, ordering him during his lifetime³ to keep both his kingdom and his sons in his power. And yet the emperor divided his own house in fatal rivalry by later appointing a successor to himself during his lifetime. For this reason it seems a safe procedure to see to it that men's wills are published only after death, lest they subject their makers to hatred or danger while yet alive.

For the same reason it has rightly been held a disgraceful and inhuman act to unseal and publish wills contrary to the wishes of the testator. So when Augustus at the outbreak of the civil war had the will of Antony, which was deposited with the Vestals, read openly before the senate, most people were incensed at the deed. Plutarch, *Antony* [lviii]: 'They thought it a strange and grievous matter that a man should be called to account while alive for what he wished to have done after his death.' (P.) Dio Cassius, Bk. L, calls it a most unjust act. It was especially so since it was a common practice with the Romans, as appears in many passages of Tacitus, to put into their wills many judgements of men. Add *Digest*, XVI. iii. 1, § 38; *Digest*, XLVIII. x. 1, § 5.

Now although these and similar reasons have strongly commended to many nations this kind of ultimate disposal, yet it is not, for all this, firmly established that wills of this kind naturally proceed from the very dominion of things, and are, therefore, derived from natural law. For even if we should suppose, that, by the common agreement of men,
 423 dominion possesses the power whereby a man may upon his death bequeath his property to any person that he pleases, this, however, in such a way that both the will of the testator should remain changeable until his death (see *Digest*, XXXIV. iv. 4), and the right of the heir would begin only with the death of the testator, while the heir should only at that time know himself to be such; still all this is but the contrivance of positive law. For otherwise, in transfers of right from one person to another, it would regularly have been necessary for the consent of him who does the transferring to coincide at the same time with

¹ [For *devisores* read *derisores*.—Tr.]

² [For *Galbac* read *Galba c.*—Tr.]

³ [For *quo ad* read *quoad*.—Tr.]

the consent of the other to whom the transfer is made, and the two unite after a fashion; from which union a transfer of right is understood to follow. But in cases of wills there is so far from being any necessity for a union of the wills of the testator and of the heir, that even between the death of the former and the succession of the latter a space of time may intervene during which the law sustains the right of the heir. Add *Digest*, XLI. i. 61.

7. It is also often a question for serious debate, whether an heir by will can enter upon his inheritance with good conscience, when the will is lacking in the formalities required by civil law; and also whether he who would have been the heir of a man, had he died intestate, may with good conscience break a will which lacks the formalities required by civil law, although it be established that the testator really wished to bequeath his property to the person designated. Those who answer both these questions in the negative, rely primarily upon the hypothesis that the making of a will is a matter of natural law. They feel, therefore, that the man who breaks such a will can defend his case in an open and civil court, but not in the court within himself, that is, his conscience.

Yet to understand these questions more thoroughly, it should be observed at the outset, that civil laws have scarcely in any other field been more solicitous in requiring a scrupulous care in form and procedure than in wills, to prevent frauds which may occur so often in written wills, and to prevent contentions, which greed for gain would have produced in serious numbers, since scarcely anything is gained with less labour than a rich inheritance. Therefore, since every one of proper age and not entirely uneducated and stupid, is presumed to have learned, or to be able to find out from those who are better informed, how civil laws wish wills to be drawn up, no one is believed to have expressed his sober will in a way which he knew would not prevail in a civil court against opponents. And this presumption is further strengthened by the fact that ample time is allowed men to draw them up. Therefore, when a will is not in accordance with civil laws, it is an easy presumption that some fraud was involved, or that the testator either was not in entire control of his mind, or else hastened the completion of his will in a superficial manner, and more at the instigation of others than of his own volition. And so the single purpose of those formalities is that a false will be not substituted for a true one, and that a hasty and inadvised impulse be not received in place of the clear and fully measured purpose of the testator, especially since the laws already call to the succession of a person dying intestate, those whom he is regularly supposed to have favoured most highly. Yet although it may happen that even a man who decides to declare his sober and fully considered purpose, may err in following the customary form,

a civil court can judge of the intention of a dead man in no other way than by his documents. And since it was within the power of civil laws to control the faculty of bequeathing property for the service of the state, there need be no departure from the general statutes in favour of one person or another, for were that precedent once established it would produce a harvest of disputes and frauds.

In the same way he who is disappointed of an expected inheritance because of a defective will, can accomplish nothing by his complaints. 424 For he has no claim by the prerogative of blood, for then he would have inherited without a will, nor does any citizen secure such a right from a will as shall at least prevail against a challenge, unless it has squared with the civil statutes. Therefore, let such a person feel that he has failed of the inheritance more because of fortune than of injury at any one's hands. Notwithstanding all this, the designated heir will be able rightfully to enter upon the inheritance, when no dispute is raised over the will. For the flaw which is presumed by civil laws upon the lack of the customary form, vanishes under such circumstances (for it is presumed that the testator actually wished this person to be his heir), and in fact the property belongs to him rather than to any others, after those whom otherwise the general law named for the succession, acquiesce and tacitly yield their right. For a sober decision, although declared without proper formality, the civil laws declare to be insufficient to transfer right only in so far as it must exclude others, who can claim a right to the same thing on other grounds. When the transaction is not brought into a civil court, the absence of the customary forms of positive law does by no means vitiate it, if such things as are otherwise able by the general law of nature to establish a right, are present. Therefore, it appears that a defect in the customary form militates against the designated heirs when they are opposed by those to whom the law gave the succession in case of a lack of heirs by will. When these are silent, the fact that the testator soberly signified whom he wanted for his heir, is considered enough to transfer dominion. This thing many nations which were either ignorant or disdainful of the great exactness of Roman law, have judged sufficient to validate a will. Yet it is unquestioned that they sin who receive anything from a will which they know is forged, even though they were not parties to the fraud. Therefore, Cicero, *On Duties*, Bk. III [xviii], is justified in censuring M. Crassus and Q. Hortensius, who were unwilling to forgo a small reward from a spurious will of Minutius Basilus by another's crime, since they were conscious of no connexion with the fraud. Add Valerius Maximus, Bk. IX, chap. iv. For the testator did not wish any of his property to go to them, while, in the absence of a legal declaration of the owner's purpose, the laws had already assigned those goods to others.

8. Yet if he to whom the inheritance would have belonged, had no will been made, breaks a defective will, he properly does no injury either to the testator or to the designated heir, whatever may actually have been the serious purpose of the former. He does not injure the testator, for the testator enjoyed no right to confer his property by his final disposition on heirs not recognized by law, unless he followed the form prescribed by the laws of his state; nor yet the designated heir, since no right is conferred on him that will prevail against the lawful heirs, unless it has by the will been conformed to the civil laws. Nevertheless, men who aspire to a reputation of great humanity have judged it a generous thing not to deviate from the purpose of a deceased person, although it had not been exactly expressed according to the forms of civil laws; and this either to avoid the suspicion of avarice, or because a feeling for man's mortality affects tender hearts so keenly that they will not see a man's final wish go unfulfilled. Pliny, *Letters*, Bk. IV, ep. x:

You regard¹ so religiously the will of the deceased, which indeed where it can be discovered will always be law to honest heirs. Honour is to you and me as strong an obligation as the compulsion of law is to others. (*Idem*, Bk. II, ep. vi): I have a private law of my own, and that is, punctually to perform the will of the deceased, though it may want the essential forms. (And Bk. V, ep. vii): This bequest, in the eye of the law, is null and void, but, considered as the clear and expressed will of the deceased, ought to stand firm and valid. Myself, I consider the will of the dead (though I am afraid what I say will not please the lawyers) of higher authority than the law. (B.)

He that would follow such an example would surely deserve the praise accorded a noble mind. For the same reason those who seek praise for their humanity are careful to observe the final commands or requests of their kinsmen and friends, however great the burden these may entail. As an example of such burdens you may list that unusual will found in Lucian, *Toxaris* [or *Friendship*, chap. xxii], where a poor man in his will gave to one of his rich friends his mother to support and to another his daughter to furnish with a dowry. Yet a man should not be vilified who does not refuse a reward allowed him by the laws of the state.

As for the rest, it must be observed from the laws of individual states, how far a man may divide his estate among a number of persons, be they all heirs, or some heirs and some legatees; whether, also, an inheritance is handed down with full right over it, or under the burden of a trust fund, subjects which are treated fully by the writers on civil law. Yet it is an injunction of natural law that burdens and debts on the property of a dead person fall upon every heir, although not to an amount greater than the value of the inheritance, nor is he obligated to make up out of his own resources what is lacking,

¹ [For *custodire* read *custodire*.—Tr.]

unless he is understood to have obligated himself in a special manner to do so.

9. It is customary to distinguish between wills and gifts *causa mortis*, whereby a man during his lifetime transfers to another living person, who also agrees to it, a right to his property in case of his death. Of these there seem to be two main kinds. One is when a man, who feels that death is likely soon to come upon him, bestows a gift of this sort upon a person, yet not in such a way as to make it his at once upon his acceptance, but only when death has followed; or when a man makes a gift which is conditional upon his death that is threatened by some present danger, such donation being null when the danger has been avoided. An instance is to be found in Homer, *Odyssey*, Bk. XVII [78 ff.]. Possibly we may include here the deed of King Philip, in Livy, Bk. XXXII, chap. xxxviii, who, when he saw a decisive conflict at hand with the Romans, 'put the city of Argos into the hands of Nabis in trust, on the terms, that if he should prove successful in the war, Nabis should re-deliver it to him; but if any misfortune should happen, he should keep it himself'. (E.) Add Diodorus Siculus, Bk. XV, chap. xix, on a gift of Amyntas to the Olynthians. In Euripides, *Alcestris*, lines 1020 ff., Hercules says:

Take, guard for me this maid,
Till, leading hitherward the Thracian mares,
I come from slaughter of Biston's lord.
But if I fall—no, no! I must return!—
I give her then, for service of thine halls. (W.)

The other kind of gift is when a man assigns a thing of his to another in case of his death, keeping for himself in the meantime possession and full usufruct, upon the condition that the gift may be recalled before his death for a particular reason; if, for instance, the second party should do some great injury to the donor, or if the latter should afterwards have an heir born to him. But if the donor would have his power to withdraw the gift depend not on some extrinsic condition, but on his own good pleasure, then the other party will have secured no right, so long as the donor has the natural faculty to change his mind, that is, so long as he retains his reason. For just as no man is obligated, if he can free himself, without performance of any kind, at his own pleasure and whenever he wishes, so an expectation which can be made void at another's mere pleasure, cannot be called a right, since the right of the other party will commence only with the death of the donor, and so that act will approach the nature of a will strictly so called. But when a person under the urge of the approaching danger of death makes a gift in such a way that it becomes at once the property of the one who receives it, and does not recall it when the danger is past, then it will rather be classed among gifts made between

the living. Although, if the gift has been very large, and will impair the resources of the donor, and much more, if it take his entire substance, it may seem to depend upon the approaching death, since it is assumed that no sane man wishes rashly to reduce himself to poverty.

That gift, also, whereby a man transfers dominion to another in an irrevocable manner, while keeping for himself the usufruct during his lifetime, will be listed as one made between living persons. 426

CHAPTER XI

ON SUCCESSIONS TO A PERSON INTESTATE

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| <ol style="list-style-type: none"> 1. Successions to a person intestate depend upon the presumed intention of the dead person; 2. Yet as it appears reasonable. 3. Children are preferred to all others. 4. Parents owe their children maintenance. 5. What is included under maintenance. 6. Who come under the name of children. 7. What is owed children beyond maintenance, and why. 8. Property need not be divided equally among children. 9. The right of legitimate children takes | <p style="text-align: right;">precedence over that of natural children;</p> <ol style="list-style-type: none"> 10. Provided the father acknowledges them; 11. Or has not disinherited them. 12. On the right of representation. 13. Parents succeed for want of children; 14. And for want of them kinsmen in the order of relationship. 15. Are friends to be preferred to kinsmen? 16. Do benefactors rank above kinsmen? 17. The order among kinsmen. 18. Yet civil laws have ample power to regulate succession. 19. How far is the heir of a dead man obligated to pay his debts? |
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ACCORDING to the disposal of natural law, when there is no express and special act of the former owner, dominions of things are said to pass in intestate succession. That is, since such a power had been given dominion that a man could not only dispose of his own property so long as he was alive, but also transfer it effectually in case of death to others, it did not appear likely that, in case a man was found to have made no disposition of his estate while yet alive, he meant that at his death it should lie open for any one to seize, as if it had been abandoned. Pindar, *Olympian Odes*, x [88-90]: 'For one who is dying, it is a hateful sight to see his wealth falling to the lot of a stranger from another home.' (S.) Therefore, natural reason dictated that in such cases men should ascertain the most probable intention of the dead man and follow it. And when that is uncertain, it is assumed that every one wanted what agrees best both with natural inclination and with duty. Compare Grotius, Bk. II, chap. vii, § 3.

2. Natural inclination regularly tends in this direction: Our greatest endeavour is to look out for those who are descended from us, and, after them, for those who are related to us by blood. For nearness of blood almost universally unites men's minds by a special regard, and almost all men have deep-seated in them the desire to see their families as prosperous as possible. Among duties the foremost is that we make provisions for those whose care nature has in a special way laid upon us, and that we show a grateful attitude toward benefactors.

Now, however often such presumptions may deviate from the real desire of the deceased, it was, nevertheless, to the interest of tranquillity

and peace, that no special conjectures should be maintained against these common presumptions, since on this ground the door would be thrown open to innumerable quarrels. And so in such matters the desire of the deceased is regarded not so much as it was, as what it should have been, and as it would have agreed with the rules of duty. Of these last probably the most important is, that no man furnish the opportunity for others to quarrel among themselves. Consequently, it is to the interest of peace that some common course be followed in such cases, even though the desire of some few may thereby be neglected, rather than that we involve ourselves and others in infinite difficulties, while labouring to meet the desires of every individual. 427

Furthermore, he who wanted some special fancy of his satisfied, should have expressly signified it. Thus, nothing is more common than for a father to show far greater affection for one of several children than for all the rest. Who would question that he would wish to provide for his favourite more liberally than for the rest? And yet when he dies intestate they will divide his estate into equal portions, not so much because it offends natural law to assign one of his children a fairer portion, as because there would arise infinite disputes among brothers, if an estate were to be divided according to the affection that their father bore them. The same inconvenience would follow in case a man died without offspring, leaving several brothers for whom, while he lived, he had different degrees of affection.

Again, it is not uncommon for a man to die leaving a distantly related kinsman, whom he never loved especially, and to whom he is not obligated for any kindness, while on the other hand he owes all that he has to the favour of some one not related to him. Who will not say that the latter was the benefactor of the deceased rather than his kinsman? And yet in view of the fact that a comparison between the bond of blood and that of gratitude would afford material for disputes most difficult of solution, all nations have agreed, that, in the case of intestates, a kinsman is preferred to a benefactor, especially since a person might seem not to have conferred a kindness but to have played the usurer, if on that account he should be preferred to kinsmen in an inheritance. Yet if the former had been placed before the latter by the express desire of the deceased, it would be but just to carry out his wishes.

From all this it is clear that natural reason, which renders decisions on successions when final dispositions are lacking, considers not the mere desire of the deceased alone, about which there is often little information, but that desire as it agrees with the common inclination and duty of men, and as it will offer no fuel to disputes. Add Boecler on Grotius, Bk. II, chap. vii, § 13. Yet this natural reason is supported in all states by civil laws, to the twofold end, that the avarice of men may not draw into bitter disputes those who seem to enjoy an equal share of

reason, and that the matter may be skilfully adjusted to the public interest.

3. Now in successions to a person intestate, both on the guidance of reason itself, and with the consent of all known nations, children are preferred to all others, even¹ to the parents themselves. See 2 *Corinthians*, xii. 14; *Romans*, viii. 17: 'If children, then heirs.' Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xiv: 'Parents know their offspring better than the children know that they are sprung from them, and the author of another's being is more closely united to his offspring than the offspring to the parent.' (W.) Isaeus, *Orations*, v [vi. 28]:

The law itself gives a son his father's property, and does not allow him who has legitimate sons to make testamentary disposition of his property. (*Idem*, *Orations*, ii [iii. 42]): For no man may lawfully make testamentary disposition or give anything of his own property to any one, without the consent² of his daughters, if a man dies leaving legitimate daughters. (And a little further down) [iii. 68]: The law says that a man³ may dispose of his property at his own pleasure, if he does not leave behind him legitimate sons. If, however, he leave behind females, their consent is required. Therefore, with the approval of one's daughters a man may give and dispose of his property. But without the knowledge of his legitimate daughters men can neither adopt anybody, nor give their property away.

428 Add *Digest*, XLVIII. xx. 7. Julian, *The Caesars* [p. 334 D]: 'It is the custom to hand down the succession to a man's sons, and all men desire to do so.' (W.) In Valerius Maximus, Bk. VII, chap. vii, § 2, 'the bond of fatherhood' is called 'the closest possible among men'. In favour of children is, first, the obligation of parents whereby they are constrained by nature to give every proper care to the nourishment and education of their children, and second, that strongest of all affections, which is extinguished only in exceptional cases, even by the atrocious crimes of children, or the unusual barbarity of parents.

4. Some have raised a question, indeed, about the maintenance owed by parents to their children, whether, namely, the obligation whereby it is owed is a perfect or an imperfect one, that is, whether it belongs to expletive or attributive justice (see Grotius, *loc. cit.*, § 4). Their position is that parents owe their children maintenance, not, however, from expletive but from attributive justice, so that parents are guilty of the greatest inhumanity if they deny it, yet no right is enjoyed by their children, whereby they can demand maintenance of their parents against their will, such a right being a proper effect of expletive justice. Yet they would add that such a perfect right may be given children by civil laws.

But it is our feeling that a perfect obligation rests upon parents to maintain their children so long as they cannot take care of themselves, and that this seems to be enjoined not merely by nature herself, but by the very act of the parents in begetting children and bringing them into

¹ [For *etiam* read *etiam*.—Tr.]

² [For *uniniquae* read *unicuique*.—Tr.]

³ [For *invitis* read *invitis*.—Tr.]

the world. For surely they would do a great injury to their offspring, if they begot them only to die. Therefore, by the act of begetting they appear voluntarily to have bound themselves to give all the care they are capable of, to see that the life which they begot shall be preserved. Thus, therefore, there will be a perfect right in the children to secure maintenance from their parents. But preventing that right from producing all its effects, is the natural weakness of children at that age when they are unable to look after themselves. Therefore, it is not so much that right which fails them, as the power to assert it, save when civil laws come to their aid and compel recalcitrant parents to furnish them maintenance. Yet the wisdom of the Creator has endued the natural affection of parents with such strength that even without the constraint of civil laws they are as a rule glad to fulfil their duty.

5. In general there falls under the head of maintenance not only such things as are necessary to preserve natural life, but also such as make a man fitted for social and civil life. And the former are owed down to the time when the young are able to secure sustenance for themselves by their own endeavours. How much should be spent on education, whereby children are trained for civil life, will have to be decided with an eye to the means of the parents and the ability of the children. The least that is required is that they shall grow into honest and useful members of human society. A general conclusion is, that, as nature apparently does not require poor parents to cheat their own promise out of favour for their children, so a parent who has enjoyed the smile of fortune will not escape censure if he does not concern himself to secure the very best advantages for his offspring.

6. Under the name of children are included not only those who are of the first degree, but those of the second and further degrees, whether descended from sons or daughters, provided they cannot be maintained by their actual parents. See *Code*, VI. lxi. 8, § 5. *Digest*, XXV. iii. 5, §§ 1, 5; XXV. iii. 8. Furthermore, maintenance is owed not merely to legitimate children but to natural children as well; nay, even to those born of incest. For why should a pitiable and innocent child perish of hunger for another's crime? Yet if such enter into competition with legitimate offspring they can scarcely demand to be admitted to equal shares with the latter, unless their parents expressly desired it. See *Genesis*, xxi. 10; xlix. 19-20; *Judges*, ix. 18; xi. 1-2. Add Boecler on Grotius, *loc. cit.*, § 4. Regarding the maintenance of such upon the death of their parent, an inheritance is owed children 429 still of immature years not only from an intestate, but it cannot rightfully be taken from them even by the express will of their father, so far as it is needed for this end. For it does not seem likely that a child of that age could have committed such a crime as to render him unworthy of maintenance. Add *Digest*, V. ii. 27, § 3.

7. Whatever exceeds such maintenance is owed children who have become able to look out for themselves, not so much by any clear command of natural law, as for the reason that parents in general wish no one to be more fully provided for than their own children. It is an unusual disposal of Crates the Theban, recorded by Diogenes Laertius, Bk. VI [88], that he is said to have left his fortune with a banker on the condition that, if his children were but of the ordinary kind, he should turn it back to them, but that if they turned out to be philosophers, he should divide it among the common folk; for if they pursued philosophy they would have need of nothing. Now as for the contention which some advance, namely, that parents acquire everything for the sake of their children, and so the latter, even in the lifetime of their parents, have a right in their goods which will avail against them in addition to the necessity of maintenance, it is false. For every man acquires things first of all for himself. Horace, *Epistles*, Bk. II, ep. ii [190 ff.]: 'I shall use and take from my modest heap as much as need requires, nor shall I fear what an heir may think of me because he does not find more than I leave him.' (W.) Juvenal, *Satires*, xiv [136-7]: 'It is palpable insanity, to live a beggar's life, simply that you may die rich.' (E.) But a man wants what exceeds his own necessities to go to those who are dearest to him, and such are regularly held to be his children. See Nicephorus Gregoras, Bk. V, towards the end. And children above all others are so far accorded an expectation to their parents' estate, because, when there is no express desire to the contrary, they are preferred to all others, and because it rarely happens that parents vary from that ordinary affection. Nor do we admit the conclusion of *Digest*, XXVIII. ii. 11.

It was, however, a good provision of the Roman laws that a parent would have to show reason for disinheriting a son, and that only special considerations would avail for such an act. Nay more, they went even further, and allowed disinherited children to enter a complaint against a will not made in accordance with duty [*inofficiosum testamentum*], in which the question was not concerned with whether the testator had for just reasons the power to bequeath his estate to others than to his children, but the reasons were discussed which led the deceased to come to a conclusion different from the common inclination of men. And if it was discovered that the father had passed by his own children owing to some deception and fraud on the part of others, or from an absurd whim, the authority of the state turned the inheritance over to those to whom it would otherwise have come, had the father followed good judgement in his counsel. Therefore, Cicero, *For Sextus Roscius* [xix], replies quite properly to Erucius, who was maintaining that Roscius, the father, intended to disinherit his son:

It was the duty of a regular accuser, who was accusing a man of such wickedness, to unfold all the vices and sins of a son which had exasperated the father so as to enable him

to bring his mind to subdue nature herself—to banish from his mind that affection so deeply implanted in it—to forget in short that he was a father. (Y.)

Add *Digest*, V. ii. 2, 4, 5. In this connexion the claim deserves notice which the disinherited¹ advanced in instituting such a case: Since they had to presuppose that there were no just reasons in their person for disinheriting them, they advanced the plea that their parents in making their will were of unsound mind. See Mornay on *Digest*, V. ii. 2 and 4; Grotius, *Sparsio Florum*, on the passage just cited.

In other matters a father should favour his children, yet in such a way that he does not entirely disregard his other duties. Therefore, when it appears that he has looked after his children adequately, he is by no means hindered from using his property in acts of gratitude or liberality, even if it will mean that less comes to his children. Thus, if a man has availed himself of great kindnesses from another, or can give an opportunity to a great genius, now struggling with want, to advance to high achievements, why may he not give some part of his goods to such persons? Certainly great acclaim is accorded the act of Attalus by Plutarch, *On the Love of Brothers* [xviii, p. 489 ff.], and in his *Apophthegms* [p. 184 A ff.]; for since Attalus had been honoured with most notable kindnesses by his brother Eumenes, he later willed his kingdom to the latter's son, although he had several of his own. A similar example is found in Hieronymus Osorius, *De Gestis Regis Emanuel*, Bk. IV, p. 117. 430

8. There is also no necessity for a father dividing his property equally among his children, but he can assign to one or another some distinction above the others, because of his particular merit, or illustrious hope, or even because of a special love for him. See *Genesis*, xlviii. 22. In the same way, in apportioning the estate, regard may be had for the family as a whole, that it may continue to retain its splendour and strength. If it will probably suffer some hurt from an equal division of the estate between several children, the father can, without prejudice to natural law, assign the outstanding portion of his goods to one, ordering the rest to remain content with smaller shares. Therefore, the rights of primogeniture are accepted² among many nations, which, in accordance with the most ancient customs, gave the elder son the headship in the family, priesthood in the household worship, and a double portion in the possessions of his father, the double portion serving, as Grotius observes on *Deuteronomy*, xxi. 17, the purpose of meeting the expenses of entertainments and worship. On the special prerogatives of primogeniture among the Japanese, see Bernhard Varenus, *Descriptio Japoniae*, chap. xv.

However, there are instances of nations in which the younger brothers receive a larger portion, or at least have their choice as to which they

¹ [For *ex haereditati* read *exhaereditati*.—Tr.]

² [For *primogenitur aere cepta* read *primogeniturae recepta*.—Tr.]

want to take. The reason for this rule is that the elder brothers have enjoyed their father's care for a longer time, and since the younger are often too early deprived of this, some recompense is properly due to them. Yet this custom is more fitting for plebeian than for noble families.

Again, when daughters pass into other families, it is not necessary for them to share equally with their brothers in their father's property. For it is foolish indeed to believe that it is opposed to the piety required of a father, to distribute his property unequally among those who, one as well as another, were begotten of him. Nay, Pliny, *Letters*, Bk. VII, ep. xlii [VII. xxiv], calls that a 'most honourable will', in which a grandson was left heir to two-thirds of his grandmother's estate, and a granddaughter to one-third. Consequently, it can be instituted not only by law but by a pact as well, that also those who are born of a marriage that is only by nature, are merely owed maintenance, or that such may at least be excluded from a large inheritance. See Grotius, *loc. cit.*, § 8, towards the end, and the comments by Boecler.

And in this connexion one may wonder why Augustine, *On the City of God*, Bk. III, chap. xxi, condemns so severely the *Lex Voconia*, by which only a stipulated per cent. of an estate could be left to women. 'I know not', he says, 'what can be said or thought that is more unjust than that law.' This law, passed upon the initiative of Cato the Censor, stipulated that no one should have his daughter heir to more than 25,000 sesterces, as is to be gathered from Dio, Bk. LVI, according to Paulus Manutius, *De Legibus Romanis*. Yet [Pseudo-] Asconius Pedianus on Cicero, *Against Verres* [II. i. 107], in writing of the urban praetor says, 'Voconius had had a law passed that no *census*, that is, no one of means, could leave a daughter as his heir.' He had said above that formerly that person was called *census* who acknowledged an estate of 100,000 sesterces. Add Livy, *Epitome*, XLI; Quintilian, *Declamations*, cclxiv; Gellius, Bk. VII, chap. xiii; Bk. XVII, chap. vi. Certainly the Spartan law, that forbade one to give a portion to girls, was much more severe, the reason for it being, according to Plutarch, *Laconian Apophthegms* [xv, p. 227 F]: 'That none might be slighted for their poverty, or courted for their wealth, but that every one, considering the manners of the maid, might choose for the sake of virtue.' (G.)

Nevertheless, there will be need of prudence in such matters, lest a father sow the seeds of envy and hatred among his children, if, without substantial reasons, he appear¹ to have treated unequally those who
 431 were equal in position and merits. See *Genesis*, xxxvii. 4. And the divine law of *Deuteronomy*, xxi. 17, is based upon the weightiest ground, namely, that a father, enticed by the blandishments² of a beloved³ wife, should not conjure up false charges against his first-born, or magnify

¹ [For *visius* read *visus*.—Tr.]

³ [For *delictae* read *dilectae*.—Tr.]

² [For *delinementis* read *delenimentis*.—Tr.]

his slight failings. Nay, the safest of all ¹ courses in such matters is not to depart from the rule of civil laws. See Charron, *De la Sagesse*, Bk. III, chap. xiv, n. 38; Michel Montaigne, *Essais*, Bk. II, chap. viii. Bacon, *Essays*, chap. vii, observes: 'Younger brothers are commonly fortunate, but seldom or never where the elders are disinherited.'

Hence it follows, also, that when a father had died intestate,² and the civil laws have not ruled otherwise, the children inherit by equal portions, because, in a case of doubt, those who are related to the deceased in equal degrees are held to have been equally favoured.³ And those are held equal portions which a person has chosen with the consent of the rest, either personally, or when he has approved what was assigned him by his co-heirs, or has taken what fell to him by lot, even if that may not be equal in value with the other portions. The statement of Quintilian, *Declamations*, v [12], should be considered in this connexion:

There is the same natural affection towards all our children, yet in the case of one or another it has generally certain peculiar reasons for fondness, and, without breaking the equality of their dearness to us, there is something which by an unconscious instinct of the mind makes us love each separate child as though it were the sole object of our affections. One is loved because he is the first-born; another because of his infancy; a third for his happier expression and a face that more readily invites a kiss and a hug; others for their restraint and goodness; and some receive a more passionate⁴ affection because of their misfortunes, and we embrace with a peculiar fervour a crippled body or a maimed limb. But still the general equality holds good, since whatever one child is felt to lack in one respect is made up to him by some other ground of affection in another respect.

9. But it should be added on this point, that, not merely civil laws, but also natural reason as well, favour legitimate children above natural, although the latter partake as much in the father's blood⁵ as the former. For those who come into the world because of a father's irregular lust, without his direct intention, can on no score compare themselves with those who were begotten to the end that the family might be continued,⁶ and that a man should have heirs for his estate. But if a man wishes to advance⁷ a natural son of his into the portion of a legitimate son, that will be possible in a state of natural liberty, provided no injury is done thereby to legitimate children, or to any persons who have otherwise secured a right; it will be possible in commonwealths also, in so far as the civil laws permit it. See *Code*, V. xxvii. 6 and 7. In Aristophanes, *Birds* [1661-6], a law of Solon's is given: 'A bastard is to have no right of inheritance, if there be lawful children. And if there be no lawful children, the goods are to fall to the next of kin.' (R.) On the other hand among the Mohammedans it makes no difference, in the matter of participating in a father's estate, whether a child was born of a lawful wife,⁸ a concubine, or a maid-servant.

¹ [For *omnio* read *omnino*.—Tr.]

² [For *delicti* read *dilecti*.—Tr.]

³ [For *sangine* read *sanguine*.—Tr.]

⁷ [For *adschissere* read *adsciscere*.—Tr.]

² [For *testamento* read *testamento*.—Tr.]

⁴ [For *inpatientius* read *inpatientius*.—Tr.]

⁶ [For *propagnandam* read *propagandam*.—Tr.]

⁸ [For *matre familias* read *matrefamilias*.—Tr.]

But when some man has preferred to secure offspring from a concubine who gives her body to him alone, rather than from his lawful wife, in order that he may in this way favour the children of a former marriage, the sons of the concubine will be ranked after such children, even without the express will of their father, and after receiving some modest share shall leave to the same the rest¹ of the inheritance. But if, on the other hand, a man has taken to himself a concubine in order that he may not have to endure the haughtiness or extravagance of a lawful wife, or if he will not accord her the position of a wife for other reasons of policy, or even because of some pact, then it must be decided in accordance with the laws of the state, whether children born under such circumstances shall be admitted together with the others of a lawful wife or whether, in case there are no legitimate children, they shall exclude other kinsmen. For if this takes place without the restraint of positive laws, I see nothing standing in the way of such children, since the cohabitation of their father with their mother constituted in natural considerations a real marriage; especially if the father made no distinction between them in their education, treatment,² and the expression of his paternal affection. Therefore, I should feel that the sons of Jacob by his handmaids should have succeeded in equal portions with the rest, even though there was no existent disposal by their father, because it is nowhere stated that he treated them differently from the rest. But if the father had expressly given out the statement that he refrained from taking to himself a lawful wife, to the end that his property might pass to his nearest of kin (and reasons of policy at times lead one to such an action), then such issue will be able to seek nothing more from their father's estate than maintenance, or what the desire of their father or the civil laws may further assign them. See Boecler on Grotius, *loc. cit.*, § 8.

Now as the mere law of nature knows no distinctions of rank, so it is with it the same thing, whether a man begets a son of a noble or a humble mother, provided conjugal faith is rendered by the latter. Therefore, if in any place the children of a less noble mother are of a lower condition, that is due to positive laws. And just as these can be influenced by reasons of policy to prefer legitimate offspring to others, and not to admit the latter together with the ascending line upon

¹ [For *relinquam* read *reliquam*.—*Tr.*]

² [This word (*actione*) is omitted by Barbeyrac and by the edition of 1744, no doubt because of a printer's error. In the British Museum copy of the 1688 edition used for the facsimile, the text reads (end of page 431) '*educatione*', (top of page 432) '*catione*'. The latter word being a *vox nihili*, both

it and *ac* were disregarded by later translators and editors; but that we should have had *actione* is clear from the first syllable, *ac*, which was printed at the end of the preceding page. It should be added that the text of pages 431 and 432 was incomplete in the copy of the edition referred to and consequently these pages were later reproduced, for the facsimile, from a copy at Trinity College, Dublin, in which the pages in question were complete. In the Trinity College copy the text of the two pages had been rearranged by the printer in order to correct errors of omission, and in this corrected text the word *actione* is clearly printed, thus establishing its correctness beyond question.—*Tr.*]

failure of the descending line, so it seems scarcely fair for them to be entirely excluded, in case there is no blemish in their birth. Yet they are under every circumstance¹ to be distinguished from those who have been born of a union to which there has been attached some natural taint, such as adultery or incest. Although these last have contracted
 432 no guilt from the crime of their parents (see Gratian, *Decretum*, I. lvi. 3 ff.), that misdeed will nevertheless constitute a reason why they are forced to be content with maintenance, and are not to be ranked along with those who were begotten in the hope of having heirs. Such a hope the parents certainly did not entertain for these when they were conceived, for they hoped that their misdeed would always remain concealed,² rather than that they could by it create those who bear, as it were,³ public testimony to the baseness of their parents.

10. Grotius, *loc. cit.*, § 8 [II. vii. 7-8], goes on to observe that children only succeed to a man who dies intestate, 'provided it be established that they are his actual offspring or provided that there be no evidence that he wished otherwise'. (K.) For no man has a fatherly affection for the offspring of another, and a presumed desire fails, when an express one points in the contrary direction. Yet that a person is the father of another cannot always be so clearly proved on unquestionable grounds, or on the testimony of others, as can be done in the case of a mother; especially where women live guarded by practically nothing else than their own modesty and conscience. Therefore, the final proof in such cases is held to be marriage itself, in which a woman promises a man that she will give her body to no one other than her husband, and as his wife is placed, as it were, under the eyes of her husband, granting to him at the same time the power to protect her body. *Digest*, II. iv. 5. It is also assumed that every man will keep his plighted word and avail himself of his power, unless the opposite is clearly proved. Therefore, every one is, as it were, possessed of this right, that he be regarded as the son of him whom the marriage of his mother designates. And no one of his own accord, unless he be insane, will lightly raise a question on this point, and 'find himself a father by the adultery of his mother'. Tacitus, *Histories*, Bk. IV [lv]: 'Julius Sabinus, in addition to his natural vanity, was inflamed by pride, in consideration of his falsely supposed descent. He pretended that his great-grandmother attracted the admiration of the deified Julius, during his Gallic campaigns, and had an adulterous amour with him.' (O.*) 'Jove is either not your father, or is so to your disgrace.' (M.) [Ovid, *Metamorphoses*, IX. 24.] But if others raise a question on this point, the burden of proof will rest upon them, such as, for instance, that he who is called the father was at the time of conception critically⁴ ill, or out of the country. It is related

¹ [For *omnio* read *omnino*.—Tr.]

³ [For *vel ut* read *velut*.—Tr.]

² [For *oc cultum* read *occultum*.—Tr.]

⁴ [For *fontico* read *sontico*.—Tr.]

in Xenophon, *Greek History*, Bk. III [iii. 2], that Agesilaus raised such a question against Leotychides on the following grounds: His father had once denied that he was his son, that he was handsomer than his father, that he was born in the tenth month after the last meeting of Agis with his mother, and that Agis had expelled his mother from his bed.¹

11. It is a second exception, whereby a son does not succeed to an intestate father, if there is an express desire of the father to the contrary; if, for instance, he has renounced him, as was the custom of the ancient Greeks, or disinherited him. In both cases, as has been shown, the decision should be backed by just and weighty considerations. In Dictys Cretensis, Bk. III [xxvi], Antenor resolved to close his home to his son Glaucus, because he had gone along in the company² of Paris when he stole away Helen. Add Boecler on Grotius, *loc. cit.*, § 7. Yet Grotius in that passage asserts, that, unless the disinherited or renounced son has deserved death, he should be supplied with maintenance. Yet I can scarcely see on what ground a son of the age when he should by natural law be given maintenance by his father, can deserve being disinherited or put to death.

12. Now as to what we said above, namely, that parents owe maintenance to children not merely of the first but of other degrees, if the parents by whom the latter might be maintained are no longer alive (see *Digest*, I. vi. 7; XXVII. i. 2, § 7), from this principle first of all is sought the equity of the so-called right of representation, by which children are understood to be advanced into the degree of their deceased³ parent, so that in inheriting from their remoter progenitors they secure the same consideration that their father would have had, had he been alive at the time, and succeed by descent together with those who were of the same degree as their father. And it would surely have been grievous, if, in addition to the affliction of the early death of their parent, they should also fail of those goods which their parents had hope of coming into, either by law or by the intention of their remoter progenitors. Add Boecler on Grotius, *loc. cit.*, § 6. But if the civil laws of any state do not recognize the right of representation, those who have been prematurely deprived of their father will bear this as an affliction visited upon them by fate.

433 13. In the lack of children of the first and further degrees, reason suggested that the succession fall to the ascending line; and this both because the estate itself or its beginnings at least, which the children afterward increased, proceeded for the most part from the parents, and because they deserve it for their good services. Since these had hoped that their property would fall to their children and that they would

¹ [The sense of the passage in Xenophon is but imperfectly rendered by Pufendorf. See the introduction by Mascovius in the edition of 1744, vol. I, pp. xvii-xix.—Tr.]

² [For *committatum* read *comitatum*.—Tr.]

³ [For *defuncti* read *defuncti*.—Tr.]

have heirs to survive them, it was but right, upon the reversal of nature's order, that they be reconciled to that loss by the solace of receiving their children's estate. Pliny, *Panegyric* [xxviii. 5]: 'It is miserable enough for a father to be a son's only heir.' *Digest*, V. ii. 15; XXIX. iv. 21; *Code*, III. xxviii. 28; VI. xxv. 10, § 2; *Institutes*, III. iii; *Code*, VI. lvi. Philo Judaeus, *On the Life of Moses*, Bk. III [xxxii], calls attention to the law on inheritances established by Moses, whereby sons succeed in the first place, then upon failure of them, daughters, then brothers, and in the fourth place uncles on the father's side, and he concludes from this that fathers may become the heirs of sons.

For it is a very foolish idea (he says) to imagine that when he allots the inheritance of the nephew to his father's brother, out of a regard to his relationship to his father, he has excluded the father himself from the succession. But since the law of nature¹ permits the property of parents to be inherited by the children, but does not allow the parents themselves to inherit, he has abstained from any express mention of the subject as one to be deprecated and of evil omen, in order that the father and mother might not seem to receive any gain from the inconsolable affliction of the loss of children dying prematurely; but he indirectly intimated their right to be invited to such an inheritance when he conceded it to the uncles, in order that in this way he might cultivate propriety and avoid the alienation of the estate. (Y.*)

There is the further consideration in some parents of the weakness and want of old age, children having been obliged² otherwise to maintain those so afflicted. This was especially provided in an Attic law. Isaeus, *Orations*, vii [viii. 32]:

The law bids parents to provide for the nurture of children; and parents are father and mother, grandfather and grandmother, if these be still alive. For these are the beginning of the family, and their property passes on to their descendants from hand to hand. Therefore,³ they must nurture their children, even though they leave nothing behind.

Add Grotius, *loc. cit.*, § 5, and the comments by Ziegler. But if a father has without⁴ reason pursued his son with deep hatred and injuries, and no reconciliation has followed, it will be just for him to be cut off from his son's inheritance. The same applies to a father who has exposed his son as an infant, for there is no question that the one who shouldered the burden of the son's education should be preferred to such an unnatural father, and it seems right that the foster-father be favoured above the natural one, so that he can recover what he expended upon the education of another's offspring.

It should also be observed,⁵ that the lawyers allow no representation in successions of the ascending line as they do in those of the descending; for instance, if a man die without offspring, leaving a father, and grandfather on his mother's side, the latter will not be admitted to the inheritance on the claim of his daughter. The reason for this seems to be that the hope of succession does not ascend but descends, and so the

¹ [The words 'of nature' are added by Pufendorf.—Tr.]

² [For *tenebantur* read *tenebantur*.—Tr.]

⁴ [For *citer* read *citra*.—Tr.]

³ [For *Qua propter* read *Quapropter*.—Tr.]

⁵ [For *opervandum* read *observandum*.—Tr.]

son had a hope of succeeding to his father, which hope he can himself also pass on to his sons; but the mother never had any hope or desire to inherit from her offspring. Therefore, she was unable to pass that hope back to her parents, contrary to the order of nature, and so in such a case the nearest claimant will justly exclude the more distant.

14. When heirs are lacking in the descending and ascending lines, collateral heirs to the intestate will be called to the succession. The order in which these should be admitted will have to be decided by natural conjecture, when there are no civil laws on the subject. This favours him¹ to whom the affection of the deceased is supposed to have been most strongly directed, provided we measure that affection more by the common inclination of sane men, and as it tends to avoid quarrels, than by the morose disposition of this or that individual. Therefore, in such a case it is the opinion of wise men that natural reason favours first of all nearness of blood, provided, however, that consideration is given to the source from which that property devolved upon the deceased, or who was once the loser² from the fact that the deceased came into the world. So Aristotle, *Nicomachean Ethics*, Bk. VIII, 434 chap. xiv, gives the first place to friendship between parents and children, and the second to the love of brothers, which arises from the fact that they owe their life to the same pair, and is maintained by similarity in years and education. After these follow cousins on the father's side and other relatives, because they are joined to us by that relationship. After these, affection for whom nature herself commends and in a way enjoins upon us, those are finally admitted who are recommended by kindness, congeniality, a special sympathy of spirits, or proved faith. Cicero, *On Duties*, Bk. I [xvii], arranges the degrees of relatives in this way:

The first principle of society consists in the marriage tie, the next in children, the next in a family under one roof, where everything is in common. Next follows the connexion of brotherhood, next that of cousins, in their different degrees; and when they grow too numerous to be contained under one roof, they are transplanted to different dwellings, as it were to so many colonies. Then follow marriages and alliances, whence spring more numerous relationships. The ties and affections of blood bind mankind by affection. (E. *)

On the relationship between brothers one may consult in general Plutarch, *On the Love of Brothers*; Xenophon, *Training of Cyrus*, Bk. VIII [vii], in the last words of Cyrus, and *Memorabilia*, Bk. II [iii]. Add Boecler on Grotius, *loc. cit.*, § 9-11. To illustrate the obligation between those united by ties of blood one may use the law in force in the kingdom of Tonquin, according to which disputes arising between such persons are not decided by a judge but by relatives of both sides acting in the capacity of arbiters, as is reported by Alexander de Rhodes, *Divers Voyages*, Bk. II, chap. vii.

¹ [For *illa* read *illo*.—Tr.]

² For *decesterit* read *decasserit*.—Tr.]

15. The question whether friends are not sometimes to be preferred to relatives, may be raised because of the encomia which are everywhere delivered on friendship. Cicero, *loc. cit.*: 'But of all the societies and unions among men, there is none more excellent, or more closely knit, than when men of real virtue and honesty, from a certain agreement and likeness of their manners, contract a familiarity¹ and friendship one with another.' (C.) Homer, *Odyssey*, Bk. VIII [585-6]: 'For a friend with an understanding heart is no whit worse than a brother.' (B. & L.) Euripides, *Orestes* [805-6]:

He whose soul is knit with thine, although he be not of thy kin,
Better than a thousand kinsfold this is for thy friend to win. (W.)

Add Valerius Maximus, Bk. IV, chap. vii, at the beginning. It often happens also that we feel much more at ease with one who is not related to us than with a kinsman, and trust to the former's discretion and fidelity much that we conceal from the latter; and, indeed, we are more prompt to serve a friend than we are when a kinsman needs our help, because he also comes more promptly to our aid than does the latter.

Yet it does not follow from this that there is a general custom, approaching the force of a law, by which a friend is to be preferred to kinsmen, even though the deceased has shown more indications of affection for him than he has for them. For in transmitting an inheritance concern is paid not alone to mere kindness, but also to the question, 'Who is the person to whom our property should most fittingly pass?'² And since it is a common tendency among men to make the family, to which they owe their origin, as splendid as possible, it follows that the most appropriate thing is for our possessions to remain within its circle. Furthermore, it does not follow at once, that, because I was greatly delighted at this man's association, I therefore wanted to transmit to him my estate. For that friendship between people of different stocks usually extends no farther than to mutual display of goodwill, the interchange of counsel, and the offices of everyday life. But if I am to be understood to be uniting my house with that of another's by bequeathing my estate to him, there will be required a clear and attested expression of my will. Thus, although, as Gellius, Bk. V, chap. xiii, relates, according to the customs of the early Romans in the classification of their duties, after the duties between parents and children, the first place was given to *wards*, the second to *clients*, the third to *guests*, and the last to *kinsmen by blood and marriage*, yet in transferring inheritances no attention at all was paid to this order. Moreover, if friends were sometimes in the case of intestates to be preferred to kinsmen, the widest avenue would be opened to disputes, as much 435 between friends, if a man had more than one, as between them and kinsmen. For the fact that a man takes more pleasure in the company

¹ [For *familiaritate* read *familiaritate*.—Tr.]

² [For *transsire* read *transire*.—Tr.]

of a certain person, or speaks with him more openly, is by no means an infallible proof that he loves such a person above all others. For often charm or nimbleness of mind, equality of age, or good judgement, make the companionship of a friend more pleasing or profitable for us than that of a kinsman who lacks such qualities. Yet these considerations do not necessarily lead to the conclusion, that, when we must dispose of our property, we will be more favourable to the former than to the latter. In such a case the remark of Hesiod, *Works and Days*, Bk. II [707], will be to the point: 'Do not make a friend equal to a brother.' (E.-W.)

A final point: It is easy to sum up the degrees of relationship, but who can arrange the degrees of friendship that there will remain no ground for dispute?

16. But it is still urged, and this with more reason, that at least friends through whose generosity, advice, or aid, property has been acquired, should in its division be preferred¹ to kinsmen, since it is right that it should return to the place from which it flowed. Yet even in such cases there will not be wanting the most plentiful matter for disputes, the elimination² of which should be the first end of all laws. For the reply will be made to a friend, that he did not confer a kindness, but only returned one, or that enough gratitude had already been shown him; that he gave it without hope of receiving anything in return, and with the purpose that he might help not only his friend but some of his family; that he gave it to secure renown, or for his own advantage; that we could have got out of our straits by other means; that it is not certain how much his assistance contributed to the amassing of that property; that a person whose valued assistance we used in securing a thing is not necessarily to be admitted at once to the common use of it; that the services of friends, furthermore, would become mere business transactions, matters for contract and usury, if they are to be rated before kinsmen in intestate estates, for in such cases it would be understood that a thing is given one person by another only for him to keep it for a while, and at his death return it with interest.

Therefore, when there is no express disposal which favours a friend, the kinsmen will fall heir to it, on condition, however, that, along with the property of the deceased, they also inherit an obligation of his toward such a benefactor, and must strive to the best of their ability to show gratitude toward him, for the fact that by his assistance they secured such a rich inheritance. Nor is it allowable for one to urge against this the statement of Aristotle, *Nicomachean Ethics*, Bk. IX, chap. ii: 'One should repay a debt to a benefactor rather than make a present to a comrade, if he cannot do both' (W.); and of Cicero, *On Duties*, Bk. I [xv]: 'There is no duty more incumbent than to repay a kindness.' And again: 'Since there are two kinds of generosity, namely,

¹ [For *graeferendos* read *praeferendos*.—Tr.]

² [For *praeschindendam* read *praescindendam*.—Tr.]

to confer a kindness or to return one, it lies within ourselves whether or not we shall be the giver; and a good man cannot but make return, provided it is possible without injury to others.' (E.) Or the remark of Phocion, in Plutarch, *Apophthegms* [188 A]: 'The Athenians gathered a benevolence for a certain sacrifice; and when others contributed to it, he being often spoken to said: "I should be ashamed to give to you, and not to pay this man—pointing to a δαειστής [creditor]." ' (G.*) Add *Digest*, XXIX. v. 12.

In fact the matter of successions to intestates neither can nor should be regulated in every respect by the rules which are observed in rendering and returning benefits. For benefits are directed by the virtue of humanity and liberality, and properly speaking are given merely to those who had a right to expect them of us only on the dictate of those virtues. But successions to intestates depend upon other foundations, namely, the obligation to look after the needs of others, nearness of blood, and the inclination, urged by nature, to increase and preserve one's own family. Isaeus, *Orations*, vi [vii. 30]: 'All persons when they approach death make careful provision about their posses- 436 sions, so as not to ruin their families.'

In affairs of this kind the first care should be to find some clear way which shall be as little as possible open to disputes. And nothing is more convenient, in case the will of the deceased is not known, than to have the succession pass according to the degree of nearness in blood, in which each person stood to the deceased. Therefore, it has been observed by still others, that, in successions to intestates, matters stand differently from what they do in the conferment of benefits; in the former case the first necessity being to confer a benefit, in the second to return one, since children, who surely ought to be bound¹ by ties of benefaction, are preferred to parents, to whom one is indebted most of all. Lucian, *Abdicatus* [18]: 'Yet surely nature requires of parents that they love their children more than of children that they love their parents.' (F.) Compare Boecler on Grotius, *loc. cit.* Yet what has been said is not to be taken to mean that a feeling of gratitude should be banished from one's final disposals, but only that it is improper to try to take simply the presumed will² of a deceased person, such presumption being based on the expression of gratitude, as a general rule by which inheritances of intestates are to be assigned.

17. Now that this much has been established, it is clear that of collateral heirs the nearest to the inheritance are brothers, because they are bound to us by the very deepest affection, and because, due to the fact that they have brothers, they have received smaller portions of the inheritance from their father. Quintilian, *Declamations*, cccxxi: 'What friendship can be so fortunate as that which imitates brotherly affection ?

¹ [For *devinciendū* read *devinciendi*.—Tr.]

² [For *volontate* read *volumtate*.—Tr.]

Certainly, when we wish to compliment those who act like friends no flattery can go farther than to call them "brothers".¹ Add also the words of Cyrus to his sons, *Training of Cyrus*, VIII; Valerius Maximus, V. v, at the beginning; Stobaeus, *Anthology*, LXXII [IV. xxvii]. Sisters are also to be admitted together with brothers, at least in the property of the mother and that lately acquired, but not so much in their fathers' goods, which are intended to uphold the position of the family, since women usually marry outside the father's line. Brothers with the same father exclude those by the same mother, in sharing property of the father, while the case is reversed in property of the mother. In the case of property acquired since the time when my father married the mother of my half-brothers, it is more fitting that I secure a larger portion, since the father usually contributes more than the mother to the building up of an estate. When no brothers survive, then their sons will inherit, although it appears that they should also admit the uncles of the deceased, since these also have received a lesser portion of their father's estate, because it had to be divided with the father of the deceased. The same order should be followed in the division of the mother's estate among the daughters of sisters and their great-uncles on her side.¹ And this order shall also be continued in all other cases, with the provision, however, that when there are no kinsmen on the father's side, those on the mother's side share in the father's estate, and *vice versa*.

18. But it should be carefully observed, that such rules of inheritance are called natural, not because they have been so defined by some precept of natural law that no different disposal can be made of them, but because they are in the highest degree agreeable with natural reason, and appear best fitted to avoid disputes in the failure of any express disposal by the deceased or of civil law. Yet, generally speaking, in scarcely any field of right are civil laws to be found so solicitous as in the disposal of inheritances, not only that they may eliminate disputes between kinsmen, but also because it is important that such matters be settled according to the needs of the state. Furthermore, in some places the making of wills is very free, in others it is more or less restricted. It was a law of the Twelve Tables² in Rome [V. iii, Bruns]: 'As the head of a family has ordained in his will concerning his money or his guardianship, let this be regarded as valid'; which was in turn taken from an Attic law made by Solon. Thus, Plutarch, in his *Solon* [xxi. 2], tells us, 437 that his law whereby he gave citizens the power, unknown before his time in the state, to make wills, was most eagerly received, and thought most just. His purpose in framing such a law was not that a person could cheat his nearest of kin of their right of relationship, but that by giving this advantage to all, he might bring it about that men might vie with

¹ [For *defuncti* read *defunctae*.—Tr.]

² [For *tribularum* read *tabularum*.—Tr.]

one another in works of kindness, and kinsmen might be drawn all the more closely to one another, since, if they wanted to receive any of their relatives' possessions, they would have to outdo strangers in kindness. Demosthenes, *Against Leptines* [xx. 102]:

Solon passed a law empowering a man to give his property to whom he pleases, if he has no legitimate children, not that he might deprive the nearest relatives of succession, but that, by throwing the chance open to all, he might excite emulation to do mutual kindnesses. (K.)

At the same time it has seemed more consonant with liberty and fulness of dominion, that a man should not be forced to leave¹ his possessions to others than those whom he held dearest. A further point can be made that there often appears a more clear hope that a stranger will administer our estate for the advancement of virtue, than will some kinsman of ours whom the expectation of a rich inheritance not infrequently entices into luxury and ease. Theocritus, *Idylls*, x [xvi. 59]: 'Riches be wasted of their posterity after they are dead.' (E.) Moreover, it is a solace in the face of death, if one can leave his property, secured at such great labour, to those whom he loves best. Add Isocrates, *Aegineticus*. Yet Solon forbids those to make a will who had legitimate male children, to whom the father's estate was entirely due. It cannot be denied that because of this freedom of legacy there crept in among the Athenians as well as the Romans an enormous mass of cheating, flattery of old men and of those without close heirs, deceits, passing off of forgeries, and the like.

Among the provisions of Solon's laws on wills Bodinus, Bk. V, chap. ii, especially censures that article which allowed a man to convey land by will. His reason is, that when it was made possible for many estates to fall to one person, the result was a great inequality of wealth among citizens, and so the poor conceived a hatred for the wealthy, and the latter a corresponding haughtiness, evils quite capable of disturbing and destroying states. Especially since it is a rule, that where there are waters, waters love to gather. He also adds that it is to the interest of democracies that a few shall not excel² too greatly the rest in wealth. This was the reason for the Hebrew law that land could not be sold in perpetuity, and of the other that women who brought with them land as their dowry could marry only within their tribe, lest their marriage be the occasion of the estates passing to another tribe. See *Numbers*, xxxvi.

Such considerations as this led Aristotle, *Politics*, Bk. V, chap. viii [VIII. xii], to include this rule among those intended to preserve a democracy: 'Provision should be made that estates pass by inheritance and not by gift; for in this way properties will be equalized.' (J.) One may read in detail, in Plutarch, *Agis* [p. 797], what evil consequences to the Spartan

¹ [For *relinquere* read *relinquere*.—Tr.]

² [For *excedunt* read *excedant*.—Tr.]

state attended the liberty of wills, introduced in opposition to the constitution of Lycurgus by Epitades the ephor. Add Aristotle, *Politics*, Bk. II, chap. ix. Among other peoples, on the other hand, there was no freedom for a man to make a will as he pleased, or else it was greatly restricted. As for the Hebrew laws on this point, see Selden in his special work entitled *De Successionibus ad Leges Ebraeorum*, especially chap. xxiv; Grotius, *On Numbers*, xxvii. 8 ff. Tacitus [*Germany*, xx] thus describes the ancient Germans: 'A person's own children, however, are his heirs and successors, and no wills¹ are made. If there be no children, the next in order of inheritance are brothers, paternal and maternal uncles.' (O.) I see no reason why we should try, as one writer
 438 does, to take this to mean that the Germans, as yet unlettered, did not use a form of wills and written record, in accordance with the custom of the Romans, which Tacitus probably has in mind in that passage. For the Romans permitted the use of nuncupative wills, which require no writing down. Therefore, if Tacitus wished to convey the impression that only written wills were unknown to the Germans, he should have expressed it more clearly. We should bear in mind, further, that special rights of kinship were observed by that people with a certain sanctity, as is shown by some remarks by the same author farther on: 'The more numerous are a man's relations and kinsmen, the more comfortable is his old age; nor is it here any advantage to be childless. [xxi] It is an indispensable duty to adopt the enmities of a father or relation, as well as their friendships.' (O.) Likewise, even to this day in many parts of Germany, when a son is born to a man the common expression is heard, 'He has gotten an heir'.

Nor does it appear that there was any need for wills to be greatly prized by a people which did not yet know how to store up wealth, and was content with meagre furniture, which wanted of its crops, herds, and hunting no more than would meet their simple, everyday uses. People who lived such a life had no need to enlarge their holdings. Nor, indeed, is the making of a will so integral and necessary an accompaniment of dominion, but that the state can introduce a uniform manner of succeeding to intestates. Which was especially true of that people, since [xxvi] 'the lands they occupied by townships, in allotments proportional to the number of cultivators, and were afterwards parcelled out among the individuals of the district in shares according to the rank and condition of each person'. (O.) Yet for men to express their final commands to their family is not the same as to make a will. The Arabian impostor also laid down laws on successions, in the chapter of the *Koran* which concerns wives.

Now as this manner of succession is the most simple and the most highly agreeable to natural inclination, so it works to the preservation

¹ [For *testamentum* read *testamentum*.—Tr.]

of equal wealth among citizens, to the maintenance of a proper number of citizens, to the prevention of the merging of great estates (see Bacon of Verulam, *Henry VII*, p. 127), and to the preservation of the standing and continuance of families. It is also believed that kinsmen are more closely drawn by such a bond to promote mutual love and advantages, since they realize that they are heirs one of another. To this thought applies the passage in Plato, *Laws*, Bk. XI, cited by Grotius, *loc. cit.*, § 9, and explained by Boecler on the same passage in Grotius. Likewise, Pliny, *Panegyric* [xxxvii. 2], commends most highly the remission of the five per cent. inheritance tax to heirs in the family:

It was easy to imagine how painfully men would consent, or rather not consent at all, to have cut off and carried away some portion of the wealth which their blood, their clan, their common religious association, seemed to guarantee them; wealth which they had received not as coming from some alien source, and as something to be hoped for, but as their own property, which they had always had, and expected to transmit to their nearest kin.

Publius [Publilius] Syrus [222]: 'To know your heir is better than to look for one.'

Yet those peoples have apparently settled this point more wisely, who have granted unrestricted assignment by will of those possessions which a man has acquired by his own labour, and decreed that what has been acquired from fathers and ancestors should pass to the nearest of kin, for by this method the reasons adduced on both sides are excellently tempered and joined. Jodocus Schouten, *Descriptio Regni Siam*, recounts a custom very different from that of the Europeans. In that kingdom the estate of wealthy persons is usually divided into three parts, of which the king takes one, the priests another, from which the funeral expenses are also taken, and the third passes to the children. No less strange is the custom among the Ethiopians on the coast of Guinea, whereby the children receive nothing from the father's or mother's estate, but it all goes to the nearest of kin.

19. But those who come into an inheritance, both when there is, and when there is not, a will, have the common obligation to pay a debt of the deceased. And this follows not so much because they have tacitly obligated themselves to do so (which is the basis for the disposition made in the ancient Roman law, *Digest*, XXIX. ii. 8), as because that burden attends the property of the deceased like a tacit mortgage, for as Quintilian, *Declamations*, cclxxiii, says, 'The theory upon which an inheritance passes to another person is that the creditor must be satisfied first.' Furthermore, a man is worth only so much as remains after his debts have been paid. Add Valerius Maximus, Bk. VII, chap. ii, § 11. Therefore, it is most highly agreeable with natural equity that an heir should not be held accountable for what exceeds his inheritance. Add *Digest*, III. vi. 5; XI. vii. 14, § 1; XVI. iii. 7, § 1;

XLIX. xiv. 11; *Law of the Visigoths*, Bk. VII, tit. ii, chap. 19. Yet we should not fail to note what Gabriel Sionita, *De Moribus Orientalium*, chap. xvi, tells of the Mohammedans,¹ namely, that when they make their will at the approach of death 'they are bound to restore according to the laws whatever had been seized or stolen, getting from the owners a receipt of payment; and if they do not know to whom the articles should go, then they must donate that money to public works, such as hospitals, mosques, and baths, or to charitable and religious purposes'. Add *Luke*, xix. 8. In Ferdinand Pinto, chap. xxi, a Chinese hermit advises Antonio de Faria, who was guilty of sacrilege, to do three things for the good of his soul: Restore what he had taken, seek forgiveness of his sin with tears, and give alms to the poor with a generous hand. Add *Idem*, chap. lx.

¹ [For *Musselmanus* read *Musselmanos*.—Tr.]

CHAPTER XII ON USUCAPION

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| <ol style="list-style-type: none"> 1. How usucapion differs from prescription. 2. How the Roman laws defined usucapion and where they allowed it. 3. How far good faith is required in usucapion. 4. Continuous possession is a requirement. 5. The reasons for introducing usucapion. 6. Whether the law of usucapion is penal. 7. Many refer usucapion to civil law. | <ol style="list-style-type: none"> 8. Whether usucapion arises from a tacit relinquishment of dominion. 9. It appears to rest upon a tacit agreement of nations. 10. How far usucapion injures those yet unborn. 11. Usucapion obtains even among different nations. |
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WE must now consider that method of acquisition whereby he who has secured possession of another's property in good faith and by just title, and has held it without challenge over a long space of time, obtains a full property right to it, the right and legal action of the former owner having ceased. This method¹ is called *usucapion*, because a thing is taken and acquired by use or continued possession. That special case, in which the former owner after a completed usucapion is repelled by the possessor, is properly called prescription, although the two are often confused. It will be worth while to offer a few preliminary observations on what the Roman law instituted in this connexion and its reasons, for in this way it will be clear what matter there is here for positive law as well as natural law.

2. In *Digest*, XLI. iii. 3, Modestinus defines usucapion as: 'The addition of dominion through continuation of possession for a period defined by law.' For our purpose we feel that it is the same whether we read 'addition' [*adiectio*], or, with Cujas and others, on the authority of Ulpian, 'acquisition' [*adeptio*]. For whoever has continued the possession of a thing for the period prescribed by law, such possession having been secured in good faith, has something 'added' to him which he had thus far lacked. And he to whom the law has added something can be said to have 'acquired' it. 440

Now just as a man can secure property by usucapion, if he is fitted to acquire dominion in any other way, so dominion can be acquired by usucapion over movable and immovable things, unless they are exempt by the laws. And free men are so exempted. For since liberty is so sweet a draught that it is presumed no man neglects an opportunity to recover it, the conclusion is just that a person who remained so long a time in servitude and did not claim his liberty, acted from ignorance of his status and not because he tacitly consented to his servitude.

¹ [For *modo* read *modus*.—Tr.]

Therefore, a continued submission should work pity for such a person rather than his detriment.

Sacred objects, and such as are connected with religion, also constitute an exception, as also the property of wards, so long as they remain such. For the neglect on their part, due to their tender age, to put in their claim, cannot be imputed to them to such an extent that they should therefore lose their property, while it would surely be too great a punishment for them to suffer for the negligence of their guardians. Exception is likewise made of stolen property, of fugitive slaves, and whatever has been possessed by force, even though a third party may have acquired possession of them in good faith. Thus, it is a rule of the Twelve Tables:¹ 'Let the authority over a thing stolen hold forever.' For as to the thief or robber himself, his own crime prevents him from acquiring a thing in this manner, while the third person, the possessor in good faith, is hindered by the fault of the theft or robbery, which is understood to accompany, as it were, the object itself. For although, properly speaking, there is no fault in the thing itself of its own nature, yet because it was taken from its former owner in a faulty manner and by means of a crime, it seemed just in the sight of the laws that this right be not extinguished, and that care be taken at the same time to keep a man's misdeed from being able to minister to his gain. For since movables can be acquired by a usucapion of three years, it would be easy for thieves to put stolen property in a place, and in other hands, where it could not be found by the former owner within that period.

Furthermore, among the other reasons for a law of usucapion is cited the negligence of the owner. And yet stolen property is as a general thing carefully concealed. Therefore, this consideration never held against those whose property had been taken from them by theft. But since later laws stipulated that all actions at law are extinguished by a continued silence of thirty or forty years (*Code*, VII. xxxix. 3 and 4), a prescription of so long a time will repel the owner if he then puts in his claim. And although some feel that this custom is opposed to equity, since it is absurd to build upon continued licence and injury as upon right and justice, yet it can be excused by reason of the general advantage which follows from it to the public. For it is of value to the public peace that disputes which would run on for ever should be finally closed, and that the dominions of things should not be in continued uncertainty. Moreover, it seemed inconvenient, in view of the fact that the human race is practically renewed every thirty years, for a following generation to be disturbed by quarrels on some slight occasion. And when a man had done without a thing for thirty years, it was justly felt that he had in good faith settled down to bear the loss, so

¹ [Rather the *Lex Atinia*, given in Gellius, XVII. vii.—Tr.]

that there was no need of so long a possession being disturbed on his account.

And the same consideration can be applied also to the prescription of crimes, for surely it seems superfluous to call back to judgement, from another generation, misdeeds, the effect of which had been so completely effaced by the passage of a long period, that the ends for which punishments are instituted are no longer met. See Antonius Matthaëus, *De Criminibus*, XIX. iv and XX. iv. 14, on *Digest* XLVIII.

3. But for usucapion to proceed, it is required that when a man secures the possession of a thing, the former possessor of which was not the true owner, he must do so by a just title, that is, such a title as is otherwise held sufficient to transfer and acquire dominion. And therefore, that he act in good faith, that is, both that he be able to show sufficient reason why he holds it, and that he is convinced that dominion was actually turned over to him and he was constituted an owner. Libanius, *Declamations*, i [iii. 16]: 'Just possession is not secured by virtue of having acquired something, but by virtue of holding it without any grounds for criticism.' Therefore, Tacitus, *Annals*, Bk. XIV [xviii], calls it a 'continued licentiousness and injustice' that the fields which had formerly belonged to the king Apion, and had been left to the Roman people, had been seized by any man who could get there first. According to Roman laws it is enough that this good faith have been present only at the outset of the possession, even if a man afterward discovers that he from whom he received the thing was not its owner. But by canon law good faith is required throughout the entire intermediate period (*Decretals*, II. xxvi. 5 and 20), so that if a man discovers, during that period, that the thing passed to him from one who was not its owner, he begins to be obligated in his conscience to restore the thing to its true owner, and his possession henceforward is in bad faith, at least if he undertakes by sharp practice to keep the thing from the knowledge of the true owner. Such a position seems to approach more nearly the sanctity of natural law, since, upon the introduction¹ of dominions of things, an obligation is understood to have been laid upon all men to strive in every way possible to enable a man to recover a thing which they hold without his consent. Add below, chap. xiii, § 2. But the Roman law thought it enough to establish the extrinsic innocence of men, and allowed the possessor who had secured a thing without fault to rest undisturbed in his possession, the task of finding the thing and establishing his claim to it being left to the owner.

4. It is, furthermore, required that possession be continuous and be not interrupted either naturally, that is, that it either pass in the meantime back to its true owner or be left at some time derelict or

¹ [For *introducua* read *introducua*.—Tr.]

abandoned; or civilly, that is, if, for instance, the owner bring a suit against the possessor about the thing, or at least by formal protests preserve for himself an undiminished right. Add Boecler and Ziegler on Grotius, Bk. II, chap. iv, § 9, where they observe, however, that the time during which the first party possessed it, counts for his successor, provided¹ that both of them entered upon their possession in good faith and with just title. For otherwise there will be no addition or accession of time from the first party, and so, when he acted in bad faith, his time of possession is not added to that of his successor, although the latter possession be entirely lawful. And this principle applies as well in the case of a general successor,² such as an heir, as in the case of a particular one, such as a purchaser or receiver of a gift, &c. Yet although the fault of the first party is of no advantage to the latter kind of successor, who is consequently unable to add the first period to his own, it does not on the other hand work to his prejudice, provided he acted in good faith, and he can complete the usucapion by keeping possession in his own name. The situation is different, however, in the case of a general successor, for since he succeeds to every right of the deceased and represents him, he does not by his ignorance and good faith remove the fault of the deceased.³

A longer period of time is required for one to be able to effect prescription against a person who is absent than against one who is present.

Movables are subject to usucapion in a briefer time than immovables. The reason for such an institution appears to be partly because it is adjudged more grievous to lose immovables than movables, partly because the latter are open to sale more often⁴ than the former, while at the same time it is easier to secure possession in good faith of the movables of others than of their immovables, with the consequence that there is no need to fear so great a mass of disputes over the latter as over the former. Plato, *Laws*, Bk. XII [p. 954 c ff.], lays down the following rules on usucapion of movables:

If a man has any possessions which he has used and openly⁵ shown in the city [. . .] no one shall be permitted to claim them after the expiration of one year; [. . .] or if in the country [. . .] after five years. Or if he uses them in the city, but in his own house, then the appointed time of claiming the goods shall be three years, or ten years if he has them in the country in private. And if he has them in another land, there shall be no limit of time or prescription, and whenever⁶ any one finds them he may claim them. (J.*)

The laws which Plato set up for his ideal state take no cognizance of usucapion of immovables.

442 5. The chief causes adduced by the expositors of the Roman law for the introduction of usucapion are, that it would tend to avoid clashes and prevent disputes in a state, if dominions were fixed among

¹ [For *dummodo* read *dummodo*.—Tr.]

² [For *defuncti* read *defuncti*.—Tr.]

³ [For *operere* read *operie re*.—Tr.]

² [For *insuccessori* read *in successori*.—Tr.]

⁴ [For *frequentibus* read *frequentius*.—Tr.]

⁶ [For *quando*, *cunque* read *quandocunque*.—Tr.]

its citizens. This could not be done if the neglect of former owners were to be granted indulgence for ever, and if those who had recently been established in possession were left in constant fear that some day their property would be taken back from them.

Nor could there be business dealings among men without it. For who would want to contract with another, who would buy from another, if there were never such a thing as undisturbed possession of an object? Nor would there be enough relief from a suit of recovery, since an infinite number of things could prevent the first party from being able to make it good after so long a period. And what serious disturbances¹ would vex a state, if, after so long a lapse of time, so many contracts would have to be broken, so many successions annulled, so many possessors expelled! Add Boecler on Grotius, *loc. cit.*, § 8. In view of all this it has appeared to be enough to leave owners a reasonably long period of time for the recovery of their possessions. But when their indolence allowed this to slip away, the judge² was properly permitted afterwards to repulse their belated importunity. And although it is possible that one man or another may unwillingly fail to recover his property through no fault of his own, and because he could not find the possessor, yet the damage arising to a few by a general rule of this nature, is balanced by the advantage accruing to the state.

Yet it should be carefully noted, that, before there can be a presumption of negligence on the part of the original owner, he must have been allowed a convenient and sufficient period in which to do his part. And so it is most equitable that the time in which a state has suffered war within its borders shall not avail toward prescription. Thus, Honorius had a law passed: 'Whatever time should be spent by the Vandals in the Roman domain should not by any means be counted towards a demurrer.' (D.*) Procopius, *History of the Vandals*, Bk. I [iii. 3].

6. But it is not necessary for explaining the equity of civil laws in establishing usucapion, that with Hugo de Roy, *De Eo Quod Justum Est*, Bk. III, tit. iii, iv, we should by right have recourse to the power³ residing in the magistrates of states to punish guilty persons. As if actions are after a certain time denied those who fail to claim their property, on the ground that those who allow their property to be taken from them by usucapion can justly and properly be included among criminals; and that in thus neglecting their own affairs they sin not only to the common injury of society, but against their own nature, which everywhere favours the benefit and advantage of the state. And that just as Solon established a penalty for negligent persons, so in the case before us the neglect of owners is punished by the loss of dominion over the things in question.

¹ [For *turbe* read *turbæ*.—Tr.]

³ [For *potostatem* read *potestatem*.—Tr.]

² [For *pretor* read *praetor*.—Tr.]

But the fact is that the primary purpose of the law on usucapion is not to punish the guilty, but to prevent states from being disturbed by uncertain and unsettled dominion. Although ¹ it does follow that the man who is afterward denied action for a claim long neglected suffers some loss.

Moreover, the exclusion from some advantage which is open only to those who look after and give proper care to their affairs, does not have the nature of a punishment properly so called. For it is certainly a figurative expression when we say, 'The lazy are punished by their own character', or 'It is punishment enough for the slothful that they are kept out of every position of influence and forced to lead a life of obscurity'. Yet it is no more right to say that a man who allows his property to be lost through usucapion, sins against the state. For the public interest is injured rather by those who, it may be, misuse their property, or by merely sitting at ease upon it, as it were, in their ownership, allow it by their negligence to be of no service. But if a thing is appropriated by usucapion, it is at least looked after by some one, so that it is of use to the state. It is, indeed, of little concern to the state whether a piece of land is cared for by Gaius or Seius, provided it does not lie without a caretaker.

Consider, also, that when an individual secures some advantage from another's punishment, it must be that he had been greatly injured
443 by the offender. And yet he who receives dominion ² by usucapion has in no way been injured by the negligence of the owner.³ It is improper to apply to such cases the words of *Digest*, XVI. iii. 31: 'He who has deserved ill of the public ought to be left to struggle with poverty, so as to serve as an example to others to keep them from doing wrong.'

Since, therefore, the law of usucapion is not penal, it is idle to discuss why the negligence of the owner should best be curbed by the loss of the thing and not by some fine. Although it is quite certain that by a fine of this sort civil laws could not have secured their end, which was to avoid at their outset the disputes that would constantly arise, and to grant to possessors over a long period, who deserve great favour, an ultimate security in their holding. For in the first place the claim would have to be settled ⁴ before a court, where the decision would be all the more difficult the longer the thing had been in the possession of others; and then the possessor would have to be ejected from his holding, and his title and good faith would be of no value to him if the fine went to the judge. But if it went as a compensation to the possessor, even then not all the difficulty would be resolved. For if it is less than what the possessor would lose by giving up his holding, he is still a loser,

¹ [For *Et si* read *Etsi*.—Tr.]

² [For *Atiquei* . . . *usucapionem dominum* read *Atiquei* . . . *usucapionem dominum*.—Tr.]

³ [For *domini* read *domini*.—Tr.]

⁴ [For *adendum* read *adeundum*.—Tr.]

and if it is the same or more, little will result to the old owner. Therefore, there is in such cases no easier way to peace, than, after the period of usucapion is complete, to declare the right of the old owner extinct.

7. Scholars are not yet agreed on the question by what right usucapion was introduced. Most writers ascribe its beginnings to civil law, and distinguish its mode of acquisition from those which are commonly attributed to the law of nations. Indeed, Cujas on *Digest*, XLI. iii. 1, goes so far as to say that usucapion is opposed to the law of nations, because it takes dominion from a man against his will; and that it is opposed also to natural equity, even though it is for the public good, for it means a loss to owners although an advantage to the state. To this Hugo de Roy, *loc. cit.*, replies that dominion, by reason of the fact that it subjects itself to civil laws which establish usucapion, agrees at least implicitly to such a transfer of dominion.

Another reason advanced by Cujas for usucapion not agreeing with the law of nations, is that he who secures a thing from a non-owner is by the law of nations not its owner; for in no manner is it possible by the law of nations for a non-owner to make another an owner, while by civil law he who receives a thing of a non-owner is made its owner, if he has held it for a certain number of years. To this Hugo de Roy, Bk. III, tit. iv, § 8, replied, that in usucapion the seller, or any other non-owner,¹ conveys only the title and possession in good faith, while the dominion is conferred by the law alone, or by him who holds by the law of nations legitimate power to pass laws, and to transfer dominions from one person to another on a sufficient plea of the public good, the actual owner by his negligence approving the transfer of ownership, or his consent being presumed from his long silence.

Some maintain that usucapion belongs to civil and positive law for the reason, that, when a man has not obtained a right originally on some other ground, time alone cannot confer it on him, since time in itself has no effective force; for nothing takes place from time, even though everything must take place in time. On that point this much is certain, that it depends entirely upon the determination of civil law, whether usucapion is completed at the tenth or twentieth year, rather than at the ninth or sixteenth; and yet it cannot be denied that the consent of nations, upon consideration of the peace of mankind, can assign some moral² force to a period of time, in so far, at least, that upon the passage of a certain period presumptions and considerations are held to have arisen from other causes, which strengthen the right of the possessor. For although bare natural reason and the agreement of all nations do not make the production of some right dependent upon the existence of some point of time, they have still been able to assign this effect to a space of time which embraces a considerable period. 444

¹ [For *non dominum* read *non-dominum*.—Tr.]

² [For *motalem* read *moralem*.—Tr.]

Others have preferred to deliver themselves on this point artfully and timidly. Since they recognized the great advantage to a state in the law of usucapion, they judged it probable from the nature of the custom, and its existence before all positive law, that it had the power to transfer dominion, since natural reason strictly commands the performance of whatever conduces to the public good and peace. They qualify this statement, however, by adding that the light of reason dictates it to be highly suitable and expedient, that usucapion be established by positive law, but that it is not so necessary that it be established by natural law itself.

Many acknowledge that prescription is not opposed to natural law, that it contains within itself natural equity and rests upon a most just right, and, as it were, a law of nature, but they hesitate to say in so many words that it is a part of natural law. Add Grotius, Bk. II, chap. iv, § 9; Boecler and Ziegler on Grotius, *loc. cit.*, § 1.

8. In order that he may show that usucapion belongs to natural law itself, and so may be properly appealed to by those who are under that law alone, Grotius, Bk. II, chap. iv, bases it upon the tacit dereliction of the former owner. In order to prove this he assumes that it is in accordance with nature's law for a man to be able to relinquish a right of his whenever he prefers to hold it no longer. But in order that such a will to abdicate may have an effect in relation to others, it must show itself by means of certain signs, since it is not consistent with human nature to assign any extrinsic effectiveness to mere internal acts. Now included among signs are both words and acts, and, indeed, when the will has been signified by words there is no reason to wait upon the delays of usucapion, since a right passes at once to another. And this is the case as well, when a man has indicated his will by a positive act, when, for instance, he casts it away, or abandons it, unless the circumstance of the thing be such that it should be thought of as cast away or abandoned only for a time, with the intention of seeking and looking for it again. Add *Digest*, XLI. i. 9, § 8; XIV. ii. 8; XLVII. ii. 43, § 11; II. xiv. 2, § 1. So also if the owner of a thing knowingly treat of it with its possessor as though he were its owner, it will be proper to hold that he has given up his right, and that, indeed, his right ceases at the very moment the terms are completed. Therefore, usucapion applies only in the case of things to which the former owner has not renounced his right either by words or any express act, and yet such a will on his part is presumed from his failure to hunt them out and claim them. For even non-performances or omissions, considered with the circumstances due to them, are held in moral matters as acts which can work to the prejudice of the one who makes no sign. See *Numbers*, xxx. 5, 12; *Digest*, XXII. i. 17, § 1; XLI. i. 44.

But in order that a will or desire may be presumed from an

omission, it must not have come from simple and innocent ignorance. Therefore, the possessors of things belonging to others secure dominion by the tacit consent of the owners, if the latter knew that the former were in possession of their property, and yet failed to claim it when they had a convenient opportunity to do so. For to such negligence and silence on the part of a man who was cognizant of the fact and free to act, no other cause can be assigned than that he had no further interest in the thing, and no longer wanted it among his possessions. Add Boecler on Grotius, *loc. cit.*, § 5, and Ziegler on the passage before us.

Furthermore, the passage of time affords a strong conjecture that a man may be assumed to have consciously neglected to claim his property. For it is scarcely possible that we should not have observed in the course of a long period that something of ours is being held by another, or that we should not have had an opportunity to open our claim to it, or at least to interrupt the other's title by denouncing and protesting it. So also any fear we may once have had usually passes 445 after a long time, while at the same time ways may be found whereby the holder of our property may not force us to fear any further.

To the presumption that no one may lightly be assumed to throw away his property, Grotius opposes another: That no one is assumed to want a thing to belong to him, in which he has for a very long time shown no evidence of interest.

Although all this is advanced in a plausible manner, it is, nevertheless, certain that prolonged silence does not always avail for a presumption of tacit dereliction. For it can also happen that a man has been ignorant of his right for a very long time, or has been hindered from asserting his claim through fear and inability (see *Decretum*, II. xvi. 3. 13, 14, in Gratian). And when a man claims his property, however long a period may have intervened, he cannot ever have abandoned it beforehand. Therefore, this basis for prescription will not hold good in all cases.

The further reason given by Grotius, namely, that dereliction is presumable also from the continued silence of the owner, because 'it ought not to be supposed that men have such a disposition that, out of consideration for a mere perishable thing, they would wish a fellow man to live in a continual state of sin' amounts to nothing. For not to mention the fact that it seems too great an assurance to promise ourselves so much upon the piety of mankind (add Ziegler on Grotius, *loc. cit.*, § 8), such a possessor in good faith, whom we have described as being able to secure dominion by usucapion, is not in a state of sin, since the manner in which he came into his possession leads him to the firm conviction that he acquired dominion at the time that he took possession. Nor does it appear that a man is bound of his own accord to call his own right in question, when it has been based upon a legitimate

and probable title. But if any sin whatsoever resides in the possession of another's property, it would have to be removed not by the silence of the owner, but by his express confession and the renunciation of his right, if he would actually have the fullest concern for the possessor's conscience. And yet in a case like this the possessor will secure his right not by usucapion but by the act of the owner himself.

9. Among such discordant opinions this much at least is clear, that just as dominions of things were introduced in the interest of peace, so it flows from the same consideration that possessors in good faith should at some time be made secure, and should not be allowed to be disturbed by an endless controversy over their possession. But we do not find that the length of time within which possession in good faith takes on the strength of dominion is precisely determined either by natural reason or the universal agreement of nations. It will have to be set with some latitude by the decision of upright men. Yet in such a way that we may not cavil at that latitude after the manner of Horace, *Epistles*, Bk. II, ep. i [34 ff.]:

If you say that poetry is like wine which improves by keeping, then I must ask you to tell me what the year is that gives writings their claim to a higher price. A writer who died a hundred years ago, should he be reckoned among the perfect and ancient, or among the worthless and new? Name a limit, to bar future quarrels. 'He is old,' you say, 'and excellet, who completes a hundred years.' What then of one who has been dead less by a single month or year—amongst which is he to be reckoned, the ancient poets, or those whom the present and all succeeding ages must hold in contempt? 'He certainly shall find place of honour among the ancients whose age is less by such a short space as a month or even a whole year.' I make the most of what you grant me; and like single hairs of the horse's tail, little by little I pull away one and then¹ another, &c. (W.)

Add Grotius, *Florum Sparsio*, on *Digest*, L. xvi. 177.

But in setting this period consideration will be given both to the former owner and to the new possessor. To the former in order that he may not too soon be cut off from the possibility of pursuing after and finding his property, in view of which it is naturally just that usucapion should not be concluded so quickly between persons absent as present. To the possessor in order that he may not receive an undeserved loss if
 446 the thing is taken from him at a time when he is no longer able to look after his interests by a suit against the vendor of the thing, or when it has become, as it were, a cornerstone of his fortune. And so, since movables pass by sale to others more frequently than immovables, and it is much more difficult to find the original purveyors of the former than of the latter, it is reasonable that a longer period should be allowed for recovering immovables than for recovering movables; especially since the latter are more quickly worn out than the former. For it would be of little use to the former owner to recover his property after so long a time, when it had been worn out and ruined.

¹ [For *domo* read *demo*.—Tr.]

And although a man may have secured his title to a thing at a good bargain, it is still a hardship and cause for complaint, after so long a time to have a thing torn away which has, as it were, long since become an integral part of his estate. Especially since it is believed that a man will feel little annoyance if he is forced for all time to do without a thing which he has cheerfully done without for a large part of his life, during which he has been able to look out for himself satisfactorily enough by other means. To this can be applied the statement of Cicero, *On Duties*, Bk. II [xxii]: 'What justice is it that lands which have been pre-occupied for many years [. . .] he who was possessed of none should get, but he who was in possession should lose?' (E.) See *ibidem* a rather long passage discussing the action of Aratus of Sicyon.

And so in view of all these considerations it is easy for an honest man to find in particular cases a length of time for usucapion which is agreeable to natural equity. Although it is better in states, in order to lessen the intricacies of disputes, to set beforehand fixed and decisive universal limits for usucapion in accordance with the state of affairs. It seems to us, therefore, that according as usucapion derives from points of time designated by civil laws, it is a kind of appendix and consequent of the dominion of things; and so, when dominions of things were introduced, it also seemed best for the sake of peace, that whoever possessed something in his own name, neither by force, nor stealth, nor precariously, was presumed to be its owner, until¹ some one else proved the contrary, while a man who had in good faith kept possession of something for an extended length of time, during the whole of which no man, at all regardful of his property, is expected to neglect it, is surely able to repulse the belated petitioner because he did not undertake sooner to claim what was his.²

10. On these principles, and the understanding that the reason for usucapion does not lie entirely in the dereliction of the former owner, it is easier to solve the rather intricate question, whether, and in what manner, children still unborn can lose their right by the tacit dereliction of their parents and ancestors. This problem can be understood in two ways, as it concerns usucapion that was either completed before they were born, or that had begun only during the lifetime of the father and was not yet completed upon his death. If we take the negative side in the first case, the difficulty arises, that, on this score, there is no advantage to the tranquillity of empires and dominions, since the larger part of all property is such as can be transferred to posterity, and so it would serve no end to repel the father, if the son could renew the suit. Yet if we answer it in the affirmative, it will appear strange how silence and negligence can injure those who were unable to speak or institute

¹ [For *quo ad* read *quoad*.—Tr.]

² [For *citus* read *citius*.—Tr.]

an action, who, indeed, were not yet in existence; or how the deed of some people can become a damage to others.

This problem¹ Grotius, *loc. cit.*, § 10, solved as follows: There are no accidents of a thing not existing, and he who is not yet a part of the world has no right, and so nothing can be said to be taken from him. M. Seneca, *Controversies*, Bk. I, cont. vi [3]: 'As long as we are not,² nature governs us, and sends us into any fortune she pleases; it is only when³ we are our own masters that any one has a right to pass judgment upon us.' Now by him who is not yet a part of the world we understand one who has not yet been conceived, not one who is still in the womb; for this latter is treated in many matters of law as a
447 member of society. See *Digest*, XXXVII. ix. 7 pr.; XXXVIII. xvi. 7; L. xvi. 231. A further consideration is that the property of parents commences to belong to their children only when the parents keep possession of it up to the time when it should pass to their children.

This may be a little further elaborated. No right can be acquired for a person not yet existing except mediately through another person already existing, from whom it will be derived to him yet to be born, yet in such a way that the right has no effect in relation to the one who is yet to be born, unless he is born afterwards. And this happens when something is acquired or passed on to a person, to be held⁴ in such a manner of possession that he may pass it on to his successors as well. Yet here a distinction is observable: Some things are conferred upon a person in such a way that it is of no interest to the one conferring them whether they can pass on to his descendants or not, although so far as he is concerned the person on whom something is conferred has the faculty to transmit it to his successors. Yet some things are conferred in such a way that the person conferring retains for himself a certain right over the manner of possession determined by himself, so that it cannot be changed without his consent. Now no matter in which of these ways a thing is held by a person antecedent to one yet unborn, to be passed on to the latter, if it is destroyed or alienated in any⁵ way before the successor is born, the latter suffers no injury whatsoever, unless some claim to it is left him after the manner of an inheritance. For since in the former case the thing itself, as well as the manner in which he is to hold it, are entirely in the hands of the possessor, even though he alienate it, or in whatsoever way it becomes no longer his, all of his right in it is at once extinguished, and so it cannot be passed on to one not yet born, who can advance no right to such property of his predecessors except what is actually turned over by them to him while alive and from hand to hand, as it were. See *Digest*, I. ix. 7, § 1. But

¹ [For *nondum* read *nodum*.—Tr.]

² [The text is highly uncertain.—Tr.]

³ [Reading *tunc* for *hinc*, which has no MS. authority.—Tr.]

⁴ [For *optinendum* read *obtinendum*.—Tr.]

⁵ [For *quoconque* read *quocumque*.—Tr.]

since in the latter case the person who bestows a thing upon another still has power over the manner of his holding it, the possessor certainly does nothing to the prejudice of his successors, if he alienates the thing or allows it to go as derelict, no matter in what way it was lost to him, unless the giver show his consent.

Although all this be as stated, Pisistratus thought otherwise, as appears from a letter of his to Solon, in Diogenes Laertius, *Solon* [I. 53], in which among other things he says:

I am not the only one of the Greeks who has seized the sovereignty of his country, nor am I one who had no right whatever to do so, since I am of the race of Codrus; for I have only recovered¹ what the Athenians swore that they would give to Codrus and all his family, and what they afterwards deprived them of. (Y.)

The question in the latter sense is denied by the Roman Jurisconsults, because, as they say, in the course of usucapion the time does not run on, but is checked during years of minority, and only on their completion commences again to run. But I should feel that cases can occur when the favour of possession would outweigh that of age, for instance, if I should lack but one or two months to complete my usucapion, and it were morally certain that the former owner would not question² my claim to it within that period, and yet he should happen to die, leaving an infant heir³ just born. In such a case it would be too hard for me to be removed by a protest from my possession of twenty-five years because of those two months. Especially if I can no longer secure from the owner damages, which⁴ could have been secured had the protest been made before the property passed to the heir. Surely in such a case an honest arbitrator, who recognized that considerations of equity in usucapion are not to be sought solely in the neglect⁵ of the former owner, will decide for me rather than for the other. Nor does it seem so hard that a right which in the lifetime of the father was drawing, as it were, its last breath, should finally perish in the minority of his son, especially since it is far more grievous to men to yield up a thing long possessed⁶ than to be cut off from what had not yet been secured.

II. It appears from these considerations, that they also who make 448 use of the mere law of nature and nations, can oppose to each other a possession which is of long standing, uninterrupted, and secured upon good faith, and this all the more as public possessions are distracted by more serious turmoils than private. Although it must be confessed, that it is often not so necessary in public disputes to have recourse to usucapion, since the right of the possessor is often able, or at least should be able, to be drawn from other considerations much more firm. And already Boecler on Grotius, *loc. cit.*, § 2, has observed: 'Those men frequently use a shorthand expression who in this matter of usucapion

¹ [For *vendico* read *vindico*.—Tr.]

³ [For *herede* read *haerede*.—Tr.]

⁵ [For *negligntia* read *negligentia*.—Tr.]

² [For *litum* read *litum*.—Tr.]

⁴ [For *que* read *quae*.—Tr.]

⁶ [For *postesta* read *possessa*.—Tr.]

specify merely the time. For there must be understood those elements which are combined with time, as for example, quitting the thing, the intention of quitting it, or tokens of the act of renouncing ownership. And since the plea of time is something that all are familiar with and is extremely plausible (as if, that is, a lapse of time supports the pleader who alleges other proofs), it is one of the devices of public pleading to urge this point in a non-technical fashion,¹ and to make frequent mention of time in a general way, purposely avoiding all explanations and additions which might be able to give some strength to a consideration which in itself is without effect; and instead of them to pile up examples of men who argue without discrimination, so as to give colour and fulness to the plea.' In Tacitus, *Annals*, Bk. VI [xxx. 3 and 4], it is called 'vainglory' for Artabanus to 'lay claim to territories formerly belonging to the Persians and Macedonians'. The same thing, according to Ammianus Marcellinus, Bk. XVII, chap. v, was done by Sapor at a much later time, who was met with the following reply by Constantius, who opposed like with like: 'It was strange that he should forget how the Persians had become the servants of the Macedonians, and now that these latter had been conquered by the Romans, the slaves of the Macedonians had become subject to Rome.' Zonaras, Bk. III [XIII. ix]. See also Herodian, Bk. VI, chaps. ii, iv.

So also Suleiman often used to say that the sovereignty of Rome and the entire Occident belonged to him, because he was the legitimate successor of the Emperor Constantine, who made the capital of the empire Byzantium.

Yet in the most outstanding examples you may see in addition to length of possession a further title asserted capable of producing dominion. See *Judges*, xi. 15 ff. Thus, Isocrates, under the person of Archidamus, shows in the first place that the Lacedaemonians got control over Messene² by a just war. Then the length of their possession is called in as a subsidiary argument [26]: 'Further, you cannot be unaware that possessions, both public and private, if a long time has elapsed, are considered by all to be confirmed and hereditary.' (F.) He adds that when there had been a good opportunity to do so previously, no controversy was raised against him about Messene. Add Alberico Gentili, *De Jure Belli*, Bk. I, chap. xxii. And, indeed, in this kind of causes a great presumption for the right of the possessor is found in the fact that during so long a time it never occurred to any one to claim any right to that thing. For transactions of this kind are usually of such great importance, and are conducted in such a clear light, that if any right of a third party is concerned in the affair, it can neither long escape him, nor can he lack an opportunity to protect his right, at least by a protestation.

¹ [For *Minirua* read *Minerva*.—Tr.]

² [For *Mestene* read *Messene*.—Tr.]

Therefore, there can occur only very rare cases when dominion shall not finally have to follow upon usucapion, if a people has secured anything¹ by peaceful title. In the case of things acquired by war there is scarcely any need of recourse to usucapion, for so long as a state of war continues, the possession of all those things which have been taken from the enemy, rests only upon force, while one has always the right of using every means to recover one's losses, at least in case one is ready to give satisfaction when one's cause is unjust. And so, even if the war may continue more than fifty years, any man will be able, before the war is concluded by peace, to recover by force any place which he lost even at the outset of the conflict. In Livy, Bk. XXXIV, chap. lxii, the 449 Numidians in asserting against the Carthaginians usucapion to land near Emporia, use the following argument: 'As occasions offered, sometimes they, sometimes the kings of Numidia, had held the dominion of it; and the possession of it had always been held by the party which had the greatest armed force.' (E.)

Upon the conclusion of peace it is easy to observe what is left to each party, for whatever the enemy gives up is at once fully acquired, and there is no need to wait upon the time required for usucapion. If a third party lays claim to the same thing, he will signify it early, and, if it is at all possible, at the time when the treaties are being drawn up. For afterwards warriors will not easily restore what they have won in battle to those who remained passive and looked on. See Grotius, Bk. III, chap. vi, § 7.

¹ [For *quam piam* read *quampiam*.—Tr.]

CHAPTER XIII

ON THE OBLIGATIONS WHICH ARISE ON THEIR OWN ACCOUNT FROM DOMINION OF THINGS

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| <ol style="list-style-type: none"> 1. Every man is required to refrain from another's things. 2. Another man's things in our possession must be returned. 3. Proof of the foregoing. 4. Illustrations of it. 5. This obligation makes all subsequent contracts about such property void. 6. Any profit made from what belongs to another should be returned to him. 7. A possessor in good faith is not obligated to make restitution of a thing that has perished; 8. But he is obligated to restore any of its fruits still existing; 9. And their value if consumed, provided he would have had to consume the same amount anyway; | <ol style="list-style-type: none"> 10. But not such as he neglected to use. 11. He is not obligated who has given away a thing given him; together with a distinction; 12. Nor if he has sold a thing bought; likewise together with a distinction. 13. How far he who has purchased in good faith another's property can recover what he paid. 14. Whether another's property, when purchased, may be restored to the vendor. 15. Can he who has something belonging to another and does not know its owner rightfully retain it? 16. Or should he restore what is given with a bad motive? |
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Now that we have inquired into the origin and nature of dominion, and into the ways in which it is constituted, our next task is to consider the obligations which immediately and on their own account come to men upon the introduction of dominion over things. The first of these is that every man is obligated to allow every other, provided he is not at war with him, to dispose of his things and to enjoy them in peace, and cannot by force or deceit destroy, divert, or take them to himself. Hence it is clear that thievery, rapine, moving of boundary stones, and similar crimes are forbidden by the very law of nature. Euripides, *Helena* [903 ff.]:

For God abhorreth violence, bidding all
Not by the spoiler's rapine get them gain.
Away with wealth—the wealth amassed by wrong!
For common to all mortals is heaven's air,
And earth, whereon men ought to store their homes,
Nor keep nor wrest by violence others' goods. (W.)

2. In the next place, when another's thing comes into a man's
450 hands without any fault of his (and under ¹ the head of things falls in this connexion also a right over persons, such as that of an owner over a slave, in so far as it can be of use to us), the further point must be settled, as to whether or not that thing be still in existence. Regarding matters in

¹ [For *sub* read (*sub.*—*Tr.*)]

existence, the obligation arises, that he who has a thing of ours in his power is obligated to make every possible effort to return it again into our power. This obligation, however, actually exerts its force only when the possessor is aware that the thing is ours. We say 'every possible effort', because he is not obligated when it is impossible for him to restore it. But he is not obliged to restore it at his own expense, and if he is put to any expense on that score, he can rightfully demand it of the owner, or else keep the article until it is paid him. And it is also enough for him to have given notice that another's belonging is with him, and that there will be no hindrance on his part to the owner's taking what is his. See *Digest*, XI. iv. 1, § 3, it being understood always that what is said concerns a possessor in good faith, for the obligation of a possessor in bad faith is treated in another place. And these considerations obtain so far that the Roman laws say that *εὑρηρα* [lost articles] are not properly claimed except upon a pact (see *Digest*, XLVII. ii. 43, § 9; XIX. v. 15; XII. v. 4, § 14), affirming also that he who picks up something of another's, to make a profit therefrom, is guilty of theft, whether or not he knows to whom it belongs (*Digest*, XLVII. ii. 43, §§ 4 ff.). Josephus, *Antiquities*, Bk. IV, chap. viii [29]: 'If any one find gold or silver on the road, let him inquire after him that lost it, and make proclamation of the place where he found it, and then restore it to him again, as not thinking it right to make his own profit by the loss of another.' (W.) But if I happen upon something by a just title and in good faith, I am not obligated myself to call my right into question and make a public announcement that such a thing is in my possession, in order that, if it happen to have belonged to another, he can claim it. For when the manner in which we secured possession contains nothing that carries taint or suspicion,¹ my good faith makes me free from every crime which can arise out of the detention of another's property.

This further restriction is understood: Provided the former owner has a probable reason to recover the thing. This we add so that the present obligation may not destroy the law of usucapion. Compare Grotius, Bk. II, chap. x.

3. It is sufficiently clear that this obligation results from dominion itself. For since it may happen from a number of causes that a man will lose possession of a thing of his, our hold upon possessions, and especially movables, would be a slippery one indeed, if they could be hidden or restrained by the person into whose hands they had happened to stray. And all the more if he could openly retain such a thing, and repel him who wished to establish his claim to them. For just as it is a law in a state of community of things, that one person can enjoy the things which are held in common no more than another, so upon the introduction of proprietorship in things, when all the rest renounced, as it were,

¹ [For *vitosi*, *vitosi bona* read *vitosi*, *bona*.—Tr.]

their right to things which had been assigned another, owners are understood to have agreed that whoever had in his power something belonging to another, should, upon his recognizing it as another's, cause its return to the owner. For the strength of dominion would be too feeble, and the safeguarding of things too replete with expenses and anxiety, if a thing did not have to be returned when the owner sought it, for he often could not be certain where his property had gone.

Now in order that a man shall be obligated to return a thing upon its being claimed by its owner, it makes no difference whether he secured possession of it in good or in bad faith. For this obligation of restitution does not arise from any fault or act of ours, or from any special pact entered into with the claimant, or owner of the thing, but from the thing itself, or rather a universal pact, which is understood to accompany the dominion of things. Therefore, whoever has secured a thing in good faith is simply obligated to the mere return of it, but whoever did so in bad faith, in addition to being bound to restore it, has also involved himself in a crime, on the score of which he is liable to
 451 punishment. But good faith ceases,¹ so far at least as a man's conscience is concerned, when he is cognizant that the thing belongs to another. See *Digest*, V. iii. 25, § 3; XVI. iii. 1, § 47; XVI. iii. 2, 3, 4. Yet the good faith present at the very first, and the just title, make a man safe, at least from punishment by his fellows.

4. These principles are confirmed as well as illustrated by the divine law itself in *Deuteronomy*, xxii. 1-3; add *Digest*, XLVII. ii. 43, §§ 4 ff. And that² no one may believe that this duty is owed to friendship alone, it is expressly stated in *Exodus*, xxii. 4, that it should also be performed in the case of things belonging to our enemy. This law Josephus, *Antiquities*, Bk. IV [viii], explains as follows:

If any one find gold or silver on the road, let him inquire after him that lost it, and make proclamation of the place where he found it, and then restore it to him again, as not thinking it right to make his own profit by the loss of another. And the same rule is to be observed in cattle found to have wandered away into a lonely place. If the owner be not presently discovered, let him that is the finder keep it with himself, and appeal to God that he has not purloined what belongs to another. (W.)

Yet the great hatred of the Jewish race toward all other peoples, afterwards converted this natural law into a civil one, and ruled that it should be observed only toward people of their own race. See Selden, Bk. VI, chap. iv, and the notes of Grotius on the same passage, § 1. Add Polybius, Bk. VI, chap. xxxi pr.

A noteworthy example is that of the Emperor Theophilus, who, as he was once riding along upon a horse, was met by a woman who cried out that the horse belonged to her, and when he found out that Eparchus had taken the horse by extortion and presented it to the

¹ [For *Definit* read *Desinit*.—Tr.]

² [For *Acne* read *Ac ne*.—Tr.]

emperor as his own, he at once restored it to the woman. And because the emperor had no other horses at hand he finished his ride with the first one that he happened to find. Hence came the custom, according to Curopalates, *De Officialibus [Palatii] Constantinopolitani* [v, p. 61 c], and Cedrenus [p. 424 ed. Xylander], that several horses always are taken along with the emperor on his rides, so that if a similar thing should happen again there would be some for him to ride on.

The instance of the Spartans condemning Phoebidas for occupying the Cadmea, and yet retaining the citadel, as given by Plutarch and Nepos in their lives of Pelopidas, does not properly square with the point before us. For the possessors themselves were in bad faith and so by another principle were bound to make restitution. Nor are we concerned with the example of M. Crassus and Q. Hortensius as given in Cicero, *On Duties*, Bk. III [xviii]:

Some persons brought from Greece to Rome a forged will of Lucius Minucius Basilus, a rich man. That they might the more easily obtain their object, they put down as legatees along with themselves, Marcus Crassus and Quintus Hortensius, the most powerful men of that day; who, though they suspected that it was a forgery, but were conscious of no crime themselves, did not reject the paltry gift of other men's villainy. What then? Was this enough, that they should not be thought to have been culpable? To me, indeed, it seems otherwise. For he who does not keep off an injury, nor repel it if he can from another, acts unjustly. (E.)

For they shared as much in the crime of forgery as do receivers of stolen goods, since they were aware that they had been written in as heirs merely in order that they by their influence might make safe the forgers.

From the same fount of injustice can be shown to flow the custom which awards the property from shipwrecks to the imperial treasury. See Grotius, Bk. II, chap. vii, § 1, and the comments of Boecler; Jacques Godefroy, *De Imperio Maris*, chap. xi; Ioannes Loccenius, *De Jure Maritimo*, Bk. I, chap. vii, § 9; Bodin, *On the Republic*, I. x; Gramondus, *Historiarum Galliae*, Bk. XVI; and others. For the same reason one concludes it to be highly absurd that in some countries stolen property, when recovered, is not restored to its owner, but claimed for the state. See Antonius Matthaeus, *De Criminibus*, I. iv. 4, on *Digest* XLVII.

5. Now since this obligation to restore another's property arises from a universal convention among men, it thereupon follows that special agreements concerned with a thing taken in some way or other from its true owner, are therefore subject to an exception; and so if the thing is known to belong to another, agreements are void which are concerned with the transfer of that thing to a third party. This is the basis of that famous saying of Diogenes the Cynic, as given by Diogenes 452 Laertius, Bk. VI [54], when he remarked upon two thieves, one of whom had despoiled the other, 'One of them has committed theft, yet the

other has lost nothing'. Nor is this reasoning opposed by *Digest*, IV. ix. 1, § 7, which is advanced by Ziegler on Grotius, *loc. cit.*, § 1, to show that a subsequent contract does not always admit of an exception because of dominion. For in the case referred to it is of greater interest to the creditor, that the pledge be safe, than to the debtor, its owner, while the debtor cannot claim his pledge until he has paid the debt. An excellent instance of that position is to be found in *Digest*, XVI. iii. 31, § 1.

But the statement of Tryphoninus, at the beginning of the same passage, is not satisfactory to us:

A man accused of capital crime has deposited with you one hundred units of value; he is afterwards deported and his property confiscated. The question is, whether the hundred units are to be returned to the man who deposited them or to be turned into the public treasury. Now if we regard only the law of nature and nations, they are to be returned to the man who deposited them; but if we regard the civil code and the method of positive law, they ought rather to be turned into the public treasury. For he who has deserved ill of the state, ought also to struggle with poverty, that by this example he may deter¹ others from wrongdoing.

But since by the law of nations as well sovereigns are accorded such a power that they can punish criminals in their property, therefore, when such a penalty is duly meted out to a malefactor, it is agreeable also with the law of nature, that all the property of the condemned person pass to the public treasury. Yet it is due to positive law that the penalty of confiscation of property is established for this particular crime. And a consideration of the advantage that will follow a penalty, made for the approval of that penal sanction, yet not properly for the approval of the preference accorded the treasury, before the condemned person, in taking back the deposit. For by the sentence of the court dominion over his property was taken from the condemned person and assigned to the treasury, and therefore deposits once made by him will have to be returned not to him but to the treasury.

Now all dominion, whether it arises from civil law or the law of nations, has this effect among others, that every possessor is obligated to restore the thing so held to him who is its present owner. What exception the law on the restoration of a deposit otherwise allows because of certain circumstances, is set forth in many writers. See Cicero, *On Duties*, Bk. III [xxv]; Seneca, *On Benefits*, Bk. IV, chap. x; Ambrose, *On Duties*, Bk. I, last chapter. To the last reference should be added the account given by Polybius, in *Excerpta Peiresciana* [XXXIII. xii], of how King Ariarathes of Cappadocia, upon recovering his kingdom from Orophernes, demanded of the citizens of Priene the forty talents which his foe had deposited with them, and when they kept the sum for Orophernes, he fell upon them with fire and sword,

¹ [For *addeterrenda* read *ad deterrenda*.—Tr.]

'unjustly', in the opinion of Polybius. Yet the deed of Ariarathes can be defended, if it is understood that he was unjustly expelled from his kingdom by Orophernes.

The Roman Jurisconsults base a number of other rules upon this obligation to restore what belongs to another. See *Digest*, XXV. ii. 25; XLVII. ii. 43, § 4. On the same ground also rests a man's right to lay formal claim to a thing, and other actions like it; also in a certain sense the formal claim for restitution of a debt, both that for some reason which has not been fulfilled, and that for no reason. Although these last are said to depend also upon a kind of contract. For when a thing has not been given for the mere sake of giving, it is understood to have been given and received on the condition that it be restored when the reason for the gift is not at hand.

What is said on the restoration of a thing should also be extended to the fruits of the same so far as they are still in existence, with the understanding, however, that all expenses are withheld which were met either in their production, collection, or preservation.

6. Regarding things belonging to another which were acquired and consumed in good faith, it seems most agreeable with natural equity, that he who consumed them should not return to the owner their entire value, but only so much of it as he used to increase his wealth, provided the owner has not been recompensed for them in some other way. For suppose a thing of yours has been stolen, which I acquired and consumed in good faith, but you have already received its value from the thief; you will not be able to claim anything of me, although I¹ am the richer therefrom. The reason for this statement is not so much the fact that dominions are introduced to maintain such an equality, so that each one may have what is his, while in so far as another profits from what is mine, he has more while I have less; as that a thing, dominion over which I have lost neither by my consent nor by my misdeed or right of war, still belongs to me, as does also whatever comes of it. Therefore, when it has fallen into the hands of another, and he has profited by its consumption, his good faith, of course, renders him justly immune in person, yet he can on no excuse retain the profit which he has made, when I demand it, since that is a part, as it were, or the fruit still remaining, of a thing that belongs to me. Therefore, nothing is more common than the saying that no one should profit by another's loss, that is, by such a loss as he caused neither by his own consent nor his own fault, so that he is not the cause of the other's loss, that is, the loss cannot be imputed to him; for it is not forbidden me to find an opportunity for some gain from another's loss, when I myself had no part in it. See Michel Montaigne, *Essais*, Bk. I, chap. xxi. Cicero, *On Duties*,² Bk. III [v]: 'It is contrary to nature to advance one's own

¹ [For *ego* read *ego*.—Tr.]

² [For *Cic.* *Off.* read *Cic. Off.*—Tr.]

interests by the disadvantage of another man' (E.), which is drawn from Terence, *Andria*, Act IV, sc. i [625-8]: 'Is it credible, is it conceivable, that any man should be so black-hearted¹ as to gloat over misfortunes and buy his own happiness at the cost of another's misery?' (S.) Add *Digest*, L. xvii. 206; V. iii. 22. So also all through the Roman law many things, which did not otherwise square so exactly with the exact demands of the law, are settled on the equity of this principle. See *Digest*, XIV. iii. 10, 17, § 4; XVI. i. 7 (yet add Ziegler on Grotius, *loc. cit.*, § 2); *Digest*, XXIV. i. 55; XIX. i. 30; XIII. vi. 3 pr.; XX. v. 12, § 1; XII. i. 32. On the same principle seems to be based also the action termed *de in rem verso*.

7. On these rules depends the decision of many questions which are so often raised by lawyers and moralists, and which it seems as well to take from the passage of Grotius mentioned above. I. [Grotius, II. x. 3]: A possessor in good faith (only with such are we concerned, since a possessor in bad faith is obligated not only by reason of the thing, but because of his own act), so long as he remains such (compare Ziegler on this passage of Grotius), does not have to make restitution if the thing has perished. In such a case the thing itself is not in his possession, and he has not received gain from it. See *Digest*, V. iii. 40; VI. i. 12, 13. I add that he is not bound, even though the thing perish by his own fault, for his good faith was for him the equivalent of dominion. Now if a thing has perished by the fault of its owner, it is enough loss for him to be deprived of it, and he is no further obligated on that account. But a different reply must be made, if, when he found out that a thing belonged to another, he wilfully lost it, in order that he might not be forced to restore it.

8. II. [Grotius I. x. 4]: A possessor in good faith is bound to restore not only the thing, but also any income of the property that still remains. For the person who is the owner of a thing is likewise naturally the owner of the income derived from it. Add *Digest*, VI. i. 20, 50. Yet they distinguish between the fruits of the thing itself, and the fruits of a man's labour. Grotius, indeed, feels that only the fruits of the thing itself should be restored, and not the fruits of a man's labour, because, although they are not possible without the thing, they are still not caused by it. Yet others hold that the fruits still remaining of the labour should be restored, citing in their favour, *Code*, III. xxxii. 22. This opinion appears to come closer to humanity, provided it is added that the possessor in good faith can withhold all expenses incurred on the thing, as well as the value of his labour (see *Digest*, V. iii. 36, § 5; V. iii. 38, 39; VI. i. 27, § 4; VI. i. 31, 48, 65); and that, if the way is not² to be opened for troublesome disputes, the owner in claiming what is
454 his own should not sweep up every grain of dust with his profit. If this

¹ [For *vecordiani nata* read *vecordi innata*.—Tr.]

² [For *de* read *ne*.—Tr.]

is observed there will rarely arise a case when the possessor in good faith will have much to restore from the fruits of his labour.

9. III. [Grotius, II. x. 5]: The possessor in good faith is bound to make restitution for the property and its income that have been used up, provided that he would have used just as much under other conditions. See *Digest*, V. iii. 25, §§ 8, 9; VI. i. 52. For he is judged to be so much the richer as he saved his own possessions by using another's. Add *Digest*, XLVI. iii. 47, § 1. But in such a case I should judge, that, in addition to the limitations added to this definition, consideration should also be given to the question as to whether the possessor in good faith can recover as much as¹ he now loses, when the thing passes from him, of the one from whom he received it with a faulty title. For if this is impossible the possessor in good faith is no longer richer after restoring another's thing for which he cannot recover the purchase price from the vendor. Regarding the example of Caligula as it is taken from Suetonius, *Caligula*, chap. xvi: 'Whenever he restored kings to their thrones, he allowed them all the arrears of their taxes and their revenues for the meantime' (R.), it can be observed that he concluded that they had been unjustly deprived of their kingdoms, and so he was the heir of a possessor in bad faith. Or if he did not condemn the act of his predecessor, it is still open to question whether he restored those fruits of the intermediate period out of pure generosity, or because of an actual obligation. Therefore, I should consider it a truer judgement to hold that a possessor in good faith is not obligated to restore the value of the thing consumed, if his claim for compensation cannot be met by the one who turned over to him another's property. For thus he cannot be judged to have been made richer, while it seems more severe to restore the value of a thing consumed than the thing itself, so long as it is still existing.

10. IV. A possessor in good faith is not liable for fruits which he neglected to collect; because he neither has the thing, nor anything in its place. And a man's neglect of his own property, or what is practically his own, is held to be enough punishment. See *Digest*, VI. i. 78.

11. V. If a possessor in good faith has given another a thing which was given to himself, he is not liable for it, unless he would have given the same amount in any case, if he had not had this; for in that case the sparing of his own property will be considered as a gain. This statement appears to presuppose a distinction between donations arising from some duty and out of pure generosity, so that only the former must be accounted for but not the latter. Because it is regularly presumed that no man gives unless he has in abundance, and so the motive for his giving is held to have come from a consideration of that thing belonging to another as something more than he needed. But that obligation

¹ [For good read *quod*.—Tr.]

which arises in the recipient because of gifts and kindnesses is by no means included among such things as can be reckoned at a set value, and so he who expects *avridapa* [counter-gifts] from another seems by no means the richer for that hope. See *Digest*, V. iii. 25, § 8; compare Ziegler on Grotius, *loc. cit.*, § 7.

But it is to be considered further, whether or not the gift still exists in the hands of the recipient. If it does, the owner shall claim it of the holder without bothering the intermediary in the case. If it does not, the obligation will be upon him who either possesses it or is made the richer by it. An intermediary, however, shall come in for a share of it only in so far as he is perhaps the richer for the transaction. Add Struvius, *Exercitationes*, Bk. XI, § 13.

12. VI. If a possessor in good faith has in any way alienated another's property, which he had bought, he will not be bound to make restitution, except in so far as he may have sold it at a profit. But if he has sold something which cost him nothing, he shall then have to give up the price he received, in case the owner cannot recover the thing itself from its present possessor, unless he may, in view of his good fortune, have squandered the amount which he would not otherwise have wasted. But he who has received for a thing only so much as he gave,
455 makes no profit, since he is considered to have recovered only what was his. Nor can it be said in such a case that the price took the place of the thing, unless it happen that a man parted with his possession out of evil design. In case this is not so, the thing must be reclaimed from the last possessor.

Appeal is made to *Digest*, XLVII. ii. 48, § 7:

If the rightful owner forces a thief to give up the money which he has received for the sale of something that he has stolen, it appears that the owner has stolen money, and is held under the law to an action for stolen property. For there is no doubt but the sum which the theft brings in is not itself stolen.

But this law properly applies to states, for those who live in natural liberty may with equal right use force to recover either the thing stolen from them, or else its value.

13. VII. A possessor in good faith is obligated to restore another's property, even though he purchased it, nor can he require what he paid of the owner but only of him from whom he received it. For otherwise the right of challenge would amount to nothing, if the challenger had to return the price paid. And he who buys a thing of another, whose ownership he might have suspected, should have looked out for himself, with regard to whether the thing would be claimed, although that matter is otherwise naturally understood in every sale. Here also belong *Digest*, V. iii. 22, 25 pr., and § 1; XII. i. 23; *Code*, III. xxxii. 3 and 23; *Digest*, XVIII. i. 16; XXI. ii. 1; XIV. ii. 2, § 3; *Code*, VIII. xlv. 16; VI. ii. 2. But the exception is to be added: Except in so far as the

owner of the thing was probably not able to recover his possession without some expense, for instance, should it be in the hands of pirates or robbers. For in such a case it will be possible to deduct as much as the owner would have been willing unconstrained to pay. For the very possession, especially when the recovery is attended with difficulties, is capable of being valued, and in this respect the owner, upon the recovery of the lost thing, is held to have been made richer. For this reason it very often happens that those who have lost something promise the finder *μίσθνρον* [a reward]. See Moschus, *Idylls*, i, which is imitated by Apuleius, *Metamorphoses*, Bk. VI [viii]. Therefore, according to the lawyer Paulus in *Digest*, XVIII. i. 34, § 4, even though the purchase of such a thing is disregarded in ordinary law, it is valid if it is agreed at the outset that the possession which is held by some one other than the owner may be purchased.

But will the man who buys a thing that he may return it to its owner, be permitted to demand a price from him? Some answer this in the negative, for the reason that the right belonging to an owner cannot be annulled by a profession of this sort. See *Digest*, L. xvii. 11. Yet if such a buyer foresaw it to be likely that the owner would have difficulty in recovering his property in any other way, and the price which he gave is not more than that at which the actual possession can be settled, it will surely have to be returned to him. But whether the purchaser is allowed an action against the owner for 'business transacted', is a point for the more subtle inquiry of the expositors of the Roman law. Grotius omits any answer to this question, for the reason that such an action arises from civil law, since it has none of the foundations from which nature produces an obligation. Yet although it is not the task of the law of nature to inquire and designate to what kind of action, as defined by the Roman law, the present case can or should be reduced, it cannot be denied that even the action of 'business transacted' has its foundation in natural equity and a tacit pact. For on no basis can a man demand that by my own labour of love I should preserve and improve another's property gratis, and receive no compensation for my labour. Add Ziegler on Grotius, *loc. cit.*, § 9.

It would be the simplest way out, therefore, to understand that the thing which has been brought back, or on which labour and money have been spent, is a temporary pledge for the purchaser or any transactor of such business, which he may hold until the amount expended has been met. But if there remains no result of his labour for such a person to hold on to, and the other party disgracefully refuses to pay for that service, I should not feel that the former can use such means of asserting his right as are possible with something that grows out of contracts. The owner shall only be held up to detestation as ungrateful and unworthy of any kind of benefaction. See 1 *Samuel*, 456

xxv. 7, 15, 21, although in this passage David seems to have wished first of all to take vengeance for a verbal affront. Yet the Roman law has considered the equity of such restitution in similar cases as well. See *Digest*, XI. vii. 14, § 13; III. v. 6, § 3; XIV. ii. 1. And in general in a similar class of cases it is well to observe the remark of Terence, *The Self-Tormentor*, Act IV, sc. v [796]:

Strictest law, worst mischief. (S.)

14. VIII. According to the view of Grotius, the person who from one man has bought property belonging to another, cannot return it to the seller, in order to save the purchase price; for the obligation of restoring it to the owner commenced at the moment when the object came into his possession. But on this point we are of the opposite opinion. For surely I am not obligated to buy a thing which I know belongs to another, in order that the owner may recover it and I lose what I paid. Therefore, if I have found out that the article belongs to another, and am unwilling that it be claimed at my hands, either in order that I may avoid the inconvenience of a dispute, or because I have no hope of recovering its price, it would be my feeling that I may properly withdraw from the contract, so long as there is opportunity for me to do so, so that I may not be drawn into a dispute against my will; provided, however, that I am obligated to disclose to the owner, upon his request, where his property is, so that he can lay claim to it. See *Digest*, VI. i. 17 pr., and Ziegler on Grotius, *loc. cit.*, § 10.

15. IX. The man who in good faith has in his possession property of unknown ownership, is not obligated by the law of nature to give it to the poor, although states might rightly establish this as a law. The reason is, because, by the institution of property, no one has a right over it save the owner. But the fact that there is none at present, and that no one ever puts in his appearance, is equivalent to the same thing with him who cannot find the owner. Therefore, in such a case, there will be no one to whom a thing of this sort better belongs than to the possessor in good faith.

16. X. The assertion of Grotius that what has been accepted for a base service, or for a worthy one, but such as a man should have performed gratis, need not be restored, we allow, provided the cause for restitution is solely to be sought in the dominion of things as such. For he to whom a thing passed with the consent of the former owner, cannot on this score be obligated to return it. But when a blemish lay in the very ground for accepting it, such as extortion, the obligation to restore it flows from another principle. Under extortion should be gathered methods, provided they are not violent, of cheating others out of their money, for example, if a judge refuses to administer justice

unless his palms are first greased. See 1 *Samuel*, xii. 3-4, where it does not appear that Samuel wished to parade in any special way his sanctity, but that he called to witness that he had in no way transgressed the common duty of judges, and that for this reason he did not deserve, for any shortcoming of his own, to be removed from his office by the creation of a king. See above, Bk. III, chap. vii, § 9.

[457]
SAMUEL PUFENDORF
ON
THE LAW OF NATURE AND NATIONS
BOOK V

CHAPTER I

ON PRICE

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| <ol style="list-style-type: none"> 1. After dominion a measure of things had to be introduced. 2. What is the moral quantity of things? 3. How many kinds of price are there? 4. What is the basis of ordinary price? 5. The fact and reason why many useful things have no price. 6. Why do the prices of things rise? 7. On the price of fancy. 8. On legitimate price. 9. On common price. 10. Causes which raise or lower common price. | <ol style="list-style-type: none"> 11. Ordinary price did not suffice for human life. 12. Therefore an eminent price was set in money. 13. This usually consists of metals. 14. How far the directors of states can determine the value of money. 15. On this point consideration should also be taken of land. 16. The value of money is likewise subject to change. |
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IN view of the fact that things subject to proprietorship differed in nature and did not afford the same service to human necessities, and because it also frequently happened that either the same things, whose parts were not in all respects alike, began to belong to several people, or that things of different nature had to be exchanged for each other, therefore, by the agreement of men some measure had to be set upon things, according to which measure things of different nature could be compared to and made equal with each other. Now since things are compared with each other and equalized on the basis of quantities, for equality is a coincidence of quantities, we shall, therefore, have to consider at this time the quantity of things and actions, in so far as they are of use in the life of men, the bases of quantity, and the common measure.

2. Now we observe that in common life things are called mutually equal, not only as they coincide in the three dimensions, but also in a certain other respect. For thus, honours, labours, and wages are called equal or unequal on another score than by virtue of the coincidence of their dimensions. Therefore, there must be some quantity, other than physical and mathematical, about which alone philosophers thus far seem to have concerned themselves. This will appear more clearly if we observe, that the formal basis of quantity taken universally, consists not in the extension of substance but in the fact that a value can be put upon it, that is, for this reason a measure is first put upon things, in so far as they can be estimated and as a consequence compared with each other, as to whether they are equal or unequal. But since things can be valued not only according to their physical substance, but also by virtue of a certain moral consideration, it follows that in addition to a physical

quantity there is also a moral quantity, by which, of course, things are valued morally. Yet that physical quantity also makes for the value of things of the same nature and goodness, for example, a large diamond, everything else being equal, is more valuable than a small one, although it is not always true in regard to the value of things of a different kind or goodness. Thus, a large dog is not always more valuable than a smaller one, nor a large piece of lead more valuable than a smaller one of gold.

How persons are morally valued according to their standing, and their moral actions according to their power to produce merit and demerit, is treated in its proper place. At this time I must investigate only the moral quantity of things and actions, in so far as they are understood to serve some purpose in common life, and as they are compared with each other so that they may be able to serve the ends of commerce. This quantity of things and actions is called *price*, which is a moral quality or value of things and actions, as they enter into exchange, according to which they are usually compared with each other.

3. Price can be divided into *ordinary* and *eminent*. The former is found in things and actions or labours, which enter into exchange, in so far as they afford service and pleasure to men. The latter is found in money and whatever serves in its place, in so far as that is understood virtually to contain the prices of all things and labours, and to furnish a common standard for their measurement.

4. The correct understanding of the nature of ordinary price is markedly aided by considering as separate things, first, its *foundation* in itself, and then why the same rises or falls. The foundation of price in itself is the aptitude of a thing or action, by which it can either mediately or immediately contribute something to the necessity of human life, or to making it more advantageous and pleasant. This is the reason why in ordinary speech things of no use are said to be of no value, just as we also usually call men that are useless burdens upon the earth, persons of no value. So in the fable the cock regarded the pearl, which he had found, of no value, because it was of no use to him [Phaedrus, III. xii].

Grotius, Bk. II, chap. xii, § 14, says: 'The most natural measure of the value of each thing is the need of it.' If he means that the foundation of price in itself is want, or that a thing is valued by men merely because they need it, his statement will not hold true universally. For on this theory the price would be taken from things which serve idle pleasure, and yet the boundless luxury of mankind often bestows a price upon such. But we are said actually to need only things without the use of which we must suffer serious inconvenience. See *Matthew*, ix. 12. But if he means that the need of the purchaser makes for the raising of price, we confess that such is commonly the case, yet no one of dis-

cernment would grant that this is the natural measure of price, so that the more one is straitened by want, the higher the price that can be extorted from him. Nor does the passage from Aristotle, *Nicomachean Ethics*, Bk. V, chap. viii, advanced by Grotius, suit his purpose. For that *χρεία* or need 'which, as it were, holds together all things' and supports them, is not the sole foundation of price, but of exchange or of commerce. For if men had need of nothing, or of another thing no more than what they have, there would be no commerce and no exchange, since each man would keep what was his own and enjoy that. For 459 Aristotle expressly says in the same passage: 'The fact that it is demand which is like a principle of unity binding society together, is evident because, if there is no mutual demand on the part of two persons, if neither of them or one only needs the services of the other, they do not effect an exchange.' (W.) The same point is illustrated by the same writer in his *Politics*, Bk. I, chap. vi (9): 'The art of exchange extends to all <possessions> and it arises at first in a natural manner from the circumstance that some have too little, others too much. For they were forced to use exchange until they had enough.' (J.)

5. Yet it is to be observed that there are some things concerned with the life of men, most useful as well, on which it is understood that no price has been set, either because they are and should be exempt from dominion, or because they are removed from man's use in commerce, or finally, because in business relations they are considered as nothing more than an appendage of another thing. Furthermore, since the law has placed many actions beyond the pale of commerce, it is likewise understood to have exempted them from all price or valuation. Thus, since the upper reaches of the air, the sky, the celestial bodies, and the open ocean are removed from human dominion, no one can properly put any price upon them, although they serve the greatest use for the life of man. Likewise, the Roman laws in excluding hallowed and sacred places from commerce, deprived them of any price, although many of them intrinsically have nothing that would prevent the fixing of a price. Thus, there is no price upon a free man's head, for it is a contradiction for a person to be free and also subject to barter, for so soon as any man is made an object of sale, he is no longer free. Therefore, it is also on this consideration that liberty is called a thing priceless, not alone for the reason that its advantages are so great that they seem to surpass all efforts at valuation.

In this connexion, however, we should note what is observed by Philo Judaeus, *On Special Laws* [II. viii]:

In the case of those persons who have vowed not merely their own property or some part of it, but also their own selves, the law has affixed a price to their vows, not having a regard to their beauty, or their importance, or to anything of that kind, but with reference to the number of the individuals, separating the men from the women, and the infants

from those who are full grown. For the law [*Leviticus*, xxvii. 3] ordains that from twenty years of age to sixty the price of a man shall be two hundred drachmas of solid silver money, and of a woman a hundred and twenty drachmas. And from five years of age to twenty, the price of a male child is eighty, and of a female child forty drachmas. And from infancy to five years old, the price of a male is twenty, of a female child, twelve drachmas. And in the case of men who have lived beyond sixty years of age, the ransom of the old men is sixty, and of the women forty drachmas. And the law has regulated this ransom with reference to the same age both in men and women, on account of three most important considerations. First of all, because the importance of their vow is equal and similar, whether it be made by a person of great or of little importance. Secondly, because it is fitting that those who have made a vow should not be exposed to the treatment of slaves; for they are valued at a high or at a low price, according to the good condition and beauty of their bodies, or the contrary. Thirdly, which, indeed, is the most important consideration of all, because inequality is valued among men, but equality is honoured by God. (Y.)¹

Many other things are also held to lack a price, in so far as they cannot be held separately, although they considerably increase the price of the thing to which they are accessory, just as their absence or deterioration reduce it not a little. Thus, no price can be set upon the warm light of the sun, pure and wholesome air, a beautiful landscape in so far as it only delights the eye, or upon wind, shade, and similar things in themselves or considered apart, since men cannot enjoy them without the use of the land; yet every one realizes how important such things are in influencing the price of districts, farms, and estates. Pliny, *Natural History*, Bk. XII, chap. i [6], says of the plane tree: 'It occupies even tributary soil; in return for which those nations have to pay a tax for the enjoyment of its shade.' (B. & R.) Thus in Belgium an annual tax is laid upon those who use windmills, on the ground that the wind belongs to the state. On which ground, we may observe, it is easy to give an answer to that dispute presented by Demosthenes before the judges, on the shadow of the ass. For he who hired the ass could not 460 prevent the owner from lying down where the shadow of the beast fell, although he could take away the shadow by moving the ass to another place.

Finally, whatever actions laws of God or of men either ordain to be performed freely, or forbid entirely, and so take them from the field of exchange, can obviously have no price put upon them by men, nor should they be performed for a remuneration. In this class are those holy acts which have had some supernatural effect assigned them by divine institution, such as remission of sins by priestly absolution, the bestowal of spiritual benefits by the performance of sacraments, and the like. If a man performs these for a price he is said to practise simony, while to measure such things in money is held an act of impiety and irreverence towards God. See *Acts*, viii. 20. Here also belong those who for money endow unworthy persons with holy offices, since such places should be bestowed freely upon the most worthy. Add Gratian,

¹ [Pufendorf's version differs in a number of small details from the original Greek.—*Tr.*]

Decretum, II. i. 1, 2, 3. Neither should rewards and recommendations for character and learning be given the unworthy for money, not merely because in this way such things are cheapened, but also because often such men for the sake of a high-sounding title are advanced to public offices, to the serious injury of the state. And surely it is a disgrace to the calling of letters that in some places men take such a freedom as the lawyer Fabius Benevoglientes illustrated in a jest. According to Ianus Nicias Erythraeus, *Pinacotheca*, Bk. II, chap. xxix, when he was on his way to make some nobody a Doctor, he happened to meet an ass along the way, which opened its mouth as if it were laughing. Turning upon it he said, 'Why do you laugh, you fool? We can induct you also into the number and rank of Doctors, if the money is forthcoming.' But of course, 'He who says, whenever he pleases, "Accept this", has a genius of his own.' (R.) Ovid, *Art of Love*, Bk. II [163].

The Chinese had different rules, on whose examinations and promotions see Neuhoof, *Generalis Descriptio Sinae*, chap. iii. A passage from Pliny, *Natural History*, Bk. XVI, chap. iv [7, 14], illustrates our point:

Our civic crown is the most glorious reward that can be bestowed on military valour, and, for this long time past, the emblem of the imperial clemency; since the time, in fact, when, after the impiety of civil war, it was first deemed a meritorious action not to shed the blood of a fellow-citizen. [. . .][14] Times these, right worthy of our everlasting admiration, which accorded honour alone as the reward of exploits so mighty, which, while other crowns were recommended as being made of gold, disdained to set a price upon the safety of a citizen, and loudly proclaimed thereby that it is unrighteous to save the life of a man for motives of lucre. (B. & R.)

Thus a judge cannot rightfully dispense for a price the justice which he should administer freely. Ovid, *Amores*, Bk. I, el. x [37 ff.]:

'It is not honour for witnesses to make false oaths for gain, nor for the chosen juror's purse to lie open for the bribe. 'Tis base to defend the wretched culprit with purchased eloquence; the court that makes great gains is base; 'tis base to swell a patrimony with a revenue from love, and to offer one's own beauty for a price.' (S.)

Plutarch, *Romulus* [xiii. 6], in discussing the duty of patrons towards clients, adds: 'The taking of money by those of high degree from the more lowly was held to be disgraceful and ungenerous.' (P.) From this source came later the Cincian law. Seneca, *Hercules Raging* [172 f.]:

The noisy mart
Still others claim, who meanly deal
In quarrelsome suits, and profit make
Of wrath and empty words. (M.)

Compare Quintilian, *Institutes of Oratory*, Bk. XII, chap. ix. Thus, the Roman laws hold it unworthy to measure philosophy and the wisdom required for civil life by setting a price upon them. See *Digest*, L. xiii. 1, §§ 4, 5, and the remarks thereon by Grotius, *Florum Sparsio*. Add Quintilian, *Institutes of Oratory*, Bk. XII, chap. vii [8], where, in

discussing whether a price should be put upon eloquence, he says among other things: 'Many things seem worthless in the eyes of the world, for no other reason than that they can be purchased.' (W.) So it is not right for an assassin or poisoner to hire out his services at a price for the murder of a man, as a scholar should not sell his pen and learning to spread abroad lies to the injury of others, nor an honest man his reputation in undertaking to aid unjust actions or to subvert just ones by false witness, and others of the same stamp.

6. There are various reasons why the price of one and the same 461 thing rises or falls, and why, therefore, one thing is preferred to another, although the latter apparently affords as much or greater service in the life of men. For here the need of the article, or the distinction of its use, does not always form the first consideration, and so we observe that those things are the cheapest which men are least able to do without, and this for the reason that by a special provision of God nature bestows them in great abundance. Vitruvius, *De Architectura*, Bk. VIII, Preface [iii]:

Whatever is necessary for mankind the divine providence has not made difficult and expensive, like pearls, gold, silver, and other things, which neither our body nor our nature requires; but those things which the life of mortals cannot safely do without, providence has scattered abroad ready to hand all over the world.

Therefore, the chief factor in high price is scarcity, the maintenance of which is considered by some to be one of the secrets of business. Strabo, Bk. XVII [i. 15], writes of the Egyptians: 'They do not permit the papyrus plant to grow in many places; they thus raise the price because of scarcity and increase their own revenues, but interfere with the extensive use of the product.' As also the Dutch destroy the clove and nutmeg plants in many sections of India in order to prevent an over-supply of those spices. Furthermore, scarcity is not a little increased when things are imported from far distant places. Plato, *Euthydemus* [p. 304 B]: 'Only what is rare is valuable, and water, which is the best of all things [. . .] is also the cheapest.' (J.) Sextus Empiricus, *Pyrrhoneiae*, Bk. I, chap. xiv [143]:

Things that are scarce are regarded as valuable, but those which grow amongst us and are easily secured, not at all. Now if we imagine water as scarce, how much more valuable would it appear than all the things now regarded as valuable? Or, if we picture to ourselves great quantities of gold simply scattered around on the ground like stones, who, may we suppose, would regard it as valuable and lock it up under such circumstances?

Mamertinus, *Panegyric of Julian* [xi. 3]: 'The most valued banquets have their worth estimated not by the way they taste, but by the difficulties overcome.' Add the account of Pliny, *Natural History*, Bk. VII, chap. xii, of two boys who bore a great resemblance to one another, one born in Asia, the other in Gaul, upon whom a slave-dealer set a perfectly outrageous price, while a certain Antony held nothing in his entire possessions of greater value than were they. For

the ambition of men especially values what they have in common with but a few others, while on the other hand whatever is seen in almost any one's house, is of little worth in their eyes. Nay, men are often so perverted that a thing is rated highly because its use has been forbidden, the mere proscription serving to whet their curiosity. And so Lucian, *Nigrinus* [xxx], rightfully ridicules those 'Who glut themselves with roses in midwinter, loving their rarity and unseasonableness, and despising what is seasonable and natural because of its cheapness'. (H.)

So also in general men scarcely ever consider a thing valuable which does not yield to the holder some distinction and position above that held by the rest of men, and by reason of which they cannot vaunt themselves above others. This is the reason why honours are especially valued because of their scarcity. See Cornelius Nepos, *Miltiades*, chap. vi; Cicero, *On Invention*, Bk. II [xxxix]:

Rewards for virtue and eminent services ought to be considered serious and holy things, and they ought not to be conferred on worthless men, or to be made common by being bestowed on men of no particular eminence. [...] for those things which are scarce and difficult of attainment appear honourable and acceptable to men. (Y.*)

Although it is in fact due to the depravity and corruption of human nature that possessions of intrinsic worth are valued by their scarcity or the number of possessors, since my possession of a thing is not impaired because others also have the same thing, nor enhanced, if they are without it. So, for instance, my health is no less valuable to me because others also are well, or more so because they are ill. In the same way
 462 knowledge of the truth is not of less worth because others also have it, nor does the price of wisdom rise because others are fools. Therefore, whoever prides himself on the fact that others lack the good things in which he abounds, appears in fact to delight in the ills of others, while whoever holds his goods of less value because others also enjoy them, is moved by envy of them.

But, of course, as in many other things, so also in this, the general inclination of men deviates from right reason. See *Numbers*, xi. 28-9; *Mark*, ix. 38-9. Consequently, the overweening luxury of men has set enormous values upon things which they could very easily do without. There are those who think that this has been done to the end that some use might be found for enormously great riches. Who is not acquainted with the enormous prices of single pearls, of which the 'fine points are whiteness, size, smoothness, and weight, qualities so difficult to match that no two pearls are found to be exactly alike' [Pliny, *Natural History*, IX. xxv]? On which Pliny [*Natural History*], Bk. IX, chap. xxxv, again says:

The first rank, then, and the very highest position among all valuables, belongs to the pearl. [...] After the surrender of Alexandria, pearls came into common, and, indeed, universal use at Rome; but they first began to be used about the time of Sulla, and later

became so common, that even poor women affected their use, saying: 'A pearl worn by a woman in public is as good as a lictor.'¹ (B. & R.) Some precious stones are held above all price and more valuable than any product of man's hands (as the same writer says, XXXVII. pr.; and XXXII. ii [21]): In the same degree as people in our part of the world set a value upon the pearls of India [. . .] do the people of India prize coral: it being the prevailing taste in each nation respectively that constitutes the value of things. (B. & R.)

Add *Idem*, Bk. IX, chap. xvii, at the end, and chap. xxxiv; Bk. X, chap. xxix; Bk. XII, chaps. xiv, xvii, xix; Bk. XIII, chap. xv; Bk. XXXVII, chap. iv. The same writer, Bk. VI, chap. xvii [20], says of silk: 'So manifold is the labour, and so distant are the regions which are thus ransacked to supply a dress through which our ladies may in public display their charms.' (B. & R.) Nay, the folly of men fancies that some great value lies in anything that has had a high value placed upon it. Lampridius, *Elagabalus* [xxix at the end]: 'He loved to hear the price of the food served at his table exaggerated, asserting it was an appetizer for the banquet.' (M.) Juvenal, *Satires*, XI [16]: 'Those please the more which are bought for more.' (E.) Curtius, Bk. VIII, chap. ix [19]: 'These excretions of the foaming sea are appreciated at whatever luxury will give.' (A.) Seneca, *On Consolation to Helvia*, chap. xi: 'Plate which boasts the signature of antique artists, bronze which the mania of a small clique has rendered costly.' (S.) At the present time amber in our lands is very cheap, but in the Orient enormously expensive.

Ianus Nicius Erythraeus², *Pinacotheca*, Bk. III, chap. xvii, in recounting the life of John Barclay, who was a great fancier of tulips, says that in his day, some thirty years ago, they grew on the tops of the Alps, without receiving any cultivation or attention; then upon being brought into cities their price so increased because of the desire of men for their novelty, that single bulbs sold for as much as one hundred gold pieces and even more. But that after they had become abundant, their price fell so greatly that scarcely anything was considered more cheap. Add *Idem*, *loc. cit.*, chap. xxiv. That is, in the case of objects like that, 'The only limit to the valuation of such things is the desire which any one has for them, for it is difficult to set bounds to the price unless you first set bounds to the wish'. (Y.) Cicero, *Against Verres*, Bk. IV [V. vii]. We should refer here to Pliny, Bk. XXXIII, Preface [v]:

From this same earth we have extracted vessels of myrrhine and vases of crystal, objects the very fragility of which is considered to enhance their value. In fact, it has come to be looked upon as a proof of opulence, and as quite the glory of luxury, to possess that which may be irremediably destroyed in an instant. (B. & R.)

Seneca, *On Benefits*, Bk. VII, chap. ix: 'I see crystal vessels, whose price is enhanced by their fragility, for among the ignorant the risk of losing things increases their value instead of lowering it, as it ought.' (S.) And surely not one of the least foibles of mankind at which 'the

¹ [For *lictorum* read *lictorem*.—Tr.]

² [For *Erythraeus* read *Erythraeus*.—Tr.]

philosopher Ariston was most astonished, was that those possessed of the superfluities of life should be counted happy, rather than those well provided with life's necessary and useful things' (P.), as it is given in Plutarch, *Cato the Elder* [xviii]. And Strabo, Bk. II [v. 26], is correct in his judgement of precious stones which are valued so highly, 'things, that make the life of persons who have only a scarcity of them fully as happy as that of persons who have them in abundance'. (J.) Therefore, it is proper to reckon also among the silly ideas of the common sort that
 463 of valuing things by their novelty, or rarity, or difficulty, or their foreign abstraction, unless these qualities are enhanced by goodness and usefulness. See Charron, *De la Sagesse*, Bk. I, chap. xxxix, n. 11; Bk. II, chap. x, n. 2. On this point bears the statement of Agatharchides, *De Mari Rubro*, chap. xlix, about the Alilaei and Casandrini, who live in a region that abounds in gold:

They exchange gold for three times as much bronze, and for iron they give twice as much gold, while silver is worth ten times what gold is. Their method of fixing value is based on abundance and scarcity. In these things the whole life of men considers not so much the nature of the thing as the necessity of its use.

But things of daily use and such as concern primarily food, clothing, and arms, experience the greatest rise in price when scarcity of them is joined with necessity, such as is seen in times of famine, and in sieges, and delayed voyages, when hunger and thirst must be appeased and life preserved at any price. Quintilian, *Declamations*, XII [xxi]: 'In great want anything that can be bought is cheap.' Pliny, *Natural History*, Bk. VIII, chap. lvii: 'At the siege of Casilinum by Hannibal, a mouse was sold for two hundred denarii, and the person who sold it perished with hunger, while the purchaser survived.' (B. & R.) The price of manufactured articles is usually raised not only by their rareness but because of their workmanship. Velleius Paterculus, Bk. I, chap. xiii, tells us that L. Mummius was so unskilled in estimating this 'that when, on the taking of Corinth, he was hiring persons to carry pictures and statutes, finished by the hands of the greatest masters, into Italy, he ordered notice to be given to the contractors, that, if they lost any of them, they must find new ones'. (W.) Considerable store is set upon some objects by reason of the reputation of the workman, while some are of great worth from the character of the former possessor. Thus Lucian, *Adversus Indoctum* [xiii], tells that a man paid three hundred denarii for the lamp of Epictetus: 'He thought, I suppose, that if he should read by that lamp at night, he would forthwith acquire the wisdom of Epictetus in his dreams.' (H.) Among the Peruvians the city of Cusco was formerly in such repute that even seeds that had come from near it, although no better than those from other places, were valued more highly than all others. Garcilaso de la Vega, *Comentarios Reales*, Bk. III, chap. xx.

Other factors working to the same end are the difficulty of the work, the abundance or scarcity of workmen, and the like. Cicero, *Brutus* [lxxiii]:

It was of more consequence to the Athenians, that their houses should be securely roofed, than to have their city graced with a most beautiful statue of Minerva; and yet, notwithstanding this, I would much rather have been a Phidias, than the most skilful joiner in Athens. In the present case, therefore, we are not to consider a man's usefulness but the strength of his abilities; especially as the number of painters and sculptors who have excelled in their profession is very small; whereas there can never be any want of joiners and mechanical labourers. (W.)

Thus Nicias is said to have paid a talent for a slave to superintend his silver mines. Xenophon, *Memorabilia of Socrates*, Bk. II [v].

Finally, the price of labours and actions is raised by their difficulty, the dexterity required in them, their usefulness, necessity, the scarcity of workers, their renown or position, their freedom to work when they choose, and similar considerations. Here belongs also the passage in Aristotle, *Politics*, Bk. I, chap. vii [I. xi]:

Those occupations are most truly arts in which there is the least element of chance; they are the meanest in which the body is most deteriorated, the most servile in which there is the greatest use of the body, and the most illiberal in which there is the least need of excellence. (J.) (*Idem*, *Politics*, Bk. VIII, chap. ii): And any occupation, art, or science, which makes the body or soul or mind of the freeman less fit for the practice or exercise of virtue, is vulgar. (J.)

Again, the nature of the art has the greatest influence on the value and the service. What is said by Seneca, *On Benefits*, Bk. VI, chap. xv, on the more noble services deserves notice:

Some things are of greater value than the price which we pay for them. You buy of a physician life and good health, the value of which cannot be estimated in money; from a teacher of the liberal sciences you buy the education of a gentleman and mental culture; 464 therefore you pay these persons the price, not of what they give us, but of their trouble in giving it; you pay them for devoting their attention to us, for disregarding their own affairs to attend to us; they receive the price not of their services but of the expenditure of their time. (S.)

Add Quintilian, *Institutes of Oratory*, Bk. XII, chap. vii.

7. But it also happens frequently that certain things are highly valued, not by all the world, but by certain individuals and for some particular quality, which is usually called the price of fancy. This is illustrated by the remark of a certain Arab, given in Leo of Africa, Bk. III: 'Whatever is dear¹, no matter how dear, if it be beautiful, is not too dear; for nothing should be said to cost too much, if I have a fancy for it.' Libanius, *Declamations*, xli [xlvi. 29]²: 'The true value of every gift is measured by the pleasure of the recipient.' That is due, particularly in the case of animals, to a certain familiarity with them, or because they know how to adapt themselves in some way to our whims; because

¹ [For *charum* read *carum*.—Tr.]

² [Barbeyrac says '870 D', but that is wrong.—Tr.]

we have escaped some great danger by their aid; or because they serve to recall some great event. Many things also are recommended by the one from whose possession they passed into ours, so that we are unwilling to exchange them for several others as good as they. Catullus [*Poems*, xii. 11-13]: 'Send me back my napkin—which does not concern me for what it is worth, but because it is a keepsake from my old friend.' (C.) Ovid, *Heroides*, xvi [xvii. 71-2]: 'Those gifts are ever most welcome whose giver makes them precious.' (S.)

Many people also value things highly because they see them valued by great individuals, whom they are extremely desirous of pleasing. Thus the price of a certain kind of food or clothing rises because the king fancies it. In this connexion, however, some observe that in sale and purchase the price of a thing should not rise because of the fancy of the purchaser, unless there are other causes contributing to the same end. So the Roman laws allow no consideration of the price of fancy in the restitution of a damage caused without evil intent. See *Digest*, IX. ii. 63. Yet merchants not infrequently raise the price because of the fancy and liking of those who are intent upon buying. Thus Diodorus Siculus, Bk. V, chap. xxvi, says:

Many Italian merchants, to gratify their own covetousness, make use of the drunkenness of the Gauls to advance their own profit and gain. For they convey wine to them both by navigable rivers, and by land in carts, and bring back an incredible price; for in lieu of a hogshead of wine, they receive a boy, giving drink in truck for a servant. (B.)

The same writer (*loc. cit.*, xvii) observes that the inhabitants of the Balearic Isles valued one woman as the equivalent of four men, because these islanders were so highly sexed. Yet the price can be raised because of the fancy of the seller, provided he make it known to the purchaser, for it is a matter of some consideration for a man to restrain his desire for something that he holds dear, out of favour to a purchaser. Add *Digest*, XXXV. ii. 62, § 1; XXXV. ii. 63.

Finally, the prices of things or services are greatly raised by some evil habit of mind, such as vainglory, cruelty, and the like. What store the ancient Gauls set upon the heads of their enemies is to be gathered from Diodorus Siculus, Bk. V, chap. xxix; Strabo, Bk. IV [iv. 5].

8. Now such considerations as these regularly raise the prices of things, just as their opposites lower them. Yet in the determination on the spot of the prices of special articles, and in adjusting them to a fair standard, other considerations regularly enter in.

And at the outset it should be observed that among those who live in natural liberty each man is allowed to fix the price of an article of his at his own pleasure, since every man in such a state is the final arbiter of his possessions and actions. For however much another may want to set a price upon a thing of mine, it will still be within my power to accept or reject his valuation, and therefore I myself will be the one to set the

actual price. And even if I should set an outrageous price upon a thing of mine, no one can complain about it, since it is no one's else affair how wealthy my fancy makes me, while others who feel my price too high, have the very simple course left them of leaving me in possession of what is mine. Therefore, if a man wants to have anything of mine, he must give the price I have decided upon, just as, on the other hand, if I want to force my wares upon some one else, I have to take whatever price a fastidious purchaser chooses to give. There can, therefore, be just cause for complaint only when a man, through inhumanity or out of hatred and envy, either refuses to sell to one in need, things of which he enjoys a superfluity, or else is willing to part with them only upon very hard terms. From this it follows that in a state of nature the prices of all things are fixed by agreement between the parties concerned, and that a man cannot be charged with a sin against the rules¹ of commerce, if he does not overlook a chance for profit, provided he show no inhumanity toward the needy. See *Genesis*, xli. 49; xlvii. 13 ff. 465

Yet in organized states prices are fixed in two ways: One way is by a decree or law of those in authority, the other by the general valuation and judgement of men, with the further consent of those who are the parties to the bargain. Some are accustomed to call the former legal, the latter common or natural price. Legal price is regularly assumed to agree with justice and equity, unless the opposite is manifestly true. For even here gross ignorance may now and then intervene, more often hatred or favour toward buyers or sellers, or even some other corruption or regard for one's own profit. Besides, the legal price stands at a *στυγμή*, or definite point, and admits of no latitude, so that any variation whatsoever constitutes injustice. And although the seller cannot demand more, when, as frequently happens, the price is set in favour of the purchaser, yet the buyer will be permitted, with the consent of the seller, to give less, provided he does not touch the lowest degree in natural price; while the seller will be allowed to accept less, provided it does not work to the injury of other merchants. But if the price is set in favour of the seller, the buyer will not rightfully be able to prevail upon the seller to accept less, although the latter may, if he chooses, accept less, since every man has the right to renounce what is to his advantage. And yet the seller can rightfully accept more, provided he does not exceed the highest degree in natural price. It appears, however, that the price of labour is more generally fixed in favour of those who give their services than that of merchandise in favour of the merchant. Yet it should be observed, in this connexion, that in some places a more subtle procedure is adopted, so that the prices of certain things may not become too high. Thus, in the states of Greece, it was a rule that the vendors of fish should not sit but stand, so that worn out by the

¹ [For *morem* read *morem*.—Tr.]

monotony and strain of standing they would sell their fish while fresh and at a fair price.

9. But common price, being that not fixed by laws, has some latitude within which more or less can be demanded and given. Seneca, *On Benefits*, Bk. VI, chap. xv, must be understood as referring to this price when he says: 'What does their real value matter¹, since the buyer and seller have settled the price between them? [. . .] The price of everything varies according to circumstances; after you have well praised your wares, they are worth only the highest price at which you can sell them.' (S.) And *Digest*, XXXV. ii. 63: 'The prices of things are not fixed by fancy, nor by their utility to individuals, but by their common utility'; that is, they are worth as much as all would value them. Compare *Digest*, IX. ii. 33. Applicable here is a passage in Aristotle, *Nicomachean Ethics*, Bk. IX, chap. i:

In some states there are laws prohibiting such actions as arise out of voluntary contracts, on the ground, that, if a person has once trusted another, he ought to conclude his contract with him in the same spirit in which he originally made it. The idea is that he who received credit has a better right to settle the value of the service done than he who gave it; for as a rule people who possess a thing do not set the same value on it as people who wish to acquire it, since we always look upon the things which we call our own and which we give away, as being exceedingly valuable. Nevertheless the amount of the exchange must be regulated by the value which the recipient sets upon the gifts received. Still perhaps it ought not to be fixed at the value which he sets upon it when it is in his hands, but at the value which he set upon it before he had it. (W.)

Now because of the above-mentioned latitude they commonly
 466 make three degrees, as it were, of common price, a lowest or generous, a middle or moderate, and a highest or rigorous. A thing can be bought and sold more dearly or more cheaply, provided it is kept within this latitude. But no general definition can be made so accurate as to establish the limits of this latitude. You might express it in no more convenient way than that it is a just price which is commonly set by those who are sufficiently acquainted with both the merchandise and the market. Here you may refer the definition of Varro, *On the Latin Language*, Bk. IV [V. clxxvii]: 'Price is determined for the purpose of fixing value and for the sake of purchase; the word (*pretium*) is derived from *periti* (skilled), because only the skilled can properly make that.' Although Salmasius, *De Usuris*, scoffs at such a derivation.

10. Now in fixing common price consideration is to be given to the labour and expense which merchants undergo in importing and handling their wares, for this is the principal reason why a merchant is allowed to sell his goods for more than the purchase price. But this consideration must be understood only of those expenses as are commonly to be met, since unusual conditions are considered as of no concern in the matter. Therefore, a tradesman will receive no attention

¹ [For *inter est* read *interest*.—Tr.]

if he tries to place a higher price upon his merchandise because he broke his leg, or became seriously ill while bringing them into the country, or because he lost a part of them by shipwreck or at the hands of thieves; provided, of course, such accidents did not contribute to the scarcity of the wares. Much less will he be heeded if he tries to shift to the purchasers such expenses as he encountered unnecessarily and in opposition to the laws of wise business. But merchants can include in their estimation the time they have spent, the plans they have formed, and the troubles they have met in acquiring, preserving, or distributing their merchandise, as well as all necessary expenses for the labour of their servants. And it would surely be inhuman¹, and likely to destroy the industry of men, to try to allow a man for his business, or any other sort of occupation, no more profit than barely permits him to meet his necessities by frugality and hardships.

In the valuation can also be included the difficulty, length, and peril of the way, as well as a different value of money and goods in different places. Furthermore, common value varies according to the manner of buying and selling. For those who sell goods by retail, that is, in small amounts, can demand a somewhat larger price than those who sell wholesale, since the former experience more trouble, and it is more profitable to receive payments in large sums than to collect it in small amounts. But it is also well known how subject a market is to sudden and frequent changes from the plenty or scarcity of purchasers, money, and commodities. For a scarcity of purchasers and money, due to some particular reason, with an abundance of commodities decreases the price. Tacitus, *Annals*, Bk. VI [xvii. 4]: 'The quantity for sale brought about a fall of price.' (R.) On the other hand plenty of buyers and a scarcity of goods increase their price. See Socrates, *Ecclesiastical History*, Bk. III, chap. xv, at the beginning.² So also it makes for a lower price if the seller hunts out purchasers and offers them his wares, that is, when the merchandise seeks a purchaser. Especially is this true when that rule of economy of Cato the Elder is observed, as given in his life by Plutarch [iv. 4]: 'He thought nothing cheap that one could do without, but that what one did not need, even if it cost but a penny, was dear.' (P.) This has passed into the proverb, 'Proffered wares stink.' The reason they allege for this is that in such a mode of selling there is a scarcity of purchasers, which lowers the price. A further consideration is that there is often but little necessity of buying a thing sold in this way, and it would scarcely be purchased at all were it not possible to do so at a low price. Nay, a man often purchases a thing under such circumstances, not so much to please himself

¹ [For *in humanum* read *inhumanum*.—Tr.]

² [In the edition of 1744 the following apposite sentence appears at this point: 'The price is also raised, when one who had no intention of selling an article, is asked to do so.'—Tr.]

467 as the seller. This is the reason why things sold at auction, or under the hammer, are often knocked down for far less than they would otherwise bring, since the terms of that mode of sale specify that the article goes to the highest bidder. Although the ardour and competition of the bidders sometimes rise above the common price, because even without these a large number of purchasers regularly raises the price.

Finally, there can be included in the common price any loss ensuing, or foregoing of profit, which befalls the seller by virtue of such a sale, especially when the buyer puts in his bid of his own accord. For it would be folly for me to sell a thing of mine, except upon the condition that I suffer no loss from so doing. But that loss or increase of profit which follows upon delayed or prompt payment can be, and usually is, taken into consideration under every circumstance. For surely the day as well is a part of price, and it is of more consequence to pay on the spot than after some time, since some further profit can be made of the money in the meantime. See Martial, Bk. VI, ep. xxx. Therefore, Polybius, *Excerpta Peiresciana* [XXXII. xiii. 10 f.], praises in warm terms the generosity of the younger Scipio, for immediately paying what he owed his sisters in the way of a dowry, although it was to be paid in instalments at the end of two and three years, and that at Rome, 'a city where no man ever gives another anything of his own accord',¹ and where 'no one will pay a single talent before the appointed day; so excessively particular are they about money, and so profitable do they consider time'. (S.) Add Grotius, Bk. II, chap. xii, § 14. We should add that, when Themistocles was selling a farm, he ordered the crier to state: 'It had a good neighbour.' Plutarch, *Apophthegms* [p. 185 E]. Sadi, *Persian Rosegarden*, chap. iv: 'A house that has a neighbour like you'—he refers to a worthless Jew—'is worth ten drachmas of bad money. But the hope may be entertained that when you are dead it will be worth a thousand.' Therefore, a good neighbour raises the price of a farm, especially whenever the custom of the Spartans, given by Plutarch, *Instituta Laconica* [p. 238 E], obtains:

It was permitted to use the servants, dogs, and horses of one's neighbour, unless he had need of them, as one's own. And out in the country, if any one had to have something, he used to open his neighbour's storehouse and take out food, seal up the storehouse again, and leave.

But the reason for raising the price of slaves, as given by Justin, Bk. XI, chap. iv, is both unusual, and caused largely by cruelty: 'The price set upon the Theban prisoners is raised not in consideration of the advantage of the purchasers but because of the hatred of their enemies.'

II. Now after most nations had given up their primitive simplicity they easily appreciated the fact that the old ordinary price no longer sufficed to carry on the business and commerce of men as these

¹ [This sentence is not in Polybius at this point.—Tr.]

increased from day to day. For commerce used to consist only in the exchange of goods, and the work of others could be paid for only in work or in kind. Yet when our luxurious desires led to a lack of so many things, in that we no longer were content with what was produced at home, but yearned for the delights of other climes, it was not easy for a man to secure such things as another would be willing to exchange for what we wanted, or which were equivalent to another's goods. And in civilized states where citizens are divided into different social orders, there must needs be several classes of men who cannot subsist at all, or else with the utmost difficulty, if this simple exchange of commodities and labour persists. It is perfectly plain that those nations which are unacquainted with the use of currency have no part in the advances of civilization. See Busbecq, *Letters*, iii, on the manners of the Colchi; add *Digest*, XVIII. i. 1 pr. And so Maximus of Tyre, *Dissertations*, xxxvi [xxxv. 2], is only sweetly dreaming when he says:

Food and drink and clothing and everything else that the body needs, men secure by exchange and mutual compensation with bronze and iron, and, in the case of the more important articles, gold and silver. And yet that is a mistake; for they might dispense with the device of metals, and receive these things from one another for nothing, using a perfectly fair standard of exchange. And that is: Let the man who needs something borrow it from the owner, and the man who has enough to spare lend it to him, expecting to get it back some time from the recipient; for the exchange of such things will not be criticized. 468

12. Therefore, it has seemed best to most nations, which have enjoyed a higher level of culture, to set by agreement an *eminent* price on a particular thing, which would serve as a measure for the proper prices of other things, and in which they would be fully contained, so that by it as a medium a man could secure for himself anything that was for sale and carry on all commerce and fulfil every agreement with perfect convenience.

On this point Aristotle, *Nicomachean Ethics*, Bk. V, chap. viii [V. v. 14], writes as follows: When need introduced the exchange of commodities, of course the immediate need could be met by their exchange, when it was simple. But since we cannot know at the present what we will want in the future and how much of it, νόμισμα, or money, was introduced in order that we might be sure in advance that we would have thereafter the means to secure what we should need in the future; and this money is a sort of ἐγγυητής, sponsor or surety, and so, by means of this agreement between men, every individual is endowed with such a power that when he presents this he can get anything that is for sale. ('Now money serves as a guarantee of exchange in the future: supposing we need nothing at the moment, it ensures that exchange shall be possible when a need arises, for it meets the requirement of something we can produce in payment so as to obtain the thing we need.' (R.)) Therefore, *idem*, *Nicomachean Ethics*, Bk. IX, chap. i: 'A common measure

has been provided by the currency, to which everything is referred, and by which everything is measured.' (W.) *Idem*, *Politics*, Bk. I, chap. vi (9):

When the inhabitants of one country became more dependent on those of another, and they imported what they needed, and exported the surplus, money necessarily came into use. For the various necessities of life are not easily carried about, and hence men agreed to employ in their dealings with each other something which was intrinsically useful and easily applicable to the purposes of life, for example, iron, silver, and the like. Of this the value was at first measured by size and weight, but in process of time they put a stamp upon it to save the trouble of weighing and to mark the value. (J.)

Idem, *Nicomachean Ethics*, Bk. V, chap. viii:

Such things as are the subjects of exchange must in some sense be comparable. This is the reason for the invention of money. Money is a sort of medium (*μέτρον*) or mean; for it measures everything. Money is a sort of recognized representation of demand. That is the reason why it is called money (*νόμισμα*), because it has not a natural but a conventional (*νόμῳ*) existence, and because it is in our power to change it, and make it useless. All things must have a pecuniary value, as this will always facilitate exchange and so will facilitate association (*κοινωνία*). Money, therefore, is like a measure that equates things, by making them commensurable; for association would be impossible without exchange, exchange without equality, and equality without commensurability. (W.)

Here also belongs a passage of the same author, *Magna moralia*, Bk. I, chap. xxxiv [xxxiii]:

But since the work which the housebuilder produces is of more value than that of the shoemaker, and the shoemaker had¹ to exchange his work with the housebuilder, but it was not possible to get a house for shoes; under these circumstances they had recourse to using something for which all these things are purchasable, to wit silver, which they called money, and to effecting their mutual exchanges by each paying the worth of each product, and thereby holding the political communion together. (S.)

Idem, *Rhetoric*, Bk. II, chap. xvi [1]: 'Wealth is a sort of measure of the worth of all else, so that it seems to command all things.' (J.)

13. To attain this end it seemed the most convenient thing to the
469 majority of nations to take the more noble and comparatively rare metals, such as gold (why this should have the first place is shown by Pliny, *Natural History*, Bk. XXXIII, chap. iii, towards the end), silver, and bronze. For just as only a person of tried credit and wealth is accepted as a bondsman, while little security is placed in a common man, so no one will exchange a thing of his which he has secured by great and persistent labour, for something that may be picked up everywhere, such as a handful of dirt or sand. Therefore, money had to be of a substance which was convenient to carry, and into which, because of its scarcity, could be compressed, as it were, the values of many things. A further consideration is that metals have a substance so closely compacted that they are not easily worn out by usage and can be formed

¹ [Pufendorf's version would run 'and it was difficult for the shoemaker', &c.—Tr.]

into small bodies, which qualities are most convenient in a thing that is to serve men as a measure for their commerce.

But since this function of money is not given it by any necessity arising from its nature, but by the imposition and agreement of men (add Philostratus, *Life of Apollonius*¹ of Tyana, Bk. II, chap. iii), it is obvious that other materials can be and are used under stress of circumstances or by preference. Thus leather, paper, and similar material, when stamped in some way, not infrequently serve the purpose of money in cases of great necessity, which currency, however, after the stress is past, can be exchanged for the current coinage. See Polyænus, *Strategemata*, Bk. III [x. 1], about Timotheus and Demetrius; Seneca, *On Benefits*, Bk. V, chap. xiv, at the end. Thus the inhabitants of the kingdom of Congo and Tombutto in Africa (see Leo of Africa, Bk. VII) and many peoples of North America use a certain kind of sea-shell for money, and the Apalachites of Florida black and white grains, see Rochefort, *Descriptio Antillarum*, Pt. II, chap. viii, n. 8. Paul of Venice [Paolo Sarpi], Bk. II, chap. xxxviii, reports that the inhabitants of the province of Caniclu use grains of salt for their small money, and the same is true in the kingdom of Abyssinia, according to Francisco Alvarez, chap. xlvi; yet articles of that kind are suitable only for commerce on a small scale. In the kingdom of Siam larger pieces of money are of pure silver, while for the smaller pieces they use a kind of shell. See Jodocus Schouten, *Descriptio Regni Siam*. Add Polydorus Virgilius, *De Rerum Inventoribus*, Bk. II, chap. xx; Alexander of Naples,² Bk. IV, chap. xv; Budæus on *Digest*, XVIII. i. 1. In this connexion we may note, in passing, that the people of the Congo held iron the noblest of the metals, and gold and silver more cheap, because the last two were of little use, while from the first could be made instruments of the greatest service to the advancement of life.

Herodotus, Bk. II, tells us that among the Ethiopians the rarest and most precious of all metals was bronze. And indeed, if you disregard their use for money, the human race can better do without gold and silver than iron. Thus Garcilaso [de la Vega], *Comentarios Reales*, Bk. I, chap. xi, writes that the Peruvians held it a stroke of fortune that the Europeans had brought them iron instruments, and that one of their nobles could not give adequate expression to his admiration at the sight of scissors brought in by the Spaniards, saying that if the Spaniards had brought in nothing but razors, scissors, combs, and mirrors, these alone would have been enough to obligate them of their own accord to give in return all their gold and silver. For before that time they had used flint knives for shaving, and this had caused them great

¹ [For *Appollonius* read *Apollonius*.—Tr.]

² [The reference is to his *Genialium Dierum Libri Sex*, first published at Rome 1522, as verified by the edition, Paris 1539.—Tr.]

distress. And the same people gave their kings their gold, silver, and jewels, not as tribute but as gifts. *Ibid.*, Bk. V, chap. vii. Add Thomas More, *Utopia*, Bk. II. Also in a section of Arabia bronze and iron were exchanged for equal quantities of gold, since the inhabitants had an abundance of the latter, but lacked the former. Diodorus Siculus, 470 Bk. III, chap. xlv; add Strabo, Bk. XVI [iv. 18, p. 778]. Lucian, *Charon*, claims that iron is more precious than gold, on the score that the latter is defended by the former. Also Pliny, *Natural History*, Bk. XXXIV, chap. xiv.

It was the old custom to measure these metals by weight (see Pliny, Bk. XXXIII, chap. iii), and therefore even to this day among many nations words¹ signifying weight are applied to money. But since this method seemed rather inconvenient, it came to be the general rule that the sovereigns of each state should issue coins of a certain size, bearing the stamp of the state, which set their value. Hence the line of Juvenal, *Satires*, xiv [291]: 'Silver cut up into pretty legends and minute portraits.' (E.) In this connexion we should note in passing the account given by Lampridius [xxxix] of Alexander Severus:

He also melted down the pieces of two, three, four, and ten aurei, and the coins of larger denominations even up to the value of a pound and of a hundred aurei—which had been introduced by Elagabalus—and so withdrew them from circulation. The coins made therefrom were designated only by the name of the metal itself, for, as he himself said, it would result in the emperor's giving too generous largesses, if, when² it were possible for him to bestow many pieces of smaller value, he should be compelled to bestow thirty or fifty or a hundred by giving the value of ten or more in a single piece. (M.)

14. But although the value of gold and silver, and of money, depends upon the imposition and agreement of men, the governors of states have not the freedom to change that value at their will, but must bear in mind certain considerations. In the first place, among all nations with which we are acquainted, it is a general rule that bronze is of less value than silver and the latter of less value than gold, and that silver bears a certain ratio to gold. Plato, *Hipparchus* [p. 231 D], fixes this ratio: 'If a man having put out half a certain weight of gold gets back twice as much silver [. . .] he receives only twice the measure of his gold instead of twelve times the measure.' According to Polybius in *Selections on Embassies*, Bk. XXVIII, chap. v, the Romans in a treaty with the Aetolians agreed to give them one mina of gold for ten of silver. Add Bodin, *On the Republic*, Bk. VI, chap. iii, p. 1071 ff.

In the next place, money is created the better to aid commerce, not merely between citizens of the same state, but between those of different states. Therefore, if the sovereign of a state has set an outrageous value on his own coinage, he makes it of no use for the trade of his citizens with foreigners. For with regard to citizens of the same

¹ [For *vacabula* read *vocabula*.—Tr.]

² [For *cummultos* read *cum multis*.—Tr.]

state the statement of Arrian, *Epictetus*, Bk. III, chap. iii, holds good: 'Neither the banker nor the greengrocer can refuse the Emperor's currency, but, if you show it, he must part, willy-nilly, with what the coin will buy.' (M.) But when the size and value of metal coins is not properly fixed, so that it is at least not inferior to the coinage of foreigners with whom we are trading, it will surely check the trade between citizens and foreigners, since it must needs be confined entirely to exchange of wares. And this alone will not sustain commerce, except in so far as we export more than we import, and those whose wares we on our part do not need, still stand in need of ours. See also Polybius, Bk. VI, chap. xlvii, at the end. And inasmuch as after immovable goods are counted, the basis of an estate consists of money, it is clear that this will be seriously undermined, if so much alloy is mixed with coins, at least those of larger denominations, that the very coins themselves are forced to blush at their own baseness. Therefore, the story given by Polyaeus, Bk. VI [xlvii, at end], of Leuco:

Leuco, when he was in need of cash, ordered all his citizens to bring in their coin to him, to be revalued when stamped in another form. Then he coined it with a new device and gave orders that each piece should have twice its former value, thus profiting himself to the extent of one-half of the amount, without at the same time injuring his citizens, can, indeed, be excused on the plea of necessity, provided that the wrong is righted after the necessity has been removed. Add Bodin, *On the Republic*, Bk. VI, chap. iii; Gregorius Tholosanus, *Syntagma Juris Universi*, Bk. XXXVI, chap. ii. But no excuse can be found for what Zonaras and others recount of Nicephoros Phocas, namely, that he struck off a lighter currency in addition to the heavier which was in 471 circulation, and then demanded that all payments into the treasury be made in the heavier, while his own disbursements were made in the lighter. Add Juan Mariana, *History of Spain*, Bk. XV, chap. ix. And yet some legislators have undertaken to root out avarice, luxury, and other vices, by the introduction of a debased coinage. According to Plutarch, *Lycurgus* [ix], Lycurgus at Sparta

withdrew all gold and silver money from currency, and ordained the use of iron money only. Then to a great weight and mass of this he gave a trifling value, so that ten minas' worth required a large store-room in the house, and a yoke of cattle to transport it. When this money obtained currency many sorts of iniquity went into exile from Lacedaemon. For who would steal, or receive as a bribe, or rob, or plunder that which could neither be concealed, nor possessed with satisfaction, nay, nor even cut to pieces with any profit? For vinegar was used, we are told, to quench the red-hot iron, robbing it of its temper and making it worthless for any other purpose, when once it had become brittle and hard to work. (P.)

By this device an end was put to all useless arts, since no opportunity was to be found in them for profit¹. And since iron money was not received in the rest of Greece, the Spartans could not import the exotic pleasures of their neighbours, which cut the very sinews of luxury.

¹ [For *lucrandsi* read *lucrandi*.—Tr.]

Add the same author's account of the life of Lysander, who introduced again into Sparta gold and silver, and in their train, avarice.

But it is certain that among other nations as well, avarice increased with the use of money. For so long as wealth lay only in stores of grain, herds, and the like, the desire for unlimited gain was ultimately quenched by the work involved in such things, the difficulty of handling and keeping them, and the further fact that they were easily destroyed. But now, upon the introduction of gold and silver money, it is easy for avarice to amass even millions. Thus even Plato, *Laws*, Bk. V [p. 742 A], in order to divert the citizens of his state from too eager a pursuit of wealth, forbids

any private man being allowed to possess gold and silver, but only coin for daily use [. . .] which passes current among themselves, but is worthless among the rest of mankind; with a view, however, to expeditions and journeys to other lands—for embassies, or for any other occasion which may arise of sending out a herald, the state must also possess a common Hellenic currency [. . .] and if, when a man returns, he has any foreign money remaining, let him give the surplus back to the treasury, and receive a corresponding sum in the local currency. (J.*)

Also Paul of Venice, Bk. II, chap. xxi, writes that the Great Cham in his city of Cambalu struck off an immense amount of money from the bark of the mulberry tree, by putting the royal stamp upon it, and that no one in his kingdom was allowed upon pain of death to refuse it, or to make and pass another kind; also that the foreigners who wanted to trade in that kingdom exchanged the gold and silver, pearls and precious stones, which they brought in for that kind of money, and then upon their departure used it to purchase goods which they exported. He adds that in this way the ruler stored up a great quantity of gold and silver. The Persians called the leather money which a certain evil king forced upon his citizens *Schebreva*, as much as to say: 'Money imposed upon his subjects by a king. Hence also the memory of that money has remained so vivid, that when they wish to censure the wrongdoing of any king they say of him that he is imposing leather money on his subjects.' G. Gentius on Sadi, *Persian Rosegarden*, chap. iii. Add Buchanan, *History of Scotland*, Bk. XII, p. 450.

On the other hand, the interest shown by the Senate of Venice for their subjects deserves every commendation. For when a great number of smaller debased coins had slipped in and could in no way be gotten rid of, a decree of the Senate was finally passed, that those who brought such to the treasury at an appointed time would receive their equivalent in silver or gold. To meet this there was drawn from the treasury over five hundred thousand crowns. Andrea Maurocenus, *Historia Veneta*, Bk. XIV, p. 641. We should add in passing the story in Pliny, *Natural History*, Bk. VI, chap. xxii:

The king of Taprobane was more particularly struck with surprise at the Romans'

rigid notions of justice, on ascertaining that among the money found on the captive, the denarii were all of equal weight, although the different figures on them plainly showed that they had been struck in the reigns of several emperors.' (B. & R.)

Compare Solinus, chap. lxvi.

15. Since money is the measure of the price of other things, it is 472
easy to see that there should be no change in its value, unless the highest interest of the state advise it, and then the slighter this change the less it will disturb the business affairs of the citizens. Therefore, Paulus in *Digest*, XVIII. i. 1, says that for the promotion of commerce a substance is selected, the public and *abiding* value of which would, by maintaining a constant amount, obviate the difficulties of exchange. Add Mornay on the passage in question. And yet on the abiding value of money attention should be given to the observation of Grotius, *loc. cit.*, § 17: 'Money acquires its function naturally, not by reason of its material alone, nor by reason of a special name or form, but because it has a more general character by which it is compared either with all things, or with the things that are most necessary.' (K.) The meaning of which passage is this: When a certain coin is worth so much here and now and is equal to a certain thing (for this is the function of money, namely, that a single coin should not only be able to take the place of another coin of the same quality and size—a characteristic of all things which are called usable—but that it may also fully contain the prices of other things), this is due not to its material alone, whether, for instance, it be of gold or silver, nor to any special name or form, whether it be called a ducat, crown, thaler, florin, or because it bears a certain stamp (*Digest*, XVIII. i. 1: 'Money is of use not so much for its substance as for its quantity'; *Digest*, XLVI. iii. 94, § 1: 'In money consideration is given not so much to the kind as the quantity'); but it results from the comparison of it as to scarcity and abundance with other things, and especially with those which are the most necessary for life.

Now land meets this end best of all, since from it comes, mediately or immediately, most of the things by which human life is sustained. And since its products are sufficiently fixed by a full year compensating for a lean one, these are understood to have a fairly stable price, on which the prices of everything else, which has so far not received a valuation from the luxury or foolishness of men, are based. For it is highly agreeable that the prices of things which come from or are supported by land, should in general be raised or lowered according to the price of the land itself. Since, therefore, in these days, when in nearly every nation the land is in the hands of private individuals, land is the general basis of all wealth, it is fair that the value of money should rise or fall according as it is found to be scarce or plentiful in respect to land. For since in the more civilized states there are in general two classes of men, that which devotes itself to cultivating the soil, and that

which in different occupations looks after the conveniences of life, if in a time of great abundance of money the price of land and its products should be low, the cultivators of the soil must needs be ruined, while if money is scarce and the price of land high, the other class of men must labour in want. This we see happen when there is a good harvest and so a low price of food, but the labour of the artisans and of all others who live upon the work of their own hands, remains at the same scale as prevailed in less productive years. For under such circumstances the farmers find little help from the bountiful harvest on their lands. And the same hardship rests upon the artisans, when, with food high, their labour draws the old price. Since, therefore, in years of moderate yield the trade of artisans and farmers seems capable of the best comparison, and then the minimum of recrimination is heard between them, it is clear that in fixing the price of money the greatest regard should be given to land, especially in case some district subsists not on trade alone but chiefly upon its own products.

- 473 16. On the basis of what has been said, the question can be answered, whether a farm which some two hundred years ago was rated at one hundred pieces of gold should not to-day be rated at more, everything else being equal; and whether the wages which were at that time comfortable enough are not now evidently too low. Here ¹ it is not enough to reply that our present currency is ² in weight and fineness equal to the old, and bears the same name and stamp. The further point must by all means be borne in mind, that in the course of some two hundred years so great a quantity of gold and silver has been brought into Europe from Africa and the Indies, and the old mines of Europe have produced such a quantity of silver, that little by little the value of money has notably fallen. Bodin, *On the Republic*, Bk. VI, chap. ii, p. 1028, concludes therefore, that, because of the abundance of gold and silver, the prices of things are now ten times as high as they were. Therefore, everything else being equal, the old prices of land and salaries would have to be increased in the same proportion. Add also Valerius Maximus, Bk. IV, chap. iii, § 12. For let us suppose that commerce is carried on merely by exchange, in a district where there is a small production of wine, but a large one of grain; under such conditions a man will receive a great deal of grain for a small amount of wine. But should it happen that the culture of the vine should be increased, with a consequent large production of wine, surely more wine than before would have to be given for the same amount of grain. On the same principle, when there is a general scarcity of money in comparison with other things, many things will have to be given for a small sum of money. On the other hand, when money increases in volume, more of it will have to be given for the same things. For since bullion can and does come into

¹ [For *Neic* read *Heic*.—Tr.]

² [For *usse* read *esse*.—Tr.]

trade, just like other merchandise, according to ordinary price, its value will rise or fall with its scarcity or abundance. Moreover, the eminent value of money necessarily follows the ordinary¹ price of metals, for it is improper that the same amount of silver, for instance, should in the same country have one value as bullion and another when coined, and so the same thing taken as a measure of itself would be more than when taken as a thing to be measured. This is the reason why, although the prices of practically all other things have advanced because of the increase of money, the value of gold as well as silver has remained the same as formerly, in that an ounce of silver, for instance, is still to-day the equal as before of the crown. For if the price of silver bullion were, for instance, about fourfold, like that of other things, then four crowns would have to be given for an ounce of silver bullion, in which case, it is clear, there would be little profit in coining money.

Therefore, when the price of one and the same thing is said to be changed, a careful distinction must be drawn as to whether the value of the thing itself is changed, or the value of money. For it is the former case when the thing itself begins to be found in greater or less abundance than usual, while the supply of money remains the same; but the latter when the coinage in general increases or decreases, while the supply of things remains as usual. Therefore, for example, if in a year of plenty a peck of wheat can be bought for a crown, and in one of scarcity for not less than three, the reason is not that money has depreciated but that the price of wheat has risen. But when land which a century before sold for 100 crowns now sells for 200, it is not the value of the ground but of money which has changed. Suetonius, *Augustus*, chap. xlii [xli]: 'By bringing the royal treasures to Rome in his Alexandrian triumph he made ready money so abundant, that the rate of interest fell, and the value of real estate rose greatly' (R.) (Orosius says 'twofold'). Add Josephus, *Jewish War*, Bk. VI, chap. xxxii; Francisco Lopez de Gomara, *Historia Generalis Indiae*, chap. cxvii. Money can none the less still serve as a measure, since it should not otherwise be an unstable thing. For the change found in money is not so sudden and abrupt as in other things, 474 which are often seriously affected by the uncertainty of seasons or a combination of situations, while its price is lowered by slow and inappreciable degrees, as it were, so that we do not appreciate the decrease as it occurs, but observe it first after some time. Add Jacques Godefroy, *Dissertatio de Mutatione et Augmento Monetae Aureae*.

¹ [For *vulgari* read *vulgare*.—Tr.]

CHAPTER II

ON CONTRACTS IN GENERAL WHICH PRESUPPOSE PRICES OF THINGS

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| <ol style="list-style-type: none">1. The difference according to Hobbes between pacts and contracts;2. And according to the expounders of the Roman law.3. Some remarks about their position on this point.4. Our own position on this distinction. | <ol style="list-style-type: none">5. Contracts are divided into <i>μονόπλευροι</i> [unilateral], and <i>δίπλευροι</i> [bilateral];6. Intoreal, consensual, verbal, and written;7. Into named and nameless;8. Into gainful and onerous.9. Enumeration of onerous contracts.10. Mixed contracts. |
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OUR next task is to consider contracts which are not understood without dominion and price of things. Here the first duty is to inquire into the difference which is alleged to exist between simple pacts and contracts. According to Hobbes, *De Cive*, chap. ii, § 9, a contract is called 'an act of two or more, mutually conveying their rights'. But since 'in every contract, either both parties instantly perform what they contract for, insomuch as there is no trust had from either to other; or the one performs, the other is trusted; or, finally, neither perform, but each trusts the other', contracts of the first class, he feels, should bear that name; but the other two, namely, where one person is the object of trust, or where both are trusted and the one trusted promises that he will perform something later, he feels should be designated by the term pact. Yet this distinction concerns not so much the nature of the contracts and pacts themselves, as only their execution. And it is contrary to common usage that a purchase, for instance, which is concluded in Greek faith [that is, for cash], should be called a contract, while one where the goods are delivered at the time, but the payment is put off until later, should be called a pact.

2. The expositors of the Roman law agree for the most part in assigning the general class to the term *pact*, and define it on the whole as the consent or agreement of two or more parties to one and the same thing. Then they divide the pact into 'a pact specially so called, and a contract'. The former is, to their mind, 'an agreement, without name and cause, of two or more parties to the same end', or, what amounts to the same thing, 'with no intrinsic force to obligate one before the law'. This again they divide into *simple* and *non-simple*, the latter being further divided into *legal* and *additional*.

Here it should be observed, in passing, that the wiser writers rightly refrain from the term 'clothed pacts'. For the use of the phrases 'of naked favour', and 'naked goodwill', is no reason why one should speak of 'clothed favour'.

They say further: That agreements pass beyond the limits of

a simple or naked pact, either by their own nature, or because of the external confirmation of civil law, that is, by its extrinsic assistance, for it is by their resting upon civil law that they are given the special designation of legal pacts. That this intrinsic nature is due to a twofold reason, to wit: Some of them do not pass under the general name of conventions, but fall under the special name of contracts; while some, although lacking a special name and distinctive form, still rest upon an underlying cause, that is, the fulfilment of a promise, the giving of a thing, or the performance of a deed. That these are properly called contracts, which of their own force produce an effective obligation, and because of which it appears just and equitable for an action to be forthcoming. Yet they add that simple pacts may carry the power to produce an action by stipulation, and pacts which are added to contracts in good faith partake of the power and nature of contracts. 475

3. But since pacts can lead to no action in a civil court, and it is our task to explain the force which they have by their own nature, we may, therefore, not follow this division so closely in this connexion. For it is clear that the civil law may deny action in a civil court even to agreements with cause. For Strabo, Bk. XV[i. 53], says: 'The Hindus have no actions for mortgage or deposit, nor do they use witnesses or seals, but simply trust one another.' And Seneca, *On Benefits*, Bk. III, chap. xv, expresses the wish that no action be allowed on what has been promised, but that it stand only on a man's word. With regard to the precept of Roman law, that 'no action is allowed because of simple pacts', a distinction must be drawn between affirmative and negative pacts. The force of negative pacts in both natural and civil law, or such as embody an agreement not to press a matter, is that they do not give rise to an action but merely preclude one. For since the only advantage they offer to the defendant is that nothing can be required of him by the other party, they can be of no use but to forestall the petition of the plaintiff, that is, to preclude an action. But simple affirmative pacts of themselves are not so wanting in the power to give rise to an obligation, as is shown above, Bk. III, chap. v, §§ 9-11. Yet the Roman law took from them the power of giving rise to an action, primarily for the purpose of cutting at the roots of a great mass of law-suits. And they quite properly felt that some of them had been made with too little consideration (for otherwise they could easily have used the legal form), while others were of no service, by reason of their being concerned with no cause, that is, a matter which would return some advantage to another. For that this is the meaning of the word *causa*, found so generally among the Jurisconsults, is clear from Plautus, *Asinaria*, Act III, sc. i[519-20]: 'If I once stay by myself resting in the rowers' room, the progress [*causa*] of this whole household stops short, you see.' (N.) Thus, for example, if some persons agree that they will

go a certain length of time without washing their hands, or combing their hair, or changing their clothes—and we have found that some profligates have done so—what use is there in a judge being bothered when some such agreement is broken? And in fact such pacts have little standing even in natural law.

4. It is our purpose to seek the distinction between pacts and contracts, first of all in their object, so that we give the name of contracts to what have to do with things and actions which are used in commerce and presuppose dominions and prices of things, and the general name of pacts to all agreements entered into regarding other matters. On this principle pacts strictly understood will include all negative conventions by which we agree that we will not do or claim something, which we might have done or claimed. So also those conventions which have as their object the exercise of our natural faculties, in so far as they work only for a mutual benefit or advantage, and as they are considered by themselves and not compared with others or measured by them. In brief, when the agreement is concerned with
476 doing some work where no money is involved. Although there are not a few conventions not concerned with things, which are called without distinction both pacts and contracts, such as that entered into in marriage.

5. Contracts are divided into *μονόπλευροι*, *unilateral*, *δίπλευροι*, *bilateral*, and such as appear *midway* between them. The first obligate the performance of something from the outset on one side only, and allow no condition *ex post facto*, such as a loan and stipulation. The second obligate both parties to some performance and require an equal consideration of both parties to the agreement, as buying and selling, letting and hiring, and partnership. To the third and intermediate class belongs a contract for a loan, a deposit, and a pledge. These naturally are made only for the one to be obligated, him, that is, who is the recipient, as is shown by the chief end of the parties concerned, and lay no similar obligation upon the giver. Yet it often happens, from some subsequent event and accident, that the giver as well is obligated to the recipient; if, for instance, the latter has been put to some necessary expense on the thing, or has because of it suffered some loss which can be charged to the owner. In such a case it is equitable for the expenses to be refunded and the loss made good.

6. A division of contracts was commonly made by the Roman Jurisconsults into *real*, *consensual*, *written*, and *verbal*. The term *real* is applied to them not because they are concerned with a thing, for that is true of the other contracts as well, but because if that thing, for the sake of which they are given such a name, can be required, there must have preceded an actual transfer of a thing. See *Digest*, II. xiv. 17. This is on the principle that I must have received something that is

usable, if I am to be obligated by a loan. Add Valerius Maximus, Bk. VIII, chap. ii, § 2. Thus no man can demand a deposit and loan of me before he has delivered a thing to me. Yet a contract for loan is one thing, a pact or promise to give a usable thing in the future as a loan is another; a trust or deposit is one thing, a promise to receive a trust or a deposit is another.

They are called *consensual* not because other contracts are performed without consent, but because they produce at once an obligation to give or perform, when each party has by sufficient signs shown its consent, while it is not necessary for a thing first to have been delivered, or for a service to have been performed.

A *verbal* contract or stipulation is unknown to the law of nature, in so far as it consists of certain customary formulae of questions and answers.

It is equally opposed to the same law, for a man who has received nothing, to be as much obligated by a mere piece of writing as if he had received it. The reason for such a case under the Roman law is clear. For since a judge cannot be certain of the truth of a deposit by other means than instruments and other proofs of that sort, it follows that when writings are existent which prove the fact, he cannot but assume its verity until the contrary has been proved. Although all contracts have this point in common, that they can be put down in writing, which may be done in two ways. For either the contract may be in writing, that is, the agreement is declared only in writing, in which case the contract is closed only when the writing has been completed in every detail, this occurring most of all in consensual contracts and their like; or the writing is but the evidence of a contract already closed. In a matter of doubt the latter is presumed. See Grotius, Bk. II, chap. xvi, § 10.

7. Another division of contracts is into *named* and *nameless*. The first class includes those which, because of their common use, have acquired a distinctive and special name and one which expresses the form and contents of the transaction, or in other words, which allows a person at once to recognize what was done. (For although bartering, which is listed among nameless contracts, does not appear to lack a name, yet it is a general one, and a person cannot tell from it whether there is meant a contract of goods for goods, buying, selling, or something similar.) For this reason the Roman legal procedure fixed certain permanent formulae for actions in such cases, since in all other less common contracts only so much was understood as was expressly stated, and so no common and accepted formula was set forth, but only such as met the particular case. Therefore, the actions they called for were designated in *formal terms*. See Grotius, Bk. II, chap. xiii, § 3.

8. The division of contracts into *gainful* and *onerous* best suits our

purpose. The former bring some advantage gratis to one of the parties, such as a loan, commission, or charge. The latter lay an equal burden upon both parties, for by them a man does or gives something upon condition that he receives as much himself. On this distinction appears to rest¹ the other whereby some contracts are called contracts of *good faith*, and others of *the letter of the law*. The effect of these in Roman law was that the former gave rise to an action of good faith, in which the judge enjoyed a somewhat free power to decide and weigh the matter in accordance with equity and fairness, the latter to an action of strict law, where the judge was bound to a strict formula, from which he could not deviate². Yet natural reason itself shows that onerous contracts also are of *good faith*, that is, allow a more generous interpretation in accordance with equity and fairness, for the reason that, since they imply an equal burden, neither of the parties should be burdened. On the other hand gainful contracts appear to be of *the letter of the law*, and allow no free interpretation of this kind, or that a man is bound to more than he has expressly declared, so that a person's kindness should not be made too burdensome to him. Add Arnold Vinnius on *Institutes*, IV. vi. 28.

9. Onerous contracts are very easily grouped under these four heads: Goods for goods, work for work, goods for work, work for goods. Here the word 'work' is taken in a broad enough sense so as to include even the act of a man not a party to the contract. Grotius, in the passage cited above, makes only three divisions, and omits 'goods for work', because he felt that it was identical with the reverse, 'work for goods'. And it must be confessed that there is no real difference between them, since in both cases work is given for goods and goods for work. Yet a *goods for work* contract begins, as it were, with the delivery of a thing, upon which follows the performance of a work, while in the second case the performance of a work comes first and the giving of a thing follows; and so in the one the doer is the author, as it were, of the contract, and in the other the giver. For some *δίπλευροι* [bilateral] contracts have this character, namely, that although there is an equal obligation upon both parties, it is understood to take its rise from one person as the author of the contract. So a contract of purchase regularly commences with the purchaser, one of renting with the tenant, &c.

Now to the *first* class belong those contracts in which one article is given for another, as in bartering in the strict sense of the term. Here a rather subtle distinction should be observed between a general contract of goods for goods, and bartering strictly speaking. For the former is when an indefinite thing is exchanged for the same, as some ox for some mule, or an indefinite thing for a definite, as some horse for this

¹ [For *institi* read *institi*.—Tr.]

² [For *discere* read *discedere*.—Tr.]

particular ox, or a definite for an indefinite, as oil for some kind of grain. But when one definite thing is given for another, such as, for example, this particular ox for this particular horse, it is bartering. See Mornay on *Digest*, XIX. v. 5. Here also belongs that contract where money is given for money, either of a different species or in different places, which is called to-day exchange (*cambium*), in Greek, *collybus*. Sometimes money is given for money, so that it becomes buying and selling; as Pliny, *Natural History*, Bk. XXXIII, chap. iii, gives an account of how once money stamped with a figure of Victory, in being brought over from Illyricum, was bought and sold as merchandise. When a thing is purchased for money it is called buying and selling. Also the use of a thing is given for another thing, as suppose I should give another my horse for a few days in return for a book. Or the use of a thing for the use of a thing, as if I should allow you to live in my house and you permit me to use your field. Or the use of a thing for money, which is properly called letting and renting. Finally, a thing is given on condition that, after a time, another of the same quantity and kind may be given in exchange. 478¹

The *second class*, work for work, can have innumerable kinds, according as there is an infinite variety of actions, useful or pleasing to all kinds of men, which can be bartered, as it were, and one kind performed in exchange for others. In Ammianus Marcellinus², Bk. XVI, chap. x, this kind of contract is called 'a pact to effect an interchange'; in Apuleius, *Apologia* [17], it is 'to make exchanges of services with your neighbours'.

To the *third class*, goods for work, belong the letting and renting for money of labours or services of everyday utility. So also that contract by which in return for money indemnity is furnished those who transport goods to others, which is commonly called insurance or avoidance of danger. And finally, a contract whereby a thing, either consumable or non-consumable, is given in return for some performance.

To the *fourth class*, work for goods, are assigned those contracts whereby some work is performed, on condition that another gives some thing or the use of a thing, and others of a like sort. See *Digest*, XIX. v. 5.

A contract may be conceived which can be assigned to none of these classes because it includes a disjunction, such as a contract of *estimation* (see *Digest*, XIX. iii. 1). Add Plautus, *Captives*, Act II, sc. iii, l. 18 [378 ff.]. Approximately this kind of a contract resembles the giving of marriage gifts among the Muscovites, of which Sigismund, Baron of Herberstein, gives an account. 'The wedding guests send presents to the bride, each of which the groom carefully marks and lays to one side. After³ the wedding he inspects them all one after the other,

¹ [For '458' read '478'.—Tr.]

³ [For *cinitis* read *finitis*.—Tr.]

² [For *Mareellino* read *Marcellino*.—Tr.]

and, if he likes any of them, he sends them to the market with the request that the merchants, who handle the various articles, make an estimate of their value, while he returns all the rest to the donors with an expression of his thanks. Within a year's time he compensates the donors of the gifts that he kept, either with the sums of money at which they were estimated, or some article of equal value. If any guest places a higher value on his present, the groom returns to the sworn appraisers, and forces the objector to abide by their decision. If the groom has not within a year's time either satisfied the donors or returned their gifts, he is fined twofold. If he has failed to have the gift valued by sworn appraisers, he must repay it at the value set by the donor. And this custom the common people regularly observe on every occasion calling for gifts.' The same thing is told by Petrus de Valle, *Viaggi*, Pt. II, ep. i, of the presents which the Persians are accustomed so generously to give strangers. If a more valuable gift is not returned for them, the donor not only complains, but also asks the return either of the gift or of its value.

But these contracts have the common characteristic, that, when they have been met by both parties, these have no further concern with the business on that score. For this reason Grotius, *loc. cit.*, calls them 'diremptory', opposing them to contracts which he calls 'communicatory'¹, which bind the parties by a common tie, and whose fulfilment consists, therefore, in a continued business relation between the parties. Of this nature is a contract of partnership, when two or more men share either in work or goods, or work from the one and goods from the other, the purpose of such a company being the mutual advantage of both. And these contracts, along with those called gainful, are usually simple contracts.

- 479 10. But some contracts are also mixed and composed, as it were, of two transactions; for instance, if I knowingly buy a thing for a higher price and present the seller with that margin in the price; or, if I knowingly sell a thing for a lower price and present the buyer with that margin, it will be partly giving and partly buying and selling. Thus Caesar as Dictator sold at auction to Servilia great estates for a song. Suetonius, *Julius Caesar*, chap. l. So also, if I set a man's salary at more than the work involved warrants, it will be partly giving and partly hiring. This is what great men sometimes do in order to add to their renown, believing that it accords with their position to pay men more generously for their services than they deserve, and in this way adding to their contract a character of generosity. Add *Matthew*, xx. 9; *Digest*, XXVI. vii. 12, § 3.

It is a case in kind if I allow payment for only a part of my labour

¹ [For *commutatoris* read *communicatoris*, from the text of Grotius, II. xii. 4, and the obvious context here.—Tr.]

and make a present of the rest. Add Valerius Maximus, Bk. V, chap. ii, § 10. If I promise to pay a goldsmith for making me some rings of his own material, it will be partly buying and partly hiring, as Grotius, *loc. cit.*, § 5, concludes. Although others consider this buying, on the ground that the latter includes not only the price of the material but also that of the workmanship, and it makes little difference whether the particular form has been already made by the worker or is still to be agreed upon. Yet it cannot be called letting and hiring when the person contracted with does not offer his person. See *Digest*, XVIII. i. 20; *Institutes*, III. xxiv. 4. So also even the contract of *emphyteusis* appears to be a mixed one of buying and selling, and hiring and letting, even though a law of Zeno assigned it to a class to itself. In a feudal contract, likewise, the allotment of a fief is an act of gratuity, in so far as the land is of much more value than the military service which must be given for it; yet in so far as military service is required in return for wardship exercised by the lord for his vassal, it partakes somewhat of the contract of work for work, while the principle involved in that contract pertains to goods for work. But if there is attached to the concession of a fief the burden of a fixed sum of money, it is to that extent involved with *emphyteusis*.

And finally, bottomry, which in general far surpasses all other forms of usury, is a mixed contract, composed of a contract of lending and a contract of avoidance of danger, that is, insurance. Yet although it is usual in a partnership for one party to furnish the money and work, and the other only money, yet it does not for that reason appear to be made a mixed contract. For a contract does not properly become mixed because of the different contributions (for example, should I hire a man to dig in my vineyard, sow my field, and plant my garden, it would still be a simple contract of letting and hiring), but because by one and the same agreement several undertakings of different natures are entered into.

Grotius, *loc. cit.*, § 6, feels that a mixed contract also arises 'by an accession of one act to another', as in the giving of a bond and pledge. This does not appear sufficiently accurate, since from a mixture properly so called there results a third species, while a suretyship is not mixed with the principal contract, but is only joined to it as a kind of external assurance. Thus a debt is not altered by the addition of bondsman and the giving of security, but the creditor¹ is only given some protection in case the debt cannot be required of the original debtor. Yet in the offering of security there are properly speaking two contracts, which have the appearance only of one, for the reason that it includes a transaction of the same bondsman with both the creditor and the debtor. For between the bondsman and the creditor there appears to be a mere

¹ [For *creditori* read *creditori*.—Tr.]

promise to intervene, yet accurately speaking that promise is merely the
480 reason why he owes it, not the cause for his obligation. For the cause of his obligation is the principal contract from which a bondsman by his promise has laid upon himself an obligation that serves to strengthen the contract. And therefore this promise is understood to take on the nature of that contract to which it is added as a surety. Nor has this suretyship the nature of a beneficent action with relation to the creditor, since the latter gets no profit from the bondsman, but only finds a proper way to secure what is his. Although this takes care of his interests, yet it obligates the debtor and not the creditor to feel grateful to the bondsman, for the latter would not have entered into the contract, had no security been offered.

But when the bondsman has paid the debt, there appears to arise an account between the former and the debtor, on the fiction that the bondsman gave the debtor a sum of money which he in turn used to pay the creditor. Although it is in effect the same if we say that the debtor ordered the bondsman to pay the debt, and must, therefore, restore the amount to him. Nor is the giving of a pledge in itself an act of generosity, since no gain accrues from it to the debtor, nor can he impute anything to the creditor for it, since the latter would not have made him the loan without the security.

CHAPTER III

ON THE EQUALITY TO BE OBSERVED IN ONEROUS CONTRACTS

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| <ol style="list-style-type: none"> 1. There should be equality in onerous contracts. 2. Therefore the faults of a thing should be indicated; 3. Which the very nature of a contract requires. 4. Whether faults which do not of themselves touch the thing should be indicated. 5. Faults known to both parties need not be indicated. | <ol style="list-style-type: none"> 6. No one should be intimidated into making a contract. 7. Gainful contracts have no place for equality. 8. In an onerous contract it is presumed that nothing is given. 9. How far an inequality¹ that arises should be corrected. 10. Whether nature allows fraud in buying. |
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ALL onerous contracts and such as yield no benefit, which are usually entered into when the prices of things are established as defined by law or the custom of the market, have this point in common, namely, that equality should be observed in them, that is, that each party to them should receive the same amount, and when inequality is found, the one who has received less acquires the right to demand that what he lacks be made up to him. And this is easily gathered from the purpose of such contracts. For they are entered into to the end that I receive from another some equivalent to a thing or labour that I have contributed, which for certain reasons I prefer to have, rather than to keep my goods or reserve my labour.

Although we are not in want of a more accurate demonstration. For since I have need of contracts to obtain things which I could not by law require of another, and so it is for him to decide whether or not he will give them to me, and since it is assumed that what a man finally gives me by contract he is unwilling to give me gratis, it follows that no one is believed to want to transfer anything to another by a contract, save in so far as he feels that he will, in return for his contribution, receive as much for his part.² And it furthermore follows, that a man, by a contract, can receive no right to what belongs to another, except in so far as that person believes his goods to be equal to what he receives for them. See *Deuteronomy*, xxv. 13 ff.; *Digest*, XLVII. ii. 52, § 22; XLVII. xi. 6, §§ 1, 2; XLVIII. x. 32, § 1.

2. Now in order to discover and determine this equality, it is 481 required that both parties know equally well the matter itself and its qualities, in so far as they are of consequence.³ Euripides, *Cyclops*, line

¹ [For *In aequalitas* read *Inaequalitas*.—Tr.]

² [For *quipollens* read *aequipollens*.—Tr.]

³ [This last clause was very properly added here by Barbeyrac from Pufendorf's revised statement of this principle in the *De Officio Hominis et Civis*, I. xv. 3.—Tr.]

137: 'The light of day accords with contracts.' Ovid, *Art of Love*, Bk. I [250-1]: 'Consult the daylight about jewels, about woof steeped in purple; consult the daylight about the figure and the proportion.' (R.) It follows from this that he who by contract wills to transfer a thing to another, should indicate not only its qualities that can be estimated, but also its shortcomings or faults, in so far as they are known to him; for unless this is done, it is impossible to fix clearly a just price. And here belong *Digest*, XIX. i. 1, § 1; XVIII. i. 43, § 2; as well as the whole section *Digest*, XXI. i, where are listed one after another the faults which should be indicated in the sale of cattle and slaves, and which give reason for refund in case they are concealed. Add Gellius, Bk. IV, chap. ii. Cicero, *On Duties*, Bk. III [xvi]:

And with respect to the law of landed estates, it is ordained among us by the civil law, that in selling them, the faults should be declared which were known to the seller. For though by the Twelve Tables it was sufficient to be answerable for those defects which were expressly mentioned, yet he who denied, suffered a penalty of double the value; yet a penalty for silence was established also by the lawyers. For they determined, that, if the seller knew whatever defect there was in an estate, he ought to make it good, unless it was expressly mentioned. (E.)

Add the illustration which follows at this point. Ambrose, *On Duties*, Bk. III, chap. x: 'In contracts the defects of those things which are for sale are ordered to be recorded, which contracts, unless the vendor has mentioned the defects, are rendered void by an action for fraud' (R.) (although what he says about an action for fraud does not exactly square with the Roman laws). Lactantius, Bk. V, chap. xvii:

He who does not point out the error of the man who is offering something for sale (for example, if through an oversight he turns over a more valuable article than the agreement specified), in order that he may buy it for a smaller sum, or he who does not avow that he is offering for sale a runaway slave or an infected house, having an eye to his own gain and advantage, is not a wise man, as Carneades wished it to appear, but crafty and cunning. (C.*)

Plato, *Laws*, Bk. XI [p. 916 A, B]:

If a man sells a slave who is in a consumption,¹ or who has the disease of the stone, or of strangury, or epilepsy, or some other tedious and incurable disorder of body or mind which is not discernible to the ordinary man, if the purchaser be a physician or trainer, he shall have no right of restitution; nor shall there be any right of restitution if the seller has told the truth beforehand to the buyer. But if a skilled person sells to another who is not skilled, [...] if he loses the suit let him pay double the price at which he sold. If a private person sells to another private person, he shall have the right of restitution, and the decision shall be given as before, but he who loses the suit shall only pay back the price of the slave. (J.*)

And the same author makes this excellent observation in the same passage [p. 917 c]: 'Let no commendation or oath attend the sale of any article.'²

¹ [Pufendorf's reading, 'mental disorder', is incorrect.—Tr.]

² [This thought is in Plato at this point, but not in just these words.—Tr.]

3. The necessity to indicate these faults arises from the nature of the action, and from the fact, that, without it, a just price cannot be set, not because that bond of humanity, by which all men are joined, is properly more tightly drawn by the closing of contracts, or because a certain new relation is established between the contracting parties binding them to some duties over and above those required by the nature of a contract. For the two parties to a contract do not feel, after they have performed it, that they are any more indebted to each other than to any other man, except that the relationships in such a contract may often lead to friendship. Therefore, it is incorrect to use the fact that we can omit a thing without injury to the common law of humanity, as the basis for the statement that we can do the same thing when we enter upon contracts. So also it does not follow, that, because no man is bound by the sole law of humanity to disclose to every one the condition of his affairs, or to communicate to another all his knowledge, we are not bound in a contract to point out to another the defects of our possessions. For if I am not under contract I have certainly the 482 right to hide many things from others, even though I may be the only one to enjoy some profit from my silence, which would be shared by another, if I acquainted him with it. For instance, if I know that gems are found in a deserted place belonging to no one, I am not obligated to tell this to another that he also may share with me in the profit. See *Matthew*, xiii. 44, where the buyer would not have secured the field at so low a price, if he had told about the treasure. Compare Grotius, Bk. II, chap. viii, § 7. Here belongs the story of the farmer, Anicas, the discoverer of the Samajedi, as given in Londorpius, *Continuatio Sleidani*, for the year 1607. And Cicero, *On Duties*, Bk. III [x], is right in saying:

Yet our own interests should not be neglected by us, nor given up to others when we ourselves want them; but each should serve his own interests, as far as it can be done without injustice to another:—Chrysippus has judiciously made this remark like many others: ‘He who runs a race, ought to make exertions, and struggle as much as he can to be victor; but he ought by no means to trip up or push with his hand the person with whom he is contesting. Thus in life it is not unjust that each should seek for himself what may pertain to his advantage—it is not just that he should take from another.’ (E.)

Ambrose, *On Duties*, Bk. III, chap. iv, has also repeated this passage.

Applicable to contracts is the statement of Valerius Maximus, Bk. VIII, chap. ii, n. 1: ‘An honest dealer ought not to exaggerate the expectation of good points, nor to obscure the consideration of bad ones.’ Under this head also comes the statement of Plato, *Law*, Bk. XI [p. 921 A B]:

When a man undertakes a work, the law gives him the same¹ advice which was given to the seller, that he should not attempt to raise the price, but simply ask the value; this

¹ [For *idipsum* read *id ipsum*.—Tr.]

the law enjoins also on the contractor; for the craftsman assuredly borrows the value of his work. Wherefore, in free states the man of art ought not to attempt to impose upon private individuals by the help of his art, which is by nature a true thing. (J.)

You may also apply to this principle what Socrates says that he learned from Aspasia, Xenophon, *Memorabilia*, Bk. II [vi. 36]: 'Good matchmakers have to consult truth when reporting favourably of any one: then indeed they are terribly clever at bringing people together: whereas false flatterers do no good; their dupes ended by hating each other and the go-betweens as well.' (D.)

4. But just as there is no doubt that notice should be given of those faults which properly concern a thing that is being contracted, so it was a frequent subject of discussion among the ancients, whether other things as well, which did not concern the actual matter at hand, and yet have some bearing on its value, should be indicated as much by the buyer as the seller. On this point Cicero, *On Duties*, Bk. III [xii], has this to say:

If (he observes) an honest man has brought from Alexandria to Rhodes a great quantity of grain during the scarcity and famine of the Rhodians, and the very high price of provisions; if this same man should know that many merchants had sailed from Alexandria, and should have seen their vessels on the way laden with corn, and bound for Rhodes, should he tell that to the Rhodians, or keeping silence, should he sell his own corn at as high a price as possible? In this case it seemed right to Antipater that everything should be disclosed, so that the buyer should not be ignorant of anything at all (no matter how it concerned the affair) that the seller knew. To Diogenes the Babylonian it appears that the seller ought, just as far as it is established by the municipal laws, to declare the faults, to act in other respects without fraud; and since he is selling, to wish to sell (to his own profit) at as good a price as possible. I have brought my corn—I have set it up for sale—I am selling it, not at a higher rate than others, perhaps even for less, since the supply is increased. The argument of Antipater proceeds on the other side. 'What do you say? When you ought to consult for the good of mankind, and to benefit human society, and were born under this law, that your interest should be the common interest, and reciprocally the common interest yours—will you conceal from men what advantage and plenty is near them?' Diogenes will answer, perhaps, in this manner: 'It is one thing to conceal, another thing to be silent. I do not conceal from you now, if I do not tell you what is the nature of the gods, or what is the supreme good; things, the knowledge of which would be more beneficial to you than the low price of wheat.' 'Yes indeed,' Antipater replies, 'it is necessary, that is, if you remember that there is a social tie established between men by nature.' 483 'I remember that,' he will answer, 'but is that social tie such that each has nothing of his own? for if it be so, we should not even sell anything, but make a present of it.'

In that matter Cicero [xiii] seems to incline toward the opinion of Antipater, in that he says that the concealment of the merchant is that 'not of an open, single-minded, ingenuous, just, good man; but rather of a wily, close, artful, deceitful, knavish, crafty, double-dealing, evasive fellow'. (E.)

And yet Cicero himself appears to free the merchant from the charge of deliberate deceit, when he says a little later, that deliberate deceit is 'when one thing is simulated and another done', which definition

does not accord with the question before us. Therefore, it may rightly be said that the merchant did not commit an act of injustice in saying nothing about the ships behind him. For justice only requires that those things be indicated which of themselves concern the matter at hand, for instance, whether a house be infected with disease, or whether the magistrate has ordered it razed, both being instances used by Cicero in the passage before us. But in the case at hand nothing like this was concealed. The quality of the grain was quite apparent, and at the time when the contract was made, it was actually worth as much as it was being sold for, although it would have been worth less a short time afterwards. Nor did the Rhodians have a right, in the proper sense of the word, to learn this from the merchant, since they had no pact with him on that point.

Whether he acted against the law of beneficence and humanity is another question, which I would not hasten to answer in the affirmative. For if I am to be bound by humanity to do another a kindness, he should be in great need of having it done him gratis. Now the Rhodians needed grain and not money, since their wealth was a by-word among the ancients. Moreover, I am not obligated to do a kindness when the giver loses more than the receiver gains; and the merchant would have lost more profit by telling of the coming fleet, than the buyers would have gained in grain. For if it had been sold in small quantities at the market price, each of the purchasers would have lost but little, while if one man had taken it all, he might have laid it to his own avarice that he chose so poor a time to grasp at great profits. And, in truth, the general custom of life is not to stick to a too close observance of duties in transactions of this nature. We can easily overlook the necessity of beneficence in the case of merchants, provided they will not try to deceive us by their greed for profit.

5. But there is no need to mention faults of a thing already known to the buyer, for the equal knowledge of both parties to the contract makes them also equal. In the same way, when faults have been made known by the seller, the purchase cannot be recalled, since it is clear that the purchaser had already agreed to them. Here belongs the following passage from Cicero, *On Duties*, Bk. III [xvi]:

Gratidianus sold to Sergius Orata that house which he had himself purchased from the same man a few years before. This house was subject to a service to Sergius, but Marius <Gratidianus> had not mentioned this in the conditions of conveyance. The matter was brought to trial. Crassus was counsel for Orata; Antonius defended Gratidianus: Crassus relied on the law—whatever defect a seller who knows it had not disclosed, it is fit that he should make good: Antonius relied on the equity—that since that defect could not have been unknown to Sergius, who had formerly sold the house, there was no necessity that it should be disclosed; neither could he be deceived, who was aware under what liability that which he had bought was placed. (E.)

Or, as it is stated by Ulpian in *Digest*, XIX. i. 1, § 1: 'He does not

appear to have had something concealed from him, who knew about it; nor did he need to be advertised of it, who was not ignorant.' Add *Digest*, XVIII. i. 43, § 1, 57, § 3; XXI. i. 65. A passage in Horace, *Epistles*, Bk. II, ep. ii [13], bears on this point, where he introduces a slave dealer, who, when about to sell to another man one of his slaves, after having detailed his good points, had this to add: 'He had a lazy fit once, and hid himself, as boys will, in fear no doubt of the lash that hangs on the staircase.' (Add *Digest*, XXIX. v. 1, § 33; XXI. i. 17) 'Pay your money, unless you find a difficulty in the escapade of which I have duly warned you: He would be on the right side of the law I trow, in taking his price. The goods are damaged, but you bought them with your eyes open: the conditions of sale were told you.' (W.) On the same basis rests the conclusion of Marius in Plutarch, *Marius* 484 [xxxviii, p. 427 E], and Valerius Maximus, Bk. VIII, chap. ii, § 3:

Fannia had been married to Tinnius, but after divorce she demanded the return of her dowry, which was considerable. Tinnius brought a countercharge of adultery, and the case was brought before the consul Marius. In the hearing it was ascertained that Fannia had been immodest, and yet that her husband, who knew the fact, had married her and lived a long time with her. Marius censured both parties; he ordered the man to restore the dowry, and the woman he fined the sum of four asses for her disreputable conduct.

Compare *Digest*, XLVIII. v. 13, §§ 9, 10.

6.¹ Furthermore, what is true of all pacts is especially true of contracts, namely, that neither of the parties may use unjust fear upon the other to make the contract. Therefore, the Lacedaemonians were right in deciding that the purchase of the land which the Eleans extorted from the owners by fear should be declared null, 'deciding that it was no more just to get property from the weaker by a forced purchase than by a forcible seizure.' (B.) Xenophon, *Greek History*, Bk. III [ii. 31]. Here belongs the passage in Cicero, *Against Verres*, Bk. IV [V. v], where he speaks of the statues and paintings brought by Verres from Sicily. This accusation Verres thought he could meet by simply saying, 'I purchased them'. But Cicero replies:

Our ancestors wisely provided that any men sent into provinces as governors should not be allowed to make any manner of purchase. For that reason they were supplied with silver and raiment out of the state funds. But slaves were not given them by the state, because there was no one in Rome of any position who did not already have some. Yet they made a law 'that no one should buy a slave except in the room of a slave who had died'. For they held it a robbery, not a purchase, when the seller was not allowed to sell on his own terms. And they were aware, that, in the provinces, if he who was there with the command and power of a governor wished to purchase what was in any one's possession, and was allowed to do so, it would come to pass that he would get whatever he chose, whether it was to be sold or not, at whatever price he pleased. (Y.)

Add *Digest*, XVIII. i. 46, 62; XLVIII. xi. 9, § 1; *Code*, IX. xxvii. 6; II. xix. 11; *Constitutions of Sicily*, Bk. I, tit. lxxxviii, § 1. Tacitus,

¹ [For 'g' read 'G'.—Tr.]

Annals, Bk. XIV [xiv, towards the end]: 'When the pay comes from one who can command, it bears the character of compulsion.' (R.) On this point bears what Dio Cassius, Bk. XLII [1], says of Caesar:

After his victory over Pompey he applied the term 'borrowing' to those levies of money for which there was no other reasonable excuse; for he exacted these sums also in a high-handed way and no less by force than he collected money actually due him, and it was his intention never to repay them. (C.)

Yet it happens rather often that perpetual or temporary subjects are forced by the government to undertake contracts which are usually of sale or hire, when, for instance, merchants are compelled to sell something of which the state is in great need, or to let their services, wagons, and ships. This is entirely proper when the public service or necessity requires it, and the price of the conveyance and merchandise is justly met. It is not uncommon also for states to require that a man must buy from one person and from no one else, if he wishes some particular kind of things.

7. But it is clear enough that this equality does not belong to gainful contracts, for when the reward is made equal to the work, it becomes a different kind of transaction. See *Institutes*, III. xxvi. 13; *Digest*, XVI. iii. 1, § 9. Upon the addition of a fee or reward, a contract takes on the character of hiring. Yet in a charge and trust, although indirectly and circumstantially, an equality will be observed, so that if any expense beyond the actual service necessary has been incurred regarding the affairs or the property of another, it is fully met, since the agreement in such contracts concerned only free service, and any expense will have to be repaid as by a tacit contract of loan. See *Digest*, XVI. iii. 12 pr.

8. But in onerous contracts this equality must be observed, that, 485 what a man has received in excess of his proper share, he cannot excuse on the claim of a presumed donation. For those who enter such contracts are not generally supposed to have any intention of making the other party a present. And so no mixture of a contract with a gift is presumed, unless the other party has expressly stated it, or unless it appear that he knew that the object or work was under-estimated. An instance is found in Pliny, *Letters*, Bk. VII, ep. xiv: 'He had, for friendship's sake, sold that estate at a low price.' (B.) In general the act of Scaevola, as given in Cicero, *On Duties*, Bk. III [xv], is praiseworthy: 'When he required that a price of a property of which he was about to become a purchaser should be named to him once for all, and the seller had done so, he said that he valued it at more, and added a hundred thousand¹ sesterces.' (E.)*

9. It follows from what has been said, that even though all the recognized faults of a thing have been pointed out, and no more has been required than was felt to be due, yet in case some inequality in the

¹ [Following the better reading *centum*, 'hundred', instead of *decem*, 'ten' in Pufendorf.—Tr.]

thing is afterwards discovered without the fault of the contracting parties (suppose some fault was overlooked or there was an error in the price), it also must be corrected, and we must take from him that has more and give to him that has less. Add *Digest*, XVIII. i. 13 pr., §§ 1-4; XXI. i. 1, § 2. Nor does the law of nature require that this inequality exceed one-half of the just price. For that famous law in *Code*, IV. xliv. 2, where it is stated that an action may be brought to break a contract or make up the just price, 'provided one-half of the just price has not been paid,' is only positive, and is based primarily upon the argument that the courts would be unable to meet the demands made upon them, if the judge could be appealed to for even the very slightest injury. A further argument is that the nature of business requires him who would not be deceived, to keep his eyes open. Especially since no matter how highly the merchant values his wares, the final determination of the price rests upon the will of the buyer. Here may also be applied the saying of Cicero, *On Duties*, Bk. III [xv]: 'The laws abolish iniquities, as far as they can lay hold of them by the hand, the philosophers, as far as they can check them by reason and intelligence.' (E.*) Although, as a matter of fact, this law of the Code is too severe to be just. For granting that the judge is not to be worn out with matters of little importance, yet there is no reason for him to refuse his aid when a man has been grossly injured, even though not to one-half of the price. For instance, if I have sold a house for 600 something or other, when it was worth 900, why should I be denied all aid of the law to recover my 300, since an action is allowed for far smaller sums? Therefore, just as among those who are only under the law of nature and nations, a small injury received through no malice of the contracting parties does not give sufficient cause to break the contract or enter complaint, so when it is of a graver nature, even though it may not reach one-half of the just price, it is right to demand, either that the contract be broken, or else that the amount by which it falls short of the just price, be made good. And the gravity of an injury is measured either by the greatness of the price, or by the slender means of the injured party, which are sometimes seriously embarrassed by a loss that could be overlooked by a more wealthy person. Nay, even in states where the aforesaid law is observed, a buyer must with good conscience make good for a serious injury, although it may be less than one-half, since the purpose of that law was not so much to confirm a profit made at the expense of another, as to relieve the judge of a mass of litigation. Yet the same law provides that no right or action is allowed for such an injury against a fellow citizen. But the lawyers were right in maintaining that the benefit of this law should be allowed not only to the buyer but also to the seller, and should be extended to other contracts as well. Selden, Bk. VI, chap. v, observes:

If any Jew had cheated another Jew, in a purchase or sale in good faith, of a sixth part of the price, he had to restore it, whether he be purchaser or seller, but not if it was less than a sixth part. If the loss was more than a sixth part, the purchaser could break the contract and reclaim his purchase price by an action for recovery, either on the spot or so long as the transaction had not been closed. But if the loss fell upon the seller, he could reclaim his article any time thereafter. This rule applied also in the sale of usable articles, such as fruits, seeds, and the like. But only a Jew could make use of this law when injured, not a Gentile when cheated by a Jew. 486

10. The expositors of Roman law have laboured hard to reconcile with what has been said, a passage in *Digest*, IV. iv. 6, § 4 [IV. iv. 16. 4]: 'In purchase and sale the contracting parties are free to take advantage of one another about the price, upon principles of natural law.' (M.) Add *Digest*, XIX. ii. 22, § 3. We are in entire agreement with the explanation of Grotius, Bk. II, chap. xii, § 26, where he shows that 'may' and 'must' do not always denote what is lawful but only what is merely permitted, so that no relief is offered against the man who wishes to defend himself by citing a pact, who, that is, on being addressed upon the subject of his unjust price, vouchsafes no other reply, than that those were the terms of the agreement, and that he who will not open his eyes, may, as the proverb runs, open his purse. Add *Law of the Bavarians*, tit. XV, chap. ix, § 1, and *Capitularies of Charles*, Bk. V, chap. ccx. So also the following rule is given in Xenophon, *Memorabilia*, Bk. II [x. 4]: 'Good economists tell us that when a precious article can be got at a low price we ought to buy.' (D.) Add the witty remark of Cicero in Gellius, Bk. XII, chap. xii. See also Seneca, *On Benefits*, Bk. VI, chap. xxxviii, where he questions whether it was proper of Demades 'at Athens to obtain a verdict against one who sold furniture for funerals, by proving that he had prayed for great gains, which he could not obtain without the death of many persons.' (S.) Add *Capitularies of Charles*¹, Bk. I, chap. cxxxi.

Regarding the stratagem of Jacob in *Genesis*, xxx. 37, it may be observed that his shrewdness deserves our sympathy more for the reason that he was dealing with a wicked man who was trying to outdo him by every means at his disposal, and who, furthermore, had made the hard terms with him that he should receive no other pay for his tending of the cattle than a part of the young, and yet should make good all accidents. *Genesis*, xxxi. 39. So also the word 'naturally' does not always signify what should be done or what agrees with natural law, but also what is customary, as in I *Corinthians*, xi. 14. Although in this passage the phrase *τὸ κομᾶν* [to have long hair] may be taken also to mean too great care in arranging the hair, which women lay claim to, in a way, as their right, but among men savours of effeminacy, according to the saying [Ovid, *Heroides*, IV. 75]: 'Away from me with your young men arrayed like women!' (S.) Although, in all truth, natural reason

¹ [For *Carolil.* read *Caroli.*—Tr.]

dictates that it is unworthy of a man to assume that manner of dress which immemorial custom uses to distinguish the female sex from the male.

A further law on this matter is in *Code*, IV. xlv. 8:

The substance (that is, universal custom) in purchase and sale¹ is that the purchaser and the seller come to the business, one hoping to get it more cheaply, the other to sell it more dearly; and finally, after a great deal of argument, as the seller comes down a little in the price asked, and the buyer adds something to his first offer, they agree upon a fixed price.

Not absurdly does Anacharsis, in Diogenes Laertius [I. 105], call a market-place 'an established place for men to cheat one another, and behave covetously', and where it is considered fair 'for any one to be cunning to his own profit'. Add, however, *Digest*, XXI. i. 18, 19. Indeed, men are by natural instinct urged on to secure their own advantage, and for this reason it has been felt that trade could scarcely be carried on in a state, were not some place left for business shrewdness. See *Digest*, XVIII. i. 71. Nay, according to Pliny, *Letters*, Bk. I, chap. xxiv, a man who allows himself to be imposed upon deserves to be laughed at: 'A dear bargain is always a disagreeable thing, particularly
487 as it reflects upon the buyer's judgement.' (B.) Horace, *Satires*, Bk. I, sat. ii [103-5]: 'Or would you rather have a trick played on you and your money taken away before the merchandise is shown?' (W.)

A further consideration seems to lie in a tacit indulgence of the parties to the contract who appear to allow each other a slight variation from that precise equality, in view of the fact that they are scarcely able to define it with precision. Therefore, it is a kind of general law of the market, that every one be free to buy or sell on the best possible terms, provided there be no deception in the article itself. Add Michel Montaigne, *Essais*, Bk. I, chap. xxi. For if there is such deception, there will be place for the statement of Fulgentius, *Mythology*, Bk. I [xviii], that Mercury presides over trade and thievery: 'Because there is no difference between the stealing and lying of a tradesman and the perjury and robbery of a thief.' We may note, in passing, that, according to Aelian, *Varia Historia*, Bk. XIV, chap. xlv, the Ephors fined a young man because he had bought a farm too cheap, giving as their reason that for a young man he was too much inclined to drive a good bargain.

Mornay in his remarks on this law explains the word 'naturally' as *εὐφύως*, 'cleverly', which is quite wrong, for the word goes not with *circumvenire* (circumvent) but with *licet* (is permissible).

¹ [For *venditionis* read *venditionis*.—Tr.]

CHAPTER IV

ON GAINFUL CONTRACTS IN PARTICULAR

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| 1. The definition of a mandate. | 5. Whether a mandate may be fulfilled by an equivalent. |
| 2. The singular veneration for it among the Romans. | 6. On a loan and how it differs from a voluntary grant. |
| 3. The agent commissioned should show the utmost diligence. | 7. On a deposit. |
| 4. How far he should be reimbursed. | |
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OUR next task is to consider more closely some points regarding the more important contracts. Now although they have been fully treated by the expositors of the Roman law, yet in view of the fact that most of them have been derived from the law of nature and nations, it is fitting that they be claimed for their proper source.

Now we assign the first place among gainful contracts to a mandate, whereby a man undertakes to care for another's business gratis at his request and upon his mandate. And yet this contract does not presuppose the dominions and prices of things directly and of itself, but only as a secondary consideration, in so far as the principal must repay the expenses which the agent has been put to, in addition to the work promised gratis on the business transacted. But if a man has undertaken another's business without his knowledge, and has conducted it with profit, the Roman laws allowed him an action 'for services rendered', the basis of which we can conveniently call an implied mandate, which is the same basis also for that obligation which lies between guardian and ward. See *Digest*, XLIV. vii. 5 pr., § 1.

2. The ancient Romans accorded a special reverence and sanctity, as it were, to a mandate, on the ground that it derived its source from humanity and friendship, which are the strongest bonds between men, while he who shelters himself beneath them in working deceit upon a person who thinks too highly of his honesty, is justly regarded as an object of detestation. See *Digest*, III. ii. 1; XVII. i. 1, § 4. Cicero, *For Sextus Roscius* [xxxviii, xxxix]:

In private affairs if any one had managed a business entrusted to him, I will not say maliciously for the sake of his own gain, but even carelessly, our ancestors thought that he had incurred the greatest disgrace. Therefore, legal proceedings for betrayal of a mandate are established, involving penalties no less disgraceful than those for theft. I suppose because, in cases where we ourselves cannot be present, the vicarious faith of friends is substituted; and he who impairs that confidence, attacks the common bulwark of all men, and as far as depends on him, disturbs the bonds of society. For we cannot do everything ourselves; different people are more capable in different affairs. On that account friendships are formed, that the common advantage of all may be secured by mutual good offices. Why do you undertake a mandate, if you are either going to neglect it, or turn it to

your own advantage? Why do you offer yourself to me, and by feigned service hinder and prevent my advantage? Get out of the way, I will do my business by means of some one else. You undertake the burden of a duty which you think you are able to support; a burden which does not appear very heavy to those who are not very worthless themselves. This fault, therefore, is very base, because it violates two most holy things, friendship and confidence; for men commonly do not entrust anything except to a friend, and do not trust any one except one whom they think faithful. It is therefore the part of a most abandoned man, at the same time to dissolve friendship and to deceive him who would not have been injured unless he had trusted him. (Y.*)

Plautus, *Mercator*, Act II, sc. iii [376]: '[. . .] All sensible men should give a mandate their very first attention.' (N.*)

3. For the same reason the Roman laws require the most exacting diligence in fulfilling a mandate, even though it has been undertaken purely for the sake of the person who has entrusted it. See Jacques Godefroy on *Digest*, L. xvii. 23. A perfect example of this is Atticus, as he is portrayed in his life by Cornelius Nepos, chap. xv:

Whatever he was asked to do, he did not promise without solemnity (that is, with great caution and circumspection), for he thought it the part, not of a liberal, but of a light-minded man, to promise what he would be unable to perform. (Compare Terence, *Andria*, Act IV, sc. i, line 5 [629 f.]): But in striving to effect what he had once engaged to do, he used to take so much pains, that he seemed to be engaged, not in an affair entrusted to him, but in his own. Of a matter which he had once taken in hand, he was never weary; for he thought his reputation, than which he held nothing more dear, concerned in the accomplishment of it. (W.)

Yet it appears that in such a contract one should consider what kind of presumption on a man's industry and diligence may be gathered by his former deeds and the general tenor of his life. For whoever has entrusted his affairs to a careless man has only himself to blame, unless the latter undertakes to show the diligence which belongs to careful men, and was in the first place fitted to show such diligence. A story found in Sadi, *Persian Rosegarden*, chap. vii, can serve to illustrate this. A man suffering with his eyes came to a veterinary¹ for a cure. The latter anointed his eyes with the same salve which he used upon beasts, but the patient goes blind. When the case is brought before the judge he says, 'You have no case for damages against the doctor, for if the patient had not been an ass, he would never have gone to a veterinary.'

4. On the other hand the agent should be reimbursed for expenses incurred on a thing entrusted to him. For in undertaking such a matter a pact is tacitly understood, whereby he promised nothing save his labour, industry, and good faith; and it would be scarcely fair to make a man's willingness burdensome to him. The same is also to be said of damage which a man experiences by *reason* of a mandate, but not of that which he incurs merely on the *occasion* of one. And so the principal will have only to meet the losses which flow directly from the

¹ [For *mulo medicum* read *mulomedicum*.—Tr.]

business itself, but not those which arise on the side, as it were, while the business is being undertaken. Here applies *Digest*, XVII. i. 26, § 6:

The agent shall not charge against his principal everything that he would not have spent had he not accepted the agency; as if he was robbed by highwaymen, or lost his property by shipwreck, or was put to expense because of his own illness or that of some of his party. For these things should be charged to the account of chance occurrences rather than to the agency which was undertaken.

This means that whoever undertakes the management of another's affairs of his own accord and good will, is supposed to recognize that all chance happenings which are wont to come upon us unawares, are at his own risk. But we must rule otherwise, in case a man uses his authority to make another man undertake his business, for here a greater necessity lies upon him who gives the order, to save from loss him who was unable to resist the command. But if a man undertakes some perilous business, it is understood that he accepted also the risks which regularly accompany such a business, unless he has expressed himself to the contrary. Compare Mornay on this law, *Digest*, XVII. i. 26, § 6. Another law to the same purpose is in *Digest*, XVII. ii. 52, § 4. 489¹

5. It is a moot question whether a mandate can be fulfilled by an equivalent, and we find it excellently debated in Gellius, Bk. I, chap. xiii:

It has been a subject of inquiry, [...] whether an office being given you, and what you are to do clearly defined, you may be allowed to depart from this, if by so doing the affair shall promise a more fortunate issue, with respect to the advantage of the person employing you. (Those who say no assert): There are not a few, who, having decidedly fixed their opinion, that a matter being reflected upon, and determined by him whose business and concern it might be, this could by no means be departed from, although some unexpected event might promise a more fortunate issue, lest, if their hopes should be disappointed, the fault of disobedience be incurred, and a penalty not to be deprecated. If accidentally the thing should turn out better, the gods indeed are to be thanked; but an example should seem to be introduced, by which counsels carefully resolved upon, should be corrupted, the obligation of a trust being broken. (Others on the contrary) have thought, that the inconvenience to be apprehended from the affair's being done contrary to what had been commanded, should first be weighed with the advantages expected; and if the former appeared comparatively light and trifling, and the advantage greater and more important from a well-grounded expectation, then the command might be departed from, lest a providential opportunity of successful enterprise should be passed by. Nor did they think the example of disobedience at all to be feared, if similar reasons could not be urged. (There follow then some precepts of prudence:) A particular regard should be paid to the genius and disposition of the person whose office was undertaken, lest he should prove ferocious, without sensibility, unimpressible, and implacable. (B.*)

Such was the case of Cn. Piso in Seneca, *On Anger*, Bk. I, chap. xvi, for if a reason must be returned to one who gives such an order, it will be the safest course to do nothing other than has been commanded.

Gellius adds an illustration from the case of P. Crassus Mutianus, who sent an engineer to bring the larger of two beams for use upon

¹ [For CAPUT III read CAPUT IV.—Tr.]

a battering-ram. When the latter brought the smaller judging it to be better fitted to the work, he had him scourged, 'because he felt that the entire function of a commanding officer was ruined and destroyed, if a man should obey an order that had been issued¹ to him, not in the spirit of the obedience which was due, but upon his own counsel which had not been asked for.' Yet it can be said for the engineer that when Crassus sends a man skilled in that science and tells him what use he has for the beam, it appears that he is thereby admitted in a sense to his counsel. Add Michel Montaigne, *Essais*, Bk. I, chap. xxvi.

On the other hand, among instances of mildness there is one in Xiphilinus, *Epitome of Dio's History*, and Zonaras, Bk. II, of the emperor Hadrian, who, when the crowd was furiously demanding something, ordered the herald to proclaim silence. But the latter fearing the effect of such a harsh and bold command secured quiet by stretching forth his hand and then announced, 'The emperor wills this same thing'; nor did the emperor take offence at his act. Lampridius, *Commodus* [i]: 'When it happened that his bath was drawn too cool, he ordered the bathkeeper to be cast into the furnace; whereupon the slave who had been ordered to do this burned a sheep skin in the furnace, in order to make him believe by the stench of the vapour that the punishment had been carried out.' (M.) Grotius, Bk. II, chap. xvi, § 21, feels that a mandate can be fulfilled by something equally useful, if it is established that what was commanded was not done so under its own special form, but under the general consideration or understanding of some advantage which can be secured as well in some other way.

- 490 Now the matter resolves itself into this. Sometimes the mere business to be performed is declared in the mandate, while the manner of the performance is left to the judgement and skill of the agent, as is expressed in the saying, 'Send a skilled person, but give him no orders.' Sometimes the manner is stipulated, but more in the way of advice, and how the principal feels the matter can best be accomplished, while the agent is not forbidden to use his own skill, provided some other method appears more expeditious, when he has come to apply himself to the task. Sometimes, finally, the manner is prescribed in such a way that a man may not depart from it at all, no matter how the thing may turn out. It is quite clear, then, that a mandate can be fulfilled by an equivalent not in the last case but only in the second. In defence of this there is a case in *Digest*, XVII. i. 62, § 1, which runs as follows: 'I commissioned you to go surety for Titius with Sempronius; you, however, did not do so but commissioned Sempronius to trust Titius. If you have been to any expense on that account, the question is whether you can bring action against me.' The answer is

¹ [Fox *russus* read *iussus*.—Tr.]

given in the affirmative. For I gained my end, which was that Sempronius would make a loan to Titius; and it is all the same to me whether that was done by your going surety, or giving a mandate, since I am bound by the one as well as the other to pay you what you were out of pocket on that score.

Yet, as has been observed by Boecler, *Dissertatio de Religione Mandati*, a careful distinction is to be made between the mandate under orders and that on commission, or, in other words, between a mandate undertaken on the command of one with authority, and that undertaken of one's own free will. These two are entirely distinct and have nothing in common but the name; and so a man versed in these matters will not apply to the commands of superiors the legal tradition regarding the undertaking of a commission between citizens. For in private undertakings it is easy to presume that the manner of conducting a matter has been prescribed to another only by way of advice, and that room has been left for the agent to use his judgement in altering it. But whoever lays some mandate upon another by virtue of his authority is understood to have ordered its bare execution, and so no deviation will be allowed from the manner prescribed, unless, as frequently happens, the agent have received by an express statement permission to add to or change it as conditions and circumstances warrant, or unless such a course be warranted by an interpretation of the words that is appropriate to the purpose of the principal and the end of his order, and is framed according to the form of right reason and the rules commonly accepted by sane men. For the true will of a man is held to be that which a lawful interpretation has suggested. Yet this liberty must by no means be indulged in save by necessity, for otherwise every force of authority would vanish and a commonwealth would often come to disaster, if a minister should try to arrogate to his own initiative the functions belonging to the supreme sovereign. Otho in Tacitus, *Histories*, Bk. I, chap. lxxxiii: 'If every subaltern may discuss the reasons for his orders, discipline is at an end, and the authority of the commander falls to the ground.' (O.) And in the same author, *Histories*, Bk. II, chap. xxxix, evil fame belongs to the soldier who is 'more disposed to scan than to execute his general's orders'. (O.) Add *Digest*, XLIX. xvi. 3, § 15; and Livy, Bk. XLIV, chap. xxxiv. Yet in some cases ministers vested with great authority are right in neglecting foolish commands of princes. See 2 *Kings*, xviii. 14; xix. 6; Valerius Maximus, Bk. III, chap. viii, § 1; Cornelius Nepos, *Epaminondas*, chaps. vii, viii; Bussièrès, *Historia Francica*, Bk. XI, p. 391, on Bavalan postponing the murder of Clisson, which his Duke had enjoined upon him. There is also a noteworthy passage on this point in Hieronymus Osorius, *De Gestis Emanuel.*, Bk. XI, where the Viceroy of India did not seize the city of Aden when he had the chance,

because it was against the command of the king; and yet acquisition of that city would have been of untold advantage.

6. A loan, which consists in our giving another the free use of a
 491 thing of ours, is governed by the following laws: That a man protect it with all forethought and show toward it the care that the most diligent men observe in their own affairs. *Digest*, XIII. vi. 5, § 5. In the second place, the article lent should not be put to other uses, nor appropriated any further than the lender agreed to. See Valerius Maximus, Bk. VIII, chap. ii, § 4; Gellius, Bk. VII, chap. xv; *Digest*, XIII. vi. 5, § 8 at end; XLVII. ii. 45, § 1. And, lastly, it must be returned uninjured and as it was received (see *Digest*, XIII. vi. 3, § 1), save that the lender is understood to have granted gratis what it has lost by ordinary use. Add *Digest*, XIII. vi. 23. But if I have lent a thing for a certain time, and meanwhile I begin to be in serious need of it for some reason not foreseen at the time of the loan, the other must return it at once upon my demand without hesitation. For it is presumed that no one lends another his things gratis, save in so far as he can himself do without them and suffer no inconvenience; and that only a careless man and one who would make a mockery of others would lend something of his for a time when he himself will need it. Therefore, a loan which has a set time added to it, carries this tacit exception: Provided in the meanwhile I have no real need of it. Save for this exception the withdrawal of a loan should not be made before the time. See *Digest*, XIII. vi. 17, §§ 3, 4.

We should add, at this point, in what respect a loan agrees with and differs from a voluntary grant. They agree with respect to the things and their use, for things which allow a loan also allow a voluntary grant, and in both cases the use is given gratis. They differ in that a loan is a contract, a voluntary grant is not, the former is *δύπλευρον*, 'obligatory on both parties', the latter¹ only *μονόπλευρον* [on one]. In a loan a thing is given for a certain time or end, a voluntary grant only so long as the giver desires. The recipient of a loan makes good every loss, he who is allowed a voluntary grant only what is due to his knavery or negligence. See Wissenbach's² remarks in his *Disputationes* [*Juris Civilis*], xxiv. 19.

It is questioned whether the recipient of a loan is obligated to make good the value of the thing, or any other loss connected with it, provided it was caused by some chance accident and one which he was unable to prevent. This is commonly denied. See *Digest*, XLIV. vii. 1, § 4. But I feel that a distinction should be drawn as to whether or not the thing would have perished in the possession of the owner, had he not given it to the recipient. If this is so, there need be no restitution. But if not, equity seems in every case to advise that it be made, since

¹ [For *hoc* read *hoc*.—Tr.]

² [For *Wissenbach* read *Wissenbach*.—Tr.]

otherwise my kindness would be too dear, if, in addition to granting its free use, I had to go without the thing itself, which I would not have lost had it not been for the other party. Nor does there appear any reason why I should meet a misfortune any more than the other, since he, in sooth, is the one who furnished the occasion that made it possible for misfortune to overtake my possession. In *Digest*, XIII. vi. 21, 22, it is stated that the value must be paid of a loan that has been stolen, although some thefts take place without any fault whatsoever on the part of the victims. And yet, when, for example, a man has lost all at once by fire everything that he had, and has been reduced to poverty, it would be hard to demand from him the value of a loan. And in cases where such accidents are wont to occur with some frequency, as shipwreck for those who sail the sea, it may be presumed that the lender was willing to take the risk of them upon himself. And I should venture that we ought to limit in this way the law given in *Digest*, XIII. vi. 18 pr., 5, §§ 4 and 7. Likewise, I cannot approve *Digest*, XIII. vi. 19, with which *Digest*, XIII. vi. 12, § 1, does not appear to be in entire agreement.

But the recipient of a loan will be held all the more responsible when he could have saved what was lent him from some disaster, such as a fire or shipwreck, but preferred to save his own as more valuable. For although it cannot be held against him as a fault, that he preferred to have a thing of less value lost, yet, since it could have been saved, and he allowed it to perish for his own gain, there is no reason why the lender should be the one to feel the loss. *Digest*, XIII. vi. 5, § 4. See also *Exodus*, xxii. 13-15, and *Digest*, XIII. vi. 18 pr., 1, § 35 [XVI. iii. 18 pr., 1, § 35]. On the other hand, it is no less fair, that, if any advantageous or necessary expenses have been incurred on a thing lent, beyond those which ordinarily attend the use of it, they should be met by the owner. Add *Digest*, XIII. vi. 18, § 2. 492

7. In the case of a deposit, where we commit to another's trust something that is ours or concerns us in some way or other, for him to guard it gratis, it is the first requirement that the thing entrusted be guarded with all diligence and be restored to the owner whenever he calls for it. See *Digest*, XVI. iii. 12, § 3. Although sometimes, under certain circumstances, a deposit need not be restored immediately upon demand. Philo Judaeus, *On Noah's Planting* [xxiii]:

Having taken a deposit from a man while he is sober, you must not restore it to him while he is drunk, or intemperate, or mad. For in such a case although he may have received the advantage of having his own back again, he will have no opportunity of being benefited by it. Again, you must not restore a deposit to debtors or to slaves, while their creditors or the masters are present; for that is betraying, and not a restoration of a deposit. (Y.*)

Cicero, *On Duties*, Bk. III [xxv]:

If any man in sound mind should have entrusted a sword to you, and having gone mad,

should ask it back, to restore would be a crime; not to restore, a duty. What, if he who may have deposited money with you, should levy war against your country, ought you to restore the deposit? I think not. For you would be acting against your country, which ought to be most dear to you. (E.*)

Seneca, *On Benefits*, Bk. IV, chap. x:

To restore what has been entrusted to one is desirable in itself; yet I shall not always restore it, nor shall I do so in any place or at any time you please. Sometimes it makes no difference whether I deny that I have received it, or return it openly. I shall consider the interests of the person to whom I am to return it, and shall deny that I have received a deposit which would injure him if returned. (S.)

Ambrose, *On Duties*, Bk. I, last chapter [1], offers these illustrations:

When a man demands back his money as an open enemy, to use it against his country, and to offer his wealth to barbarians. Or if you should have to restore it, whilst another stood by to extort it from him by force. If you restore money to a raving lunatic when he cannot keep it; if you give up to a madman a sword once put by him with you, whereby he may kill himself, is it not an act contrary to duty to pay the debt? Is it not contrary to duty to take knowingly what has been got by a thief, so that he who has lost it is cheated out of it? (R.*)

But even if it has been agreed that a thing be restored at a certain time, a man may change his mind and ask it back before the expiration of the time. See *Digest*, XVI. iii. 1, §§ 45, 46. This appears to be opposed by a passage in Quintilian, *Declamations*, ccxlv:

One deposit is made to be returned upon demand; another for a fixed term. How was this thing deposited? To be paid you when you quit your extravagance. When you called for it you were still extravagant. Therefore, it was not due, and he cannot be regarded as having betrayed his trust because he refused it to you at a time when he could not have been forced to turn it over, even if he had admitted that the deposit was in his possession.

In this case, as it appears to me, we must say that if the man who demanded it is the person who made the deposit, it cannot be denied him. But if another deposited it, and someone else, for instance, his heir, called for it before the time has elapsed, the holder of the deposit was not required to restore it before the heir had complied with the requirement by laying aside his luxurious style of living. Add Valerius Maximus, Bk. VII, chap. iii, § 5.

As for the degree of diligence required in guarding a deposit, it is in general stated that common diligence, which excludes fraud and criminal negligence, is sufficient, and this because, in the first place, such a contract is entered into only for the sake of the depositor, and there is no advantage in such cases for the trustee; and because, in the second place, that man is not free from fault who has entrusted his property to an untrustworthy person. And for this reason no blame attaches to a man who in guarding a deposit has shown his customary degree of care, or such as he regularly observes in his own affairs, however little that may be. See *Digest*, XLIV. vii. 1, § 5. But since some degree of friendship regularly intervenes in a deposit (for practically no

one ever deposits a thing save with a friend or one of whose probity he is convinced), I should hold in general that in guarding a charge such care should be used as diligent men commonly are wont to show regarding their own property. Yet the greatest care is to be shown at times, not only when it has been expressly agreed upon, but also when the nature of the charge demands it, as when it is a thing of great value, or all of a man's fortune depends upon it. Add Ambrose, *On Duties*, Bk. II, chap. xxix. 493

Now this diligence consists not in one's watching it like a sentry night and day, but in keeping it in the safest place that he has, and where it is the least likely to suffer injury. Therefore, although I have satisfied the laws of friendship if I guard the goods of a friend as carefully as I do my own, and no one can rightfully demand that I neglect my own in comparison with another's, if they are both of equal value, yet it will be but just, that, if both cannot be saved, I should abandon a cheaper thing of my own and save a more valuable deposit; for instance, who would not feel, that, when a fire breaks out, a chest filled with gold or other precious things, or of documents and writings of great importance, should not be saved before some cheap furniture? Yet the depositor is required to pay me the price of those things of mine which were lost when I undertook to save his goods before my own, as well as other expenses incurred on the deposit or losses which I suffered because of it. But if a man preferred some less valuable possession of his to a more valuable deposit, when there was no agreement on such diligence and care, he will be judged only to have broken the laws of friendship and humanity, and to have no responsibility to make good the value of the thing lost. For he is made no richer by such conduct, and the fact that he neglected the offices of simple friendship and humanity does not obligate him to make up the consequent loss. The reason for the Roman laws requiring a less degree of diligence in a deposit than in a mandate, is that the latter is managed by our own special act, which we can also direct, in every circumstance that concerns it, by our own judgement, while in the case of a charge no one wants me obligated to keep watch over it without ever closing my eyes. Therefore, it is enough if I have put it in a proper place and examine it only when some special reason impels me, just as we usually do with such things of our own as may not be injured by storing and are not necessary to our use. On the law of *Exodus*, xxii. 12, Grotius adds this comment: 'Provided there was criminal negligence, which is not far removed from knavery.'

But the further question is often raised, whether the recipient of a charge may make use of it. Clearly he may not without the consent of the depositor, in case it is injured by any kind of use. In Gellius, Bk. VII, chap. xv [VI. xv], Scaevola says: 'Whoever applied to his own use that which was entrusted to his care, or, receiving anything for

a particular purpose, applied it to a different one, was liable to the charge of theft.' (B.) Add *Institutes*, IV. i, § 6. But if the article is none the worse for the use, for instance, if a silver cup is set out to ornament a dining-hall, or is used for the service of an honoured guest, I see no reason why the trustee may not so use it, provided it is not a special point with the owner that the deposit be not seen by others, and the trustee recognizes that he must make good any risk that it may run in such use. But on no account may the charge be taken from the wrappings or box in which the owner has put it. Add *Digest*, XVI. iii. 1, § 36. But if a consumable thing has been given over, neither wrapped nor sealed, the trustee will not be able to use it up unless he is in the position to restore an article of the same kind, and of the same quantity and quality, whenever the owner may desire it, for we often are in such need of articles of this kind that we are unwilling to accept others in their place.

494 Finally, the Roman laws rightfully established that whoever denies or knavishly refuses to restore a charge given him by a poor man, or because of impending civil tumult, fire, some catastrophe, or shipwreck, shall be fined twofold, since those who do not scruple to make ill-gotten gains out of the loss of men who are deserving of pity, surely deserve punishment for their inhuman wickedness. See *Digest*, XVI. iii. 1, §§ 1, 2, 4. Quintilian, *Declamations*, ccxlv, adds: 'A deposit ought to be restored all the more faithfully, because they are generally made secretly and without evidence.' Add *Exodus*, xxii. 7-9; *Leviticus*, vi. 2 ff. Nay, it is my opinion that it is a baser crime to deny or make away with a deposit than to steal it, for by the latter only justice and the right of dominion are violated, but, by the former, friendship and humanity as well. Nicolaus of Damascus [frag. 103 l Jakoby]: 'Among the Pisidians the worst crime is that involving a deposit; if a man is convicted of making away with one he is put to death.' For there is no force in the view that when a deposit has been placed, as it were, in another's hands, an opportunity, which ordinarily is some incentive to sin, is furnished him to make away with it, while a thief carefully makes the opportunity to fall upon the property of others, and furthermore offers violence to that bond of common sacredness by which every man regards his home as the place of greatest safety. For surely a guardian who has violated a ward committed to his care and received into his home, is not judged to have committed a less serious offence. Add Aristotle, *Problems*, Sect. xxix, qu. 2 and 6; *Digest*, XLVII. ii. 1, § 2; XLVII. ii. 67.

It is clear, of course, that since the custody of a charge is given gratis, any expense incurred on it should be repaid. For this reason the decision is correct of *Digest*, XVI. iii. 12 pr.: 'If the deposit is made in Asia to be repaid in Rome, the result of such a transaction appears to be that the depositor is to meet the expense involved, and not the man with whom the deposit is made.'

CHAPTER V

ON ONEROUS CONTRACTS IN PARTICULAR, AND FIRSTLY, ON BARTERING, BUYING, AND SELLING

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| 1. On bartering. | 5. What the buyer should perform for the seller and the seller for the buyer. |
| 2. When is a contract of buying and selling closed? | 6. On the buying of prospects. |
| 3. On the risk and gain of a thing sold. | 7. On monopolies. |
| 4. On pacts commonly added to selling. | |
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THE first place among onerous contracts is properly accorded to bartering, since in the earliest times before the introduction of money commerce was carried on in that way alone. Tacitus, *Germany* [v]: 'The remoter inhabitants continue the more simple and ancient usage of bartering commodities.' (O.) But it should be observed that bartering is carried on in two ways: First, when the commodities are valued in money and are exchanged as if in place of money; second, when they are merely compared with each other. The first manner is practically the equivalent of buying and selling, for the thing is measured by the price on both sides, and this manner of bartering is much used to this day. Therefore, it is not certain that only bartering was in use at the time of the Trojan war, as most men have concluded from *Iliad*, Bk. VII, 482 ff. [472 ff.]: 'So the flowing-haired Achaïans bought them wine thence, some for bronze and some for gleaming iron, and some with hides and some with whole kine, and some with captives.' (L.L. & M.) For thus Pliny, Bk. XXXIII, chap. i, writes:

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Would that gold could have been banished for ever from the earth, accused by universal report, as some of the most celebrated writers have expressed themselves, reviled by the reproaches of the best of men, and looked upon as discovered only for the ruin of mankind. How much more happy the age when things themselves were bartered for one another; as was the case in the times of the Trojan war, if we are to believe what Homer says. For in this way, in my opinion, was commerce then carried on for the supply of the necessities of life. Some, he tells us, would make their purchases by bartering ox-hides, and others by bartering iron or the spoil which they had taken from the enemy: and yet he himself, already an admirer of gold, was so far aware of the relative value of things, that Glaucus, he informs us, exchanged his arms of gold, valued at one hundred oxen, for those of Diomedes, which were worth but nine. Proceeding upon the same system of barter, many of the fines imposed by ancient laws, at Rome even, were levied in cattle. (B. & R.)

Yet even to-day nothing is more common than for soldiers to exchange their booty for other things, since it does not always consist of money, and they do not scruple to take also other things. And so it does not follow from the fact that soldiers got wine in exchange for booty, that money was not used at the time of the Trojan war. For assuredly talents of gold are mentioned several times in Homer; for

instance in the *Iliad*, Bk. IX [122], Agamemnon promises to give Achilles 'ten talents of gold'. In the *Odyssey*, Bk. VIII [393], each of the princes of the Phaeacians gives Ulysses a 'talent of fine gold'. And even though gold in the *Odyssey*, Bk. XIII [11], is called 'much wrought', and a talent is properly a term of weight, yet it is not likely that all their gold was then wrought or used only for cups and similar vessels. Nor does it appear how Homer should accord such τιμή [veneration] to gold, if the agreement of nations had not given it an eminent value, while 'much wrought' can also signify a substance from which many things can be worked. And doubtless the reason why Homer [*Iliad*, VI. 236] calls the gold arms of Glaucus 'worth a hundred oxen', and the bronze ones of Diomedes 'worth nine oxen', is because in the earliest times great wealth lay in herds, of which oxen held the first place as the most essential aid in agriculture, and so it was customary for the price of other things to be compared with them. And this common habit of speech did not at once die out when all things began to be measured by money. Therefore, Didymus remarks on the *Iliad*, Bk. VI, line 236, that maidens, who, because of their beauty, were given many wedding presents by their former suitors, were called 'gainers of oxen'. Yet even if there was at that time among the Greeks no use of coined money, the use of gold and silver by weight could have obtained in commerce. Still that many peoples used money before the Trojan war is shown, if you please, by sacred history.

The passage in Homer reminds one of the argument once held between Sabinus and Cassius in *Digest*, XVIII. i. 1, on the question, whether, before the use of money, and to-day after it has come into use, it can be called selling, if I have given my tunic in exchange for a toga. Sabinus maintained that it was, according to the passage of Homer, mentioned above, on the claim that the Greek army bought wine with their bronze, iron, and captives. Yet as a matter of fact οἰνίζεισθαι does not really mean to 'buy wine', but to secure it in any way whatsoever, just as in Latin *pabulari*, *lignari*, and *frumentari* only mean to gather food, wood, and grain, in any manner possible. But the opposite opinion seems the better, that it is one thing to buy, another to sell, one person is the buyer, another the seller, the price is one thing, the commodity another, none of these combinations being discernible in bartering; and that it appears absurd for both persons to have been buyer and seller, and for both articles to be called the price and the commodity. But to this a reply can be made on the basis of what we said just above regarding the two modes of bartering: When things already estimated in money are bartered, it appears to be a purchase on
 496 both sides, and so there is no absurdity in the same person in a different respect being both buyer and seller.

It should also be observed that under the name of bartering some-

times falls a reciprocal donation which is extremely common among friends, and which, by reason of its not being a contract, does not require equality. To this is to be referred the exchange of arms between Glaucus and Diomedes in the *Iliad*, Bk. VI, which, because of its inequality, can perhaps lay a charge of folly upon Glaucus, but none of injustice upon Diomedes. So also Maximus of Tyre, *Dissertations*, xxiii [xxxix. I c], says that Glaucus 'measured the value of the exchange by the psychological moment, not the price of the armour itself'. And again, *Dissertations*, xxiv [xl. I c], of the same transaction: 'Gold was not worth more to the man who received it, nor bronze less to the man who gave the gold away in exchange; but both men were well treated, for the inequality in the material was balanced by the equality in the purpose.' Add Isocrates, *To Nicocles*, at the beginning. Among the Russians there is a market for sacred images which they say they do not 'buy but exchange for money'. Olearius, *Itinerarium Persicum*, Bk. I, chap. i.

2. But after the introduction of the use of money, a contract of buying and selling began to be the most common means of effecting exchange, in which the procedure is, that, in exchange for a certain amount of money, there is acquired the dominion over a thing, or some equivalent right. Here the first point of inquiry is: When is such a contract so completed that nothing remains further than for the seller to hand over clear possession of the article and for the buyer to take it. According to Roman law this kind of contract is considered completed as soon as both parties have fully agreed upon the sale price, and at that time the buyer is entitled to an action against the seller to hand over the article, and the seller against the buyer to take it and pay the price, either at once, or at a time agreed upon. Add *Digest*, XVIII. i. 19, 34, §§ 5, 6; XVIII. i. 35, §§ 1, 5, 6, 7.

A purchase is held incomplete, and one which gives rise to no action, either for a general or a special reason. It is the first when the buyer and seller are not yet agreed but are still labouring to secure an agreement, or when the bargaining is still going on within limits, as they say. Then it is still possible to draw back from and break off the bargaining, no obligation as yet having been assumed, provided there has been no fraud or any intent of one party to deceive the other, as is true of all contracts. In the latter case the efficacy of an obligation will be in suspense when a condition has been added to the contract, whether express or understood, for instance, when it must be seen whether the commodity suits the eye or taste. For in this case a tacit condition is understood to underlie the negotiations, to the effect that the article will be found to be as the seller described it, or that we will like it when we see it. For in every case the knowledge of a thing is absolutely necessary for determining its price, and it is thought to be

careless of you to buy what you have not inspected, when you cannot depend upon the word of the salesman.

But the determining of the commodity by weight, measure, or number does not properly imply a condition, unless it be that the thing so rated be useless to me, save in a certain quantity. However, a specifying of the measure, number, or weight always is required to execute a contract, since only in this way can such things be specified, as it were, and separated from the rest of their kind. Likewise, only after the use of such measuring is it understood that a transfer is made, or dominion given over, since without it I do not know what belongs to me and what to the seller. Although a sale is sometimes made in the bulk, and then measurement, or any other rating of quantity is added by way of testing and not of fixing the amount, for under such circumstances measuring
497 does not necessarily precede the actual exchange. It is one thing, for instance, for me to sell you wine in this ten gallon container, and to sell you ten gallons of wine from this container.

Finally, it will be an incomplete sale, if the parties make a special agreement that the terms shall be expressed in writing and the document is not yet executed. But it is another matter if the sale is put in writing merely as an aid to the memory and for evidence. Selden, Bk. VI, chaps. i and iv, has very carefully noted the observance of the Hebrews on this kind of contract. Add a passage of Theophrastus in Stobaeus, *Anthology*, xlii.

3. But in this matter we must distinguish, first of all, between the contract itself and its execution. The contract itself will be completed, when an agreement is reached on the commodity and price, without any condition which suspends the obligation, and if nothing is added which will allow either party to withdraw. But the execution of a contract consists of the buyer actually giving over the price and the seller the article. The simplest course is for the execution of a contract to follow immediately upon its completion, that is, for the buyer to pay over the price as soon as it is agreed upon, and to accept the commodity. This used to be called 'doing business with Greek faith'. See Plautus, *Asinaria*, Act I, sc. vi [199]. So also Plato, *Laws*, Bk. XI [p. 915 D E], made the following regulation in his state: 'When goods are exchanged by selling and buying, a man shall deliver them, and receive the price of them, at a fixed place in the agora, and have done with the matter; but he shall not buy or sell anywhere else, nor give credit.' (J.)

But when an interval of time transpires between the completion of a contract and its execution on the part of the seller, that is, for the commodity to change hands, the question commonly arises as to whom the risk and advantage of the article in this period concerns, the buyer or the seller. It is well known that the Roman law in such case lays the risk of the article sold upon the buyer as soon as the purchase is completed,

even though it is not yet delivered and the seller is still its owner. By risk is understood some accident that befalls the commodity which thus perishes¹ entirely or in part, whether due to natural causes, or supposing it be unjustly taken from the other. See² *Digest*, XVIII. xvi. Yet here the difficulty arises: How can the buyer assume the risk for an article of which he is not yet the owner, since otherwise a thing perishes for its owner, that is, such losses as befall a thing held by another without that other's fault, belong to the owner. To this some reply that the old proverb, 'a thing perishes for its owner,' holds good only in those contracts by which an article belonging to one party to the contract is in the hands of the other, and not in those contracts when a certain thing is owed the other party. Some advance this statement on the following argument: The saying is true, when the owner is opposed to those who have the simple use and custody of the thing, not to those who have a right in it and the power of an owner, as it were, to claim it. Among other reasons for this distinction they maintain that the buyer could and should have claimed the thing and paid the price, whereupon the thing would have perished in his hands; and therefore his delay and negligence cannot work against the seller. Some say that the risk before transfer belongs to the buyer not because he is the owner, but because, after a contract has been completed, the seller is not considered with respect to the buyer so much an owner as a debtor, and that of a certain kind of thing, for the loss of which, provided it happen without his connivance and fault, he is free from all responsibility.

Yet there appears no clear reason in these arguments why, in view of the fact that it devolves upon the seller to give the buyer full possession, it should not be he rather than the buyer who should have to stand the risk before he has fulfilled his part. Nor does the statement that the promisor of a certain kind of thing does not meet its loss, concern the matter before us (as it runs in *Digest*, L. xvi. 33, 83, § 7; XXXV. ii. 30, § 4; IV. iii. 18 at end), for the person promised was going to acquire the thing at a profit. In such a case it would be absurd and unjust for a man who had promised a certain kind of thing to have to make good its value, when it is lost. Even the nature of business which requires strict interpretation makes no such demand. But why should the buyer, in such a case, who has not yet received his article from the seller, although entitled to it by contract, be without it and still have to pay the seller its price? Add Ziegler on Grotius, Bk. II, chap. xii, § 15.

In our opinion the best way to establish natural equity in such a case is to distinguish, whether the delay between the completion of the contract and the transfer of the commodity, is necessary for the delivery of the article, or is due to the slowness of the seller, or, finally, whether the buyer is the one at fault for his not having it in his

¹ [For *pareat* read *pereat*.—Tr.]

² [For *Vib. l. i. de* read *Vid. l. i. D. de*.—Tr.]

possession. The first case may be like this: If I have bought some cattle which are pasturing at a distance, and while the seller is bringing them to me they become the prey of robbers or wolves, or some similar mishap befalls them, there is no doubt that reason orders the loss to fall upon the seller. The loss will likewise be upon the seller if he has failed to deliver the article owed at the proper time.

But when delay in receiving the delivery of the article lay with the buyer, it would be but just that its loss be upon him. For at the very moment when by the contract the article was due to be delivered, and it was not the fault of the seller that delivery did not take place, dominion, in so far as it denotes mere right and a moral faculty, passed to the buyer, and the thing commenced to belong to him alone (see above, Bk. IV, chap. ix, § 5). When the seller, out of humanity only, kept custody of the thing which was not formally left to his care, it would be too much to require of him also a guarantee against any accidents. But if the buyer has left the commodity for a while in the care of the seller, it is understood to be in his hands, yet not as though he were the owner but only the receiver, from whom one cannot demand a guarantee against accidents. In this case the delivery will be held to have been made by the fiction of the short hand, exactly opposite to what prevails in the handing over of a thing lent or let. For in the former case it is understood that the feigned delivery has made what was ours another's, while in the latter what was another's has been made ours.

Furthermore, what is said here about the risk of an article sold, should be applied also to any gain derived from it.

4. It is also a common thing for such a contract to be qualified by the addition of different pacts, whether at the desire of the contracting parties, or by the requirement of civil laws. On this matter the law of nature requires nothing other than that the will of the parties be observed, provided it contains nothing absurd or unfair, and that every citizen observe the civil laws, if he is really desirous that his contract be valid in the eyes of a court. Thus nothing is more common than to agree to pay the price at some time after delivery of the goods; and no less frequent is the agreement that delivery shall take place on a certain day, the dominion as well as the risk and profit remaining meanwhile with the seller.

Frequent use is made also of the 'assignment with a time-limit' (*addictio in diem*), whereby a sale is made with an understanding that the seller may accept a better offer if made by another within a certain time. This may be done in two ways: Either the purchase is completed, yet on the condition that it is void if a better offer is made, or, if it has been agreed that, in case nothing comes up to oppose it, the contract shall be closed. *Digest*, XVIII. ii. 2. In the former case dominion passes

to the buyer, in the latter it remains with the seller, until the contract is completed.

It is called a 'conditional sale' (*lex commissoria*), when it is agreed that, if the purchase price is not paid on a certain day the sale is void. Although this can be agreed upon in two ways: Either the seller may deliver the article at once, and upon non-payment receive it back with full right (see *Digest*, XVIII. iii. 5); or he may not be bound to deliver the article unless payment is made. The latter appears to be much the safer course, for as a general thing the seller adds such an agreement in order that he may not be put to a great deal of trouble in collecting the price, and the trouble would be the same, if he had delivered the article and had to recover it, instead of the payment, from a sullen debtor. See *Digest*, XVIII. iii. 2, 3.

It is no less common for the contracting parties themselves, or 499 civil laws in the case of certain bargains, to add a pact allowing a rescission or withdrawal (*retractus*) from the sale, which is done in several ways. Sometimes there is added to the deed of sale a clause to the effect, that, if the purchase price is offered at some time, or within a certain time, the buyer is obligated to restore the article purchased to the seller or his heirs. And this time, again, is set with different purposes; either as a limit after which it is permissible to take back the article, or as a limit beyond which it need not be returned. Here it should be observed, that, as the right of repurchase is introduced in favour of the seller, who is sometimes by outward circumstances forced to alienate a thing which he is unwilling to part with for all time (Julius Capitolinus, *Marcus* [xvii], tells us that the Emperor Marcus [Aurelius] when in dire need of money sold the royal furniture: 'Afterwards he gave the buyers to understand that if any of them wished to return his purchases and recover his money, he could do so' (M.)), so the fixing of a limit for that right is of advantage to the buyer, who finds his advantage in the fact, that, if he is not obligated to part with a thing within a short time, he may be certain ultimately of the permanent possession of it. Sometimes, also, when a purchase is made, out of consideration for the seller it is agreed that the buyer may, whenever he wishes, or at some particular time, return the commodity to the seller, who is obligated to refund its price. Add Livy, Bk. XXXI, chap. xiii.

Another and less onerous kind of withdrawal is what is called *πρωτίμυσις* [the right of preference], when to a contract of sale a clause is added to the effect, that, if the buyer decide to dispose of what he has bought, he must do so to the seller rather than to another at the same price that the latter would pay. In many places certain persons enjoy this *πρωτίμυσις* (right of preference), such as the real owners in emphyteutic property, creditors in the property of a debtor which has been

sold at auction, neighbours in the sale of their neighbour's property, associates in a thing held in common, and relatives in the property of their kin, which last is given the special title of family redemption (*retractus gentilitius*).

It is no less common for one to reserve out of the sale of land some small spot or its use. Thus in antiquity prodigals upon selling their lands were wont to reserve a place for their burial. This is the explanation which many feel should be given to the passage in Vergil, *Eclogues*, III [104-5]: 'Tell me in what land—and you shall be my great Apollo—heaven's space is but three ells broad.' (F.) When Menius sold his home to the censors, Cato and Flaccus, for the erection of a basilica upon the spot, he reserved the right of one column on which to build a box from the projecting eaves, whence he and his posterity could view the gladiatorial displays¹ which were held at that time in the forum. This was the reason, so it is believed, for the name *Meniana* being applied to such projections ([*Pseudo*-] Asconius Pedianus, on Cicero, *Against Verres* [*Divinatio in Q. Caecilium*, 50.]).

The disposal of the divine law on the redemption of land can be read in *Leviticus*, xxv. 14 ff., the reason for which institution is to be drawn from the form of that state as established by Moses. This was to promote the existence of an equal degree of liberty, which end was secured by preventing a few from gathering to themselves the land, which formed the principal basis of their wealth, and from making the
500 rest of their nation, thus deprived of their estates, subject to them, and so gradually introducing the domination and tyranny of a few. For I cannot approve of the reason advanced by Grotius on line 29 of this passage, that 'it is easier to find a dwelling somewhere than the necessities of life'.

Lycurgus had the same end in mind when he divided all the land of the Spartans into 39,000 equal parts, and after they had been assigned by lot, forbade that they be increased, diminished, subdivided, or sold. Heraclides, *De Politiis* [in Aristotle's *Fragments*, DCXI. xx]: 'It is regarded as disgraceful among the Lacedaemonians to sell land, and in the case of one's ancestral portion it is not even permitted.'

A further type of sale frequently used is what they call 'in the gross' (*per aversionem*), when several things of different values are not estimated separately but are valued as a mass and sold in that way.

Finally, it is not unusual for a thing to be purchased for a period of time, at the expiration of which it returns to the seller without his having to refund the price given. Thus in England great families often sell their ground for a term of thirty or thirty-five years, on the condition that the buyers shall build upon it in a certain manner. But this contract is related to emphyteusis.

¹ [For *spectare munus* read *spectare munus*.—Tr.]

5. It is, furthermore, easy to gather from the nature of the contract and the pacts specially added, what obligations the buyer and seller should mutually undertake. It falls to the buyer to give the price agreed upon at the specified time, and this in such a way that he makes the sum actually belong to the receiver of it, that is, that he pays over his own and not another's money. If he pays with another's money and it has been claimed, he shall pay as much again, and whatever loss the seller suffered by having the price claimed from him. It falls to the seller to deliver the thing agreed upon with such qualities as are required by the general nature of the contract or a special agreement, and this at the time designated. Add *Digest*, XIX. i. 11, §§ 1 ff. But if, upon the completion of the sale but before he has delivered the article, he be led to change his mind, and wish to restore the price with compensation for any loss, the buyer is not required to accept this against his will, but will be able to force him to deliver the article, unless it happen that considerations of humanity persuade him to take a more lenient course. But when the knavery or fault of the seller prevents delivery, both the price and the loss he suffered must be paid to the buyer. As to what is the law in case no blame is to be laid at the door of the seller, we have discussed above.

But when a man sells the same thing to two persons, and has as yet delivered it to neither of them, the buyer who was the first to close the contract will certainly have the stronger case, and the same will be true if he has already received the article. Yet the fraudulent¹ seller will have to pay the second buyer for the loss he received by being deceived with an empty contract. But when delivery has been made to him who made the second contract, it is clear that, on the basis of civil law, he is to be preferred to the first party, because he accepted the article from its owner on a just title. And the first buyer enjoys no right for action against the second, either a real right, for he was at no time its owner, or a personal right, because the two never met in the transaction. Nor has the seller any excuse for calling back the article from him. Add *Digest*, VI. ii. 9, § 4.

Also Grotius, *loc. cit.*, § 15, feels that the second buyer is to be favoured in comparison with the first, for the reason that by the present transfer or delivery of dominion every moral faculty passes from the seller into the thing, which is not the case in a promise to sell. Yet I am not convinced that he is consistent. It is true that a promise to sell is not selling. Yet Grotius himself had said, in the same passage, that transfer of dominion can take place at the very moment of contract, without actual delivery. When, therefore, such a sale is completed, 501 there remains to the seller no moral faculty or power over the article, except in so far as what tends to seeing that the article comes into the

¹ [For *frandulentus* read *fraudentus*.—Tr.]

hands of the buyer. And consequently, any later acts of the seller touching the thing will rest upon no right, and so will not work to the prejudice of him who had acquired a prior right in the article.

For these reasons it is very questionable whether the favour of a possession which has been improperly acquired can always work to the prejudice of the first purchaser. Furthermore, since a right in a thing is not extinguished by the mere loss of possession, and it is possible for a man to hold in good faith what belongs to another, such a possessor, by selling a thing to a third person, does not extinguish the right of the owner, nor can he transfer to the buyer more right than he had himself. Therefore, although it is the intention of the buyer to acquire dominion of the thing, yet because the property thus sold either in fraud or ignorance belongs to another, it is enough if the seller gives the buyer free possession of the thing, makes it possible for him to use it, and allows him reimbursement in case it has been claimed. Add Plautus, *The Persian*, Act IV, sc. iv [549 ff.]; *Digest*, XXI. ii.

6. It is a special kind of purchase when not a special article but only a plausible prospect is purchased, upon which a price is set by agreement of the contracting parties. Nor is such a sale made void when it turns out that the article surpasses or falls far below the price. This happens both in purchases 'in the gross' and in auctions¹, because in such purchases and sales there is an added element of chance. See *Digest*, VI. ii. 9 pr.; add, however, Pliny, *Letters*, Bk. VIII, ep. ii. Here belongs the amusing kind of sale made by Augustus at his banquets, as described by Suetonius, *Augustus*, chap. lxxv, at the end. On the purchase from fishermen of the cast of a net, see *Digest*, XVIII. i. 8, § 1; XIX. i. 11, § 40; XIX. i. 12. From this arises that famous dispute of antiquity between some fishermen of Miletus and the purchaser of a cast of their net; Plutarch, *Solon* [p. 80], gives it as between fishermen of Cos and a stranger of Miletus, while Diogenes Laertius, *Thales* [II. 28], between some Ionian youths and fishermen of Miletus. When a gold tablet was taken from the net the buyer claimed that by right of purchase it belonged to him, for he had purchased, as he claimed, all the haul, that is the chance of the cast. The fishermen contended on their side that the agreement concerned only the haul of fishes. And they were right. For in the interpretation of every contract regard must be had to the intent of the contracting parties; and in this case no consideration had been given to the landing of gold, but only to the landing of fishes. Nor does it make any difference that the case is one of chance. For that is extended only to the amount of the draught of fishes and not to any kind of thing that may by some chance or other fall into the net. Therefore, the tablet of gold followed the law of treasures.

And the decision of the oracle in the matter which allotted the

¹ [For *actionibus* read *auktionibus*.—Tr.]

find to the wisest quite clearly smacks of the shrewd avarice of priests. They undertook in this way to gain so fair a prize for themselves, in accordance with the judgement of Sophocles, *Antigone* [1055]: 'The race of seers is ever fond of money.' What mortal, indeed, would wish to claim the title of the first in wisdom? See Valerius Maximus, Bk. IV, chap. i, § 7, *inter externa*; Mornay on *Digest*, XIX. i. 12.

7. In this connexion something is usually said about monopolies, as to whether or not all such are opposed to the law of nature, for both the name itself is odious and the laws of many states censure the practice severely. But many things should be exempted from the reproach of monopolies, inasmuch as they are not truly such. For surely no law forbids it, nor can it be termed a monopoly, for a single citizen in some city to be the only one to know how to make a certain commodity, or for some farmer alone to have a certain kind of fruit on his farm; or for a certain thing to be obtainable in but one district. Diodorus Siculus, Bk. V, chap. x: 'For since alum exists in no other part of the world, and is yet very useful, the Liparians upon good reason have the sole vending of this commodity, and by setting what rate they please on it, they grow prodigiously rich.' (B.) For a monopoly means that if one man has secured for himself alone the power to sell certain goods, no others may have the same power. But a man who is the only one to import certain merchandise from some remote region does not exercise a monopoly, provided no other men are forbidden to secure the same merchandise from that place. Just as it can also be lawful for a nation which has a large supply of some commodity to agree with another to sell to it alone that kind of merchandise. For every one is free to sell his own goods when and to whom he pleases; unless it happens that we have a superfluity and another cannot do without it; for in that case the law of humanity requires that the condition of others be not made worse by such a pact. But if a man would dare to clear for himself the way to a monopoly, apart from any such pact with the proper owner of the commodity, and to prevent by force or secret machinations others from coming to that place, in order that all other men would have to purchase it of him, it is clear that he both sins against the law of humanity, and malevolently infringes upon the liberty of the rest of mankind.

Regarding monopolies which are exercised against citizens, it should be observed that it is not illegal that not just any person be allowed to follow a certain trade, but only those who have secured, in accordance with the rules of the state, a right to do so. Thus, in most of the states of Europe, a man who wishes to open a store or produce some commodity must fulfil certain conditions, for it is not enough for him to know the mere art of the trade.

But it is also possible for the final authority in the state to grant

a single citizen or a guild of merchants, to the exclusion of all others, the privilege of importing a certain kind of goods from certain places. There may be different reasons for doing this; for commercial relations with distant places involve a great expense before they are firmly established, and at the outset are open to risk. Therefore, the first adventurers in such trade must have security that what they have undertaken at great risk and expense, may not fall gratis into the hands of others. Furthermore, such privileged companies can by their wealth be of more assistance to the state in time of need than separate individuals. It appears also that by this means trade is carried on in greater confidence and a larger supply of commodities imported. Nor do those men whose profit, when brought into a common treasury, as it were, is distributed in equal portions, have to worry about so many chances of chicanery and so much expense.

But, in granting such privileges, a prudent government should see to it that they are allowed only in the case of commodities which are imported from very remote places, and over paths fraught with danger, and which concern not so much the necessities of life as its adornment and ease. Nor should the merchants be so indulged that they can raise the prices of such things to suit themselves, for it is against reason to give a few citizens the opportunity to amass great wealth at the expense of the rest, when no special advantage derives therefrom to the state.

Finally, injustice apparently¹ attends those monopolies where artificers or farmers are forced to sell the products of their industry or the fruits of their ground to certain men who then distribute them among others, and, first of all, among their fellow citizens, for it is clear that in this way the wealth of a state flows into the hands of a few to the oppression of the rest.

503 We may observe, in passing, that Grotius, Bk. II, chap. xii, § 16, in discussing monopolies, was not justified in introducing the illustration of Joseph when viceroy of Egypt. For the king had not forbidden others to lay up grain in the fruitful years, and no one was prevented from selling any of his surplus supply. So also it was not a special privilege, but their situation, that gave the Alexandrians a monopoly, as Strabo, Bk. XVII [xiii, p. 798], calls it, over the trade with the Indians and Ethiopians.

But a monopoly in the proper sense of the term cannot be established by private citizens, because it has the force of a privilege. For how can a private citizen who has no right to command and cannot use force, directly forbid others, who are also citizens, to deal in a certain kind of merchandise? They can, therefore, only carry on spurious monopolies which do not have the force of a right or privilege, but are generally maintained by clandestine frauds and conspiracies. For

¹ [For *videntur* read *videntur*.—Tr.]

instance, some men may by trickery prevent all other citizens from approaching the spot where they get their wares, or hinder others from bringing their wares to our market, or form an association and buy up all such wares and then suppress them, so that they cause a scarcity, and then finally sell the wares at an unjust price. To such men may be applied the old saying of Apollonius of Tyana, in Philostratus, Bk. I, chap. xii [I. xv]: 'The earth is mother of us all, for she is just, but you, because you are unjust, have pretended that she is your mother alone.' (C.) The wickedness of such men should be restrained no less than that of those who, in the oil-sellers' market, act together to raise the price of things too high by secretly agreeing among themselves not to sell their wares below a certain price [Plautus, *Captives*, 489], which evil course is sometimes followed by labourers and artisans. Add Pliny, Bk. VIII, chap. xxxvii, on the hedgehog; *Code*, IV. lix. 1; *Digest*, XLVII. xi. 6; and Cujas, Bk. X, obs. xix. Although one can scarcely censure the shrewdness of Thales in leasing all the oil-mills when he foresaw by his study of the heavens that there would be a great harvest of olives the following year. Aristotle, *Politics*, Bk. I, chap. vii (xi); Diogenes Laertius, Bk. I [26].

CHAPTER VI

ON LETTING AND HIRING

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| 1. In what respects letting coincides with buying.
2. An interruption in the definite use of a thing works to the loss of the lessor; | 3. In the uncertain use, regularly to the loss of the lessee.
4. Can the same work be let to several at the same time? |
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LETTING and hiring, whereby the use of an article or labour is furnished another for a price, is similar to buying and selling and is governed by practically the same rules. For the rent or wages correspond to the price, and the dominion secured by buying, to the power to use the thing; and just as a purchase is completed when the price has been agreed upon, so also is hiring when the wages have been fixed. *Digest*, XIX. ii. 2. Yet the wages may be extended in some way and tacitly. See *Digest*, XIX. ii. 13, § 11; XIX. ii. 14. And just as an article if bought to oblige the seller, is commonly purchased more cheaply, and if sold to oblige the buyer, more dearly; so in letting and hiring, whoever is hired when out of work must be content with a modest

504 wage, while he whose services are solicited can value them more highly. Finally, as in buying, it is the business of the seller to set the price (Plautus, *The Persian* [586]: 'She's your goods, you're the one to put a price on her.' (N.)), while the buyer ultimately decides upon it, such also is the case in letting. This is shown by Aristotle, *Nicomachean Ethics*, Bk. IX, chap. i:

Who is the proper person to settle the value of a benefaction? Is it he who was in the first instance the author, or he who was in the first instance the recipient of the benefaction? It seems as if the author leaves it to the recipient to settle the value. This, they say, was the practice of Protagoras, who, whenever he taught any subject, would tell his pupils to estimate the value of the knowledge in their own eyes, and would take just so much payment and no more. (W.)

Although on the custom of Protagoras, the philosopher in person delivers himself as follows in the Dialogue of Plato which goes by that name [p. 328 B C]: 'When a man has been my pupil, if he likes he pays my price, but there is no compulsion; and if he does not like, he has only to go into a temple and take an oath of the value of the instructions, and he pays no more than he declares to be their value.' (J.)

But just as he who purchases merchandise is understood to have obligated himself to pay the common price for them, when no set price has been agreed upon, so also whoever places his services at the disposal of another before the wage has been determined, leaves it thereby to the equity of his employer, it being understood, of course, that no less shall

be paid than the common wage. See *Matthew*, xx. 4, 7. But the manner of paying a labour of pleasure, mention of which is made by Aristotle, *Nicomachean Ethics*, Bk. IX, chap. i, and Plutarch, *On Listening to Lectures* [p. 41 D E], and *On the Fortune of Alexander* [ii, pp. 333-4], is but a cavil. A certain man had promised a harpist that the better he played the more he would pay him; but next day when the harpist asked him to fulfil his promise, he said he had given him one pleasure in payment for another. But Aristotle rightly says: 'It is as if nothing is done, when a person does not get what he is intent upon.' More correctly did Bocchoris make use of a similar cavil in Plutarch, *Demetrius* [xxvii, p. 901 D]:

When a certain Egyptian was in love with Thonis, the courtesan, she demanded a great sum of money for her favours. Then the youth dreamed that he enjoyed those favours, and ceased from his desires. Thereupon Thonis brought an action against him for payment due, and Bocchoris, on hearing the case, ordered the man to bring into court in its coffer the sum total demanded of him, and to move it hither and thither with his hand, and the courtesan was to grasp its shadow. Although Lamia thought this judgement to be unfair. 'For', she said, 'although the dream put an end to the young man's passion, the shadow of the money did not set the courtesan free from her desire for it.' (P.)

A further point of resemblance in a contract of letting is, that, if a labourer meets with some loss while engaged in his work, it falls upon him and not upon his employer. See *Digest*, XIV. ii. 2, § 1; XIV. ii. 6. Although a law once in force among the Ephesians, and mentioned by Vitruvius, *De Architectura*, Bk. X, preface, is worth noticing, for according to it an architect had to bear the expense if a building cost above a fourth more than his estimate.

2. The next point to be settled is, whether accidents which interfere with or depreciate the use of a thing, fall to the expense of the tenant, or the landlord, and can be taken from the rent. Some give the succinct answer, that, as the thing perishes for its owner, so any natural sterility and such as is not exempted in special agreements, and other mishaps which interfere with the use of the thing, lie upon the tenant; and that the landlord has a right to demand of the tenant the rent agreed upon, even though the latter has perhaps received a lower return from his lease than he expected. For the landlord gave the tenant the faculty to use his property, the prospect of the fruits of which was reckoned at so much at the time when the contract was drawn up, and since he has done his part, it is right that the other also do his part and pay the rent.

Yet it appears that this question should be gone into a little more fully, it being certain that when a thing perishes by no fault of the renter, he is not only free from having to make it good, but his rent 505 ceases at that moment. For if the entire sum can be demanded, it is presupposed that the thing be in existence during all the term of the

contract; and so, when it no longer exists, the contract expires. See *Digest*, XIX. ii. 9, § 4. This agrees with the decision of Sesostris, king of Egypt, that, if the river took away some of the land apportioned to a man, his rent was decreased in proportion. Herodotus, Bk. II [cix]. In the next place a distinction should be drawn between things, the fixed and definite use of which can and should be afforded by a landlord, and those the use of which is as regards quantity uncertain and subject to chance, and so may not and should not be afforded by him in a fixed quantity. To the former kind belongs, for instance, a house rented as a dwelling, which the landlord should make fit for such use. Therefore, if it has been blown down, or damaged by a neighbouring fire, the tenant deducts from the rent in proportion to the amount of the damage done to it as a dwelling. For the rent or hire was determined by the use which the house, in the condition in which it was at the time of the bargain, was able to afford during the whole period of the lease. Therefore, when that use is lessened through no fault of the tenant, it is fair that the rent be lowered in proportion, unless the house is immediately restored to its former condition without any notable inconvenience and loss to the tenant. See *Digest*, XIX. ii. 15, § 1; XIX. ii. 30. Thus, if a renter has been driven by force from his dwelling, or a tenant from his farm, they owe no rent for the same, because in this case the property has morally perished to the owner until such time as the enemy is forced out. But if the produce of the land had been gathered and was carried away by the enemy, the loss lies upon the lessee.

Regarding the hiring of labour it should be observed that, if a man engages the temporary, and, as it were, transient services of a person, he does not have to pay him when some accident has prevented him from being able to furnish the services agreed upon. But if he has engaged his permanent services, it is only human, in case the latter has been incapacitated by disease or some other mischance from performing his tasks for a short time, not to take from him his position or cut off his salary, especially when there is hope that he can make up for the services lost by showing diligence later, or when his former record has been such as to merit this humanity.

3. But regarding those things which yield an uncertain return, such as farms, gardens, vineyards, fishing rights, and the like, just as an abundant yield goes to the profit of the renter, so he must face the loss from a poor crop, nor by strict right should he hold back any rent for a poor harvest, especially since that of one year is usually compensated by the good harvest of another. For a wise husbandman does not rent or lease such things for only one year. See *Digest*, XIX. ii. 16, § 4. Nor can one oppose in this case the old saying, that no one should profit by another's loss. For the landlord could raise the same plea, upon a good

harvest, to raise the rent, although no attention would be paid him. Moreover, because the return of different years is usually unequal, the landlord prefers a fixed and small amount to depending on the uncertain prosperity of the years. On the other hand, the renter is willing to lay out a fixed sum in the hope of an uncertain gain, realizing that, if it disappoints him, he has himself to blame. Yet it is proper to mitigate this judgement by the principle set forth in *Digest*, XIX. ii. 15, § 2, where it is stated that the loss falls upon the landlord, 'if the produce is lost by river floods, or jackdaws, or starlings, or by a raid of the enemy, or a blight spoils the olives, or unusual heat of the sun.' The reason is given: 'Lest the tenant, in addition to the loss of the seed which is gone, may not have to pay rent for the land too,' and so bear a double mis- 506 fortune. 'But if the faults are due to the very nature of the case, or if nothing unusual happened, the tenant bears the loss.' Here it appears that a tempering of equity consists in a division of the mishaps, whereby fruits can be destroyed, into more frequent and more rare. Add to this *Digest*, XIX. ii. 25, § 6, where it is rightly appended: 'A moderate loss the renter ought to take with resignation, unless an immoderate profit is being made off him.' For if some part of the rent could be withheld for every kind of loss, the result would be an enormous crop of perplexing suits. And so the rent of farms is determined by the yield of average years, lest the tenants should find cause for complaint in every little loss. Yet the fixing of the precise amount of the loss for which some part of the rent should be remitted, will better be left to the judgement of an honest arbitrator, who will consider the circumstances of each case, rather than to a general rule.

It should also be observed, regarding tenants, that farms are sometimes rented to them on the condition that they pay as rent everything in excess of the labour they put in. In such cases the tenant, who is no more than a hireling, withholds at the first the price of his labour, and so the failure of the crop falls for the most part only upon the owner.

But if it should be the renter who is first hindered by some mishap in the use of the leased property, and the landlord thereupon lets it to another, or in some way receives that use of it which was otherwise owed to the first renter, he shall have to return to the latter whatever he has gained therefrom, or else keep it as payment, provided the tenant is ready to pay his lessee. As to the respective obligations of the tenant in the thing leased and of the lessor in the work agreed upon, they are set forth in *Digest*, XIX. ii. 9, §§ 2, 3, 5; XIX. ii. 11, 12, 13, 25, §§ 3, 4, 7, 8; XIX. ii. 27, 30, § 4; XIX. ii. 38, 55, §§ 1, 2; XIX. ii. 60, § 2; XIX. ii. 61 pr.

Here belongs the law of the Egyptians on physicians who were free from blame if their patient died, provided they had prescribed for him in accordance with the direction of the public code; if, however, their

prescription was contrary to the code, they were tried for their lives. Diodorus Siculus, Bk. I, chap. lxxxii. We may also note, in passing, a form of contract with physicians followed in the kingdom of Tonquin, as given by Alexander of Rhodes, *Divers Voyages*, Pt. II, chap. xxx, where the patient at the beginning of his illness agrees with the physician on his fee, which the latter accepts only if he effects a cure, but gives his service gratis in case the patient dies. They feel that in this way the physician will give closer attention to the case. In the same passage the writer cites an instance of a physician who said when called in to a case, and while they were discussing his fee, 'If the patient were a youth I would not undertake to cure him for less than 100 scudi, but since he is old I will be satisfied with twenty, for the life which I may give him cannot last long.'

4. The further question is raised, in this connexion, whether, if the same services of mine can be useful to several persons, as on a journey, and I have already promised them to one of the party for a fair and equitable price, I can demand as great a price from one or several more. Grotius, Bk. II, chap. xii, § 19, feels that I can rightfully do so, provided the civil law does not forbid it, maintaining that the fact that my services are also of use to another, has nothing to do with the contract entered into with the first person, nor are they made thereby of any less value to him. Yet it scarcely seems that such a contract squares with equity and humanity, even though it may not be opposed to the letter of the law. For when one man pays another as much as his services are actually worth, with respect to the rest who profit from them at the same time, while they are, notwithstanding, made no more onerous than if they were proffered only to one person, they are considered a thing of innocent utility, which is no burden to the performer and yet of
507 advantage to the recipient. Yet since it seems a hardship for the one who promised the entire price to bear the burden by himself, while the others get off, it will be only fair for them to contribute their share of the sum. Thus, to cite a common practice, when I have chartered a vessel, the owner cannot take others on board without my permission, and, if I wish to receive a few, it works to my advantage.

Yet in the higher studies, which receive their value from the small number of teachers, and the scarcity of those who are acquainted with them, a man may rightfully require the entire fee of each student, although he can teach several with the same outlay of effort. For such knowledge loses in value as it is imparted to many. Therefore, even though my effort is made no greater when directed to several, I can still rightfully charge against it the loss my knowledge suffers in being imparted to many. Yet there are those who deny that the salary which a man receives for teaching the liberal arts falls under hiring and letting, since they feel that learning is not measurable in money; and so they put it under the nameless contract, work for goods. *Digest*, L. xiii. 1;

yet compare Seneca, *On Benefits*, Bk. VI, chap. xv. The manner in which poor schoolmasters are often cheated in these matters is set forth by Lucian, *De Mercede Conductis*.

However this may be, such a contract holds something in common with the letting out of one's services, wherein only good faith and industry can be guaranteed, but no results, so that even if one's labour goes for naught, the fee agreed upon can still be required. Juvenal, *Satires*, VII [159 ff.]: 'Pay indeed? Why, what have I learnt?' asks the scholar. It is the teacher's fault, of course, that the Arcadian youth feels no flutter in his left breast.' (R.) Or sometimes there can be applied to him the remark made by Pliny, Bk. VIII, chap. xxxiii, of the tarandrus¹: 'Although it might have had its own colour, it resembles an ass.' And it is an excellent remark of Euripides, *Hippolytus* [921-2]:

A cunning sophist hast thou named, of power

Them to constrain to sense who sense have none. (W.)

Libanius, *Declamations*, xxix [i. 143]: 'Nature is more violent and powerful than discipline.' Although in some cases the remarks of Lucian, *Hermotimus*, Bk. II, p. 293,² may well be used in reply. Also worthy of notice is the statement once made by the Grand Mogul Aureng Zebe to one of his teachers, as given by Bernier, *De Rebus in Regno Mogolis Gestis*, last part, p. 57.

Yet the very opposite kind of a contract was made by Aeschines, who, according to Diogenes Laertius [II. 62], 'hired his audience',³ a custom which was afterwards followed at Rome by ambitious writers, who gathered auditors for their readings by invitations, rewards, and doles. Nor should we fail to mention the custom of Socrates, who, as we are informed by Xenophon, *Memorabilia of Socrates*, Bk. I [vi], never required any fee from his auditors. In fact he used to express his surprise that a man who claims to be a teacher of virtue should demand pay, and should not feel that he would find his highest reward in securing a good friend; that he should be afraid that a pupil who had been made a good and honest man by him, would not be supremely grateful to the one who had so befriended him.

¹ [For *tarando* read *tarandro*.—Tr.]

² [The reference is to no standard edition and is hard to identify. Barbeyrac seems to have supposed that the treatise *De Mercede Conductis* was actually meant. Yet there is an excellent retort by a teacher of philosophy in the *Hermotimus*, lxxxii, and this is probably the passage meant.—Tr.]

³ [The Greek words quoted mean precisely the opposite.—Tr.]

CHAPTER VII

ON THE LOAN OF CONSUMABLE COMMODITIES (MUTUUM)

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| <p>1. The definition of a mutuum and of consumable commodities.</p> <p>2. The twofold use of such.</p> <p>3. What things are we usually given credit for?</p> <p>4. On a tacit mutuum.</p> <p>5. May a mutuum be alienation?</p> <p>6. Suppose some change takes place in the intrinsic value of money;</p> <p>508 7. Or in its extrinsic value.</p> | <p>8. The laws of the Hebrews on usury.</p> <p>9. It is shown that usury is not opposed to the law of nature.</p> <p>10. A reply is made to arguments on the other side.</p> <p>11. Approval is given to contracts that amount to usury.</p> <p>12. The makeshifts frequently employed to avoid the infamy of usury.</p> |
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IN a mutuum a consumable thing is given a person on condition that he return the same kind in the same quantity and quality. *Digest*, XII. i. 3. The things given in a mutuum are called consumable, or such as are capable of use in their kind, because a thing of that kind serves the use or takes the place of another, so that whoever has received another thing of the same kind, in the same quality and quantity, is held to have received the original. This is the way in which such a mutuum differs from the loan of a non-consumable thing (*commodatum*), and that of a thing put out for hire (*locatum*), for in the last two the very thing lent must be returned, and nothing else can be taken for it without the consent of the creditor. And this must be observed, not merely because things of that nature are usually of different value, but also because it was expressly stated that I should get back my exact article. But if I receive another's bushel of wheat, for example, of the same grade as the one which I had lent a person, it is held that I have received what is mine.

Such things are said, furthermore, to consist of weight, number, and measure, as the things by which they are determined and specified, while all other things have their quantity determined by nature. For this reason consumable things go under the special name of *quantities*, while other things, for which we are not credited, pass under the name of *species*. Yet here we should observe that oxen, for example, are not called consumable things, simply because I can buy 100 or 50, and because they are sold by number; for they are not actually specified by the number, but this only shows the quantity of the species. Add Jacques Godefroy, *Dissertatio de Aequalitate et Functione¹ in Mutuo*.

2. Now the use offered by such things is either ordinary or extraordinary. The latter use of such things can be as follows: In order that

¹ [For *functione* read *functione*.—Tr.]

a man may appear wealthy to another and richly endowed in the things of this world, because, for instance, a reputation for wealth is a great help to aged suitors in securing the love of maidens, a man of little wealth may temporarily borrow a bit of money from another to exhibit in his chest while he shows his loved one around his house. Since in this case the money has been taken simply as a non-consumable loan, on no score does it belong to the recipient, and should be returned as it was received, that is in species. But the ordinary use of such things consists in their loss, that is, I cannot apply them directly to my own uses without consuming them, so that so far as I am concerned they perish and are lost from the number of my possessions. This is plain in the case of grain, wine, and other things which maintain the body. But I am also unable to use money to purchase other things, or to pay my debts, unless I renounce and part with it. When this has been done, the substance of the money may endure with another, but so far as I am concerned, it is held to be consumed. Therefore, when things of that kind must be transferred to another for ordinary use, not with any intention to exchange it, but to have the same returned, the restitution must necessarily be made in kind, because the species which was delivered has been consumed.

3. Consumable things are the most common of all and are usually measured by number, such as money; by weight, as gold and silver in bullion, and bread; by measure, as grain, salt, wine, beer, olive oil (see 509 *Digest*, XII. i. 2, § 1), and in general all kinds of food, such as meat, eggs, milk, and even live animals on the foot in so far as they are considered as food. For if, by way of example, I had to prepare a banquet, and there was not enough food in the house or any money to buy it with, I shall be able to collect from my neighbour by way of a loan not only eggs and some cuts of meat, but also fish, lobsters, hares, chickens, geese, and even sheep and calves, on the condition that I return the same in kind. Add Pliny, *Natural History*, Bk. IX, chap. lv. Under this head can sometimes come blank paper, which is consumed by use, since when it is once written upon it cannot be used again; and, indeed, any kind of commodity capable of being determined by a certain measure, which is found everywhere in equal quality, and which cannot be restored exactly to its original condition, after it has been put to its proper and principal use. For although such things are as a rule sold, yet sometimes it happens that they are credited to us. For instance, if I have collected some cloth for my future use, and a friend suddenly finds himself in need of such cloth and has no opportunity to purchase it, I can give him my cloth on condition that he return it to me in the same quality and quantity.

4. Furthermore, a mutuum is contracted not only expressly, but also tacitly if for instance I by mistake pay something to a man to

whom I was not in debt, or if I have given a person something in consideration of something else which then does not follow. From these two conditions there arise in Roman law 'a suit of recovery for a thing not owed' and 'a suit of recovery for a consideration which did not follow'. For since the thing is not given with the intention of making a present, but because it was supposed to be a debt, or that its equivalent might be secured, and yet what is so given has been made to belong to the recipient, it is looked upon as if those things were given as a loan, and can be recalled in the manner of such. And so the foundation of those suits of recovery may conveniently be denominated a tacit mutuum, to which, however, the Jurisconsults give the name 'quasi-contracts'. It is related in Paulus Warnefridus [Paulus Diaconus], *History of the Lombards*, that the Emperor Mauritius, after he had concluded peace with the Lombards, called for the return of the money which he had given Childebert, king of the Franks, to drive them out of Italy. Yet 'the latter, relying on his superior strength, would not give him an answer to his request'. We should, in passing, also note in this connexion the remark of Plutarch, *Greek Questions* [liii]: 'What was the reason of the custom amongst the Cnossians, that those who borrowed money upon usury should snatch it and run away? Was it that, in case they should attempt to defraud the usurers, they might be liable for the violence, and thereby receive further punishment?' (G.) And so, in this way, there would be an evasion of the law against usury, with the result that, if the other did not return with interest what he had taken, he could be sued for theft.

5. A dispute was carried on some years ago between Salmasius and certain lawyers, as to whether a loan of a consumable commodity was an alienation. It is plain on this point, that, since the regular use of things lent in this way consists of their consumption, the transfer of them from the creditor to the debtor should be made on the condition that the latter receives the fullest power over the disposal of them, and therefore dominion itself, without which one cannot understand the power to consume a thing. But since the creditor gives on the condition that he receive the same in return, and the debtor accepts it upon the condition that he makes return, it cannot be felt that the wealth of the former has diminished, nor that of the latter increased, unless it be that the former, in place of what was his property, has only an action against the latter, which is judged to be of less value than what passed between them, because of the trouble involved and the uncertainty of full recovery. Therefore, just as debts are considered part of a man's estate, so a person is understood to be worth only so much as will be left
 510 when his debts are subtracted and paid. And so it would not be absurd for you to say that the man who owes more than his estate is worth has less than nothing. This is the basis for the saying of Caesar in

Appian, *Civil Wars*, Bk. II [ii], that he needed twenty-five¹ million sesterces to be worth nothing. And so a debt is called 'another's money' (*aes alienum*), not because a man does not hold it as his own, but because it is received from another on the condition that as much be returned. On the other hand he who is burdened with no debts can say, 'I am rich in my own money'. In a word, he who lends money to another actually alienates it, yet in such a way that he neither takes from his own wealth, nor adds to that of his debtor.

6. It is a question of greater moment, whether, when the exchange value of money varies during the time between the contraction of the debt and its payment, the value of the money should be considered as at the time when the debt was contracted, or as the time of payment. Most authorities feel that a distinction should be drawn between the intrinsic and extrinsic value of money, where the former lies in a certain quantity of a certain material, and the latter in the public assessment or value set by the state. They feel that if the change is in the intrinsic value, that is, if something has been taken from the material or weight (and in practically every change in money it becomes debased), the money should be reduced to the value it bore at the time of the loan. For it is felt that the contract was drawn up on the consideration that the same thing should be returned, not only in its kind but also in its value, for otherwise the same quantity is not given back. For instance, if a recent issue of money has been reduced in its intrinsic value 25 per cent., then for 100 units by the old reckoning 125 by the new will have to be returned. Likewise, if I have lent a man 100 pieces, of which one-half is alloy, only 50 will have to be paid, should that issue be recalled and silver take the place of the alloy. For although it be within the power of the state to raise or lower the value of money of the same metal, yet when the extrinsic value of coinage varies materially from its intrinsic goodness, and because consideration must always be given to foreigners, unless we are willing to see our commerce with them reduced to mere barter, the prices of commodities will be determined more by the intrinsic goodness of money than by its extrinsic value and denomination. And so if one-fourth of the bullion has been taken out, I shall have to pay 125 pieces for an article which before I could have bought for 100, while if a man who had formerly borrowed 100 pieces of the old coinage should pay me the same sum in this new coinage, he would in fact pay me one-fourth less.

7. But if, while the intrinsic goodness is unchanged, the external value of money rises or falls, it is then felt that the value of the money should be considered as it was at the time when the contract was drawn up, so that the increase or decrease in its value may turn to the profit or loss of the debtor. For example, if I should lend a man 100 imperials in

¹ [Pufendorf's translation would make it two-hundred-and-fifty million.—Tr.]

specie, as they say, when the imperial was worth 48 white pieces, and its value should later rise to 52 white pieces, I should not have to pay at the rate of more than 48 white pieces for each imperial, if the payment is made in the lower denomination. But if the payment be made in imperials in specie, I can deduct 4 white pieces for each imperial, and so pay no more than 92 imperials. And, *vice versa*, if the value had fallen to 44 white pieces, and the payment is to be in that denomination, it would have to be made at the rate of 48 white pieces to the imperial. But if the imperials be repaid in specie, 4 white pieces would have to be added to each imperial, so that 108 imperials in specie would have to be repaid.

Yet even by this reckoning the affair is not entirely clear. For the creditor may raise the point in the first case, that, if he had kept his imperials the increase in value would have gone to him, and, if he is now
511 forced to lose it, another man is profiting by his loss. And the debtor will raise the same complaint in the second case.

Therefore, the situation will have to be canvassed more thoroughly, as to whether (1) a certain kind of money was paid, for instance, imperials in specie, that the same might be returned in specie and not in other money; or (2) whether they were given as common and current money, as they say; and (3) whether all the money was changed in this way; or (4) only that particular kind. In the first case payment must without doubt be made in the very same denomination. In the second the decision already given has force, and therefore, in such a loan, the value of imperials is to be referred to some other kind of money, that is, so many imperials at 48 white pieces. The third case, where the variation affects all money in comparison with the plenty or scarcity of other things, is to be decided by the principles set forth above in Bk. V, chap. i, § 16. Although that such a general variation of money should affect the payment of old debts, is scarcely sanctioned by general usage.

With regard to the fourth case, it should be observed that, when one kind of money has increased in value while retaining its intrinsic goodness, all other money must have been debased. So, for instance, when the value of imperials, which was before 48 white pieces, has risen to 52 white pieces, without changing its intrinsic goodness, it is proof that the smaller denomination has fallen in intrinsic goodness. Therefore, if under these circumstances imperials have been used in the loan and the payment must be made in white pieces, for each of the former not 48 but 52 will have to be reckoned. But when the loan was made in common or current money, the change will turn to the gain of the debtor, unless the great size of the loan or of the variation persuades to the contrary.

Now regarding other consumable things no attention is paid as to whether their price has risen or fallen in the meantime, provided they

are paid at the time and place agreed upon, but the advantage from the increase, or the loss from the decrease, belongs to the creditor, unless there has been a different agreement. But if the debtor is in arrears in his payment, and the price of the thing changes in the meantime, the expositors of Roman law are solicitous to define the time and place by which the valuation should be made, an instance in the case of wine appearing in *Digest*, XII. i. 22. In such a case the fairest thing appears to be to take the valuation at the time and place of payment, but if the price changes while the debtor is contriving delays, he should bear the loss. Add *Digest*, XIII. iii. 4; XIII. iv. 3.

8. The question is also seriously discussed in connexion with a mutuum, whether usury, which is commonly given for it, is opposed to natural and divine law. This question should be canvassed the more thoroughly because most men have passed beyond the view held by the Persians, as given by Plutarch, *De Vitando Aere Alieno* [v, p. 829 c]: 'The Persians repute lying to be a sin only in a second degree, but to be in debt they repute to be in the first; forasmuch as lying frequently attends those that owe.' (G.) Although Herodotus, Bk. I [cxxxviii], more correctly, I feel, gives the first place to lying and the second to owing money. It is along this line, as Selden, *De Jure Naturali et Gentium*, 6, 9, elaborately sets forth, that the ancient Hebrews explained the divine law on usury, as it is found in *Exodus*, xxii. 25; *Leviticus*, xxv. 37; xix. 14; *Deuteronomy*, xxiii. 19. They held that it was unlawful between their own people not only to receive usury but to pay it as well, and that the scribes, actuaries, and witnesses, who participated in a contract for usury, as well as the agents, were guilty in the eyes of the law. But interest on the money of orphans could legally be collected of a wealthy man, on condition that he gave the interest to the orphan and bore the loss himself.

Now they distinguish between two kinds of usury, of which one 512 was usury properly so called, that was agreed upon and received at the time when the contract was entered into or projected; and this they held was forbidden by divine law. The other was called the 'dust of usury' and was illegal only by the decrees of the elders.

Usury properly so called was held a crime, not only if a man received back consumable things together with an increase, but also if he, for instance, in return for a loan, lived gratis in another's country-house or town-house, until it was paid, or if he rented it for less than it would otherwise have brought, or if he got any advantage from a pledge left with him to secure a loan. And yet it was their custom that no one was ever punished in court for accepting usury, as he regularly was for breaking other divine laws, but he was merely required to restore it. But if the man who had received usury were dead, his heirs were not required to restore the interest which they had gained, nor any consumable things, but only the plate, clothing, utensils, and live animals

which they had received by way of usury, this being done out of honour for the dead man and to keep his memory inviolate; and if it appeared that he repented of his action and had thought of restoring it before his death. If such did not appear to be the case, the heirs were not obligated to make restitution. Private citizens were also forbidden to receive the slightest kind of a gift from a debtor during the period of the loan. But lawyers might, because it was presumed that they had no intention of breaking the law of usury, but had accepted the article merely as a simple gift, not taking the place of usury.

Under the 'dust of usury' they were forbidden to accept any favour and acknowledgement of the benefit, which could come to the creditor outside the contract of the loan, or after the time for its payment, with any respect to the loan except the right to pay it before it was due. And they found two kinds of such usury, the first of which concerns the difference of time in which something is done by a debtor in the way of profit or advantage to the creditor, while the second has to do with the difference in contract. The first of these they divided into antecedent and consequent. By the former they understood some gift, made by the one who intended to raise a loan, to him of whom he would ask it, and this with the hope that the debtor might thereby more easily secure the granting of the loan. By the latter they understood anything given by the debtor to the creditor, after the consummation of the loan, by way of a present, in order that the time for payment might be extended. They even opposed all the duties of humanity from the debtor to the creditor save such as were in use between them before the negotiation of the loan.

The second kind of dust of usury was held to apply in such a contract as when the seller would say, 'If you buy to-day I will sell it for 90 shekels, but if you will not pay before to-morrow, it will be 100.' For in such a contract the delay in conjunction with the increase in price, appears to suggest that the ten shekels had to be paid on the score of usury. Yet this kind of usury did not have to be restored, nor did it allow¹ an action to be brought in a court of law, although whoever had violated these decisions of their elders might be punished with rods or in some other fashion. Likewise, he who had taken a farm in pledge could not rent it again to the owner for a consideration, because that consideration appeared to resemble usury.

But these rules obtained only between Hebrews, for they felt that the law of *Deuteronomy*, xxiii. 19, allowed them to require usury of the Gentiles; nay, they held that this passage required it, in order that nations already condemned by God to destruction should be drained of their wealth and weakened. Although Leo of Modena, *De Ritibus Hebraicis*, Pt. II, chap. v, says that this injunction is to be understood

¹ [For *rita* read *rite*.—Tr.]

only of the seven peoples which inhabited Canaan, and not of other nations from which it is forbidden to take usury. Yet because of the miseries of their long captivity and their being denied possession of their lands and of a more worthy way of securing a means of livelihood, many of them degenerated from the strict observance of their law. But he maintains that the statement is false, which some spread about, namely, that the Jews take a daily oath that they will do what they can to cheat Christians; this, he says, was invented to inflame hatred against them. 513

9. We must now inquire whether these rules on usury, so diligently observed by the Hebrews, belong to natural law, or to the positive divine law, and that which was laid down not for the Jewish nation alone but for all peoples. Certainly it is clear that the additions made by the rulers of the Jews belong to positive law, and were contrived to preclude the evasions which sharp-witted men devised to evade the law. But our feeling in general about usury is, that, provided that it does not unjustly oppress and grind the poor, but corresponds to the gain which either we would have made in the meantime, or the debtor receives from the use of our money, especially when he has negotiated the loan not so much out of necessity as to make some profit, it is neither a natural nor a divine law to which all nations are obligated, but a positive one, such as was peculiar to the Jewish people, and rested almost entirely on political considerations. And according to Selden, *loc. cit.*, the Rabbis themselves felt the same thing, namely, that neither was interest opposed to natural law, nor did it constitute a theft, since it rests upon the free consent and agreement of men.

And it seems that this can be shown clearly enough by mere reason. For although the Hebrews were by command of God bound together by a relatively close tie of affection, yet they were required to observe the common duties of natural law towards all other peoples. Therefore, Juvenal, *Satires*, XIV [103-4], justly censures the following: 'Never to show the road except to one that worships the same sacred rites—to conduct to the spring they are in search of, the circumcised alone.' (E.) Moreover, if all usury is opposed to natural law, I do not see how a most holy God expressly allowed it to a people which he wished to be especially holy, and, as it were, charged them to violate a precept of natural law against men who had done them no manner of injury, provided *Deuteronomy* [xxiii. 19], is to be taken as applying not alone to the Canaanites but to all peoples.

But the reason for that law seems to have been twofold, the one to be sought in the genius of the people, the other in the form of their state and the condition of those times. No less at that time than to-day did an insatiable thirst for wealth vex that nation, and it was held the highest felicity to abound in riches. Therefore, God wished by that

law to guard against that craving for gain which leads to the oppression of the poor by the rich, while He allowed them to exercise all their skill against strangers, lest He offer too great violence to their native disposition. And it is clear enough, in the next place, that Moses wished to establish a democratic form of government (nor is this inconsistent with a single headship) among the rules of which one of the first is that so far as possible equality of wealth be preserved among its citizens. This was the purpose for the establishment of laws on the Year of Jubilee and of Remission, in *Leviticus*, xxv. 14, 31; *Deuteronomy*, xv. 2, and on not alienating land in perpetuity. Add *Numbers*, xxxvi, which finds a parallel in the law of Solon, that an ἐπίκληρος [heiress] who had inherited land was bound to marry the nearest relative on her father's side.

But also the conditions of those times furnish a reason for the law on usury. At that period this nation found its livelihood in grazing and agriculture, or else in manual labour. Its trade was likewise simple and modest, while the devices of commerce as well as of navigation were unknown to them. When such is the economy of states no one negotiates a loan unless driven to it by want. Therefore, *Deuteronomy*, xxviii. 12, mentions as a proof of the highest felicity, 'And thou shalt lend unto
514 many nations and shalt not borrow.' Add *Deuteronomy*, xv. 7-8. Now since the profits in such cases cannot help but be very small, it follows that even the slightest usury would seriously embarrass debtors. And since money so lent is consumed on bodily necessities, it cannot be recovered without the greatest difficulty, since you were unable beforehand, even by your own labour, to avoid being driven to secure a loan. The same reasons led to Athens once being involved in such disorders by interest charges that relief could be given her in no other way than by Solon's σεισάχθεια [shaking-off of burdens]; see Plutarch, *Solon* [xv]. And this evil Rome also felt in her early days.

Grotius on *Luke*, vi. 35, advances this reason among others for the law of *Deuteronomy*, xxix. 13: 'The chief wealth of the Hebrew people lay in agriculture and money. Therefore, the very best reason suggested that usury be not allowed between Hebrews, although since most of their neighbours acquired the larger part of their wealth by trade, the taking of interest from them was permitted. For other peoples also hold it oppressive to take interest from farmers.' The further point may be noted, that Moses hoped to draw the Jews closer to one another by this law, which was employed all the more often because at that time only modest sums were lent, and these to men who had little means and were engaged in a struggle with poverty. So also Philo Judaeus, *De Caritate* [pp. 701-2], feels that such a law increases love and banishes sordid avarice among fellow citizens, and this virtue the great legislator favoured by many other laws, such as *Exodus*, xxi. 10-11; xxii. 22,

23, 25-7; xxiii. 4-5, 9, 11, 12; *Leviticus*, xix. 9-10, 13, 33; xxiii. 22; xxv. 6, 10, 11, 35, 36, 37, 39 ff.; *Deuteronomy*, xiv. 28, 29; xv. 2, 4, 7-11; xxiii. 24-5; xxiv. 10-15, 19-21; xxvi. 12-13.

But loans are made these days most commonly for another purpose, namely, that we may secure the means to increase our wealth in some notable degree, or to get something that can bring us profit. When a man negotiates a loan for this end there is no reason why a person should accommodate him gratis. Nay rather, it would be impudent of you to make some considerable gain by the use of my money, and yet to be unwilling to allow me a share in your profit, for in the meantime I myself am shut out of that gain which my money could have brought me, if I had turned it to my own uses. Moreover, on the principle that an action at law is of less value than possession, a transfer of actual value has taken place, and one which should be compensated for by some interest charge, since the place of possession is taken by a personal action which always implies some trouble. Not all men hold with Martial, Bk. II, ep.¹ xiii:

The judge wants money, and the counsel wants money.
Pay your creditor, Sextus, I should advise. (A.)

Moreover, many accidents can arise to make my debt perish. Pindar, *Olympian Odes*, x [9 ff.]: 'Lo, the lingering hours have come from afar, and have made me ashamed of my deep debt. Yet payment with usurance hath power to do away with the bitter rebuke of mortal men.' (S.) Sometimes, indeed, a debtor must be carefully courted, so that the loan be not lost, while some men render others dependent upon them by making them their creditors. See Diodorus Siculus, Bk. XIX, chap. xxiv; Plutarch, *Eumenes* [xiii], p. 591 c. In Gramondus, *Historiarum Galliae*, Bk. V, the Mareschal de Roquelaure urges as an excuse for his rebellion: 'I followed not the Duke of Mayenne but my money. My debtor would become a bad debt if he were not followed close by his creditor.' Bad debts are not infrequent, as is shown by the saying of Martial, Bk. I, ep. lxxvi [I. lxxv]: 'He who prefers to give Linus the half of what he wishes to borrow, rather than to lend him the whole, prefers to lose only the half.' (A.)

This line of reasoning closely accords with the feeling of those who hold that it is to the advantage of a state for money to be let at interest to none but merchants, on the ground that in this way the industry of the poor is increased, while those who do not hesitate to go into debt for luxuries are forced to live frugally. And men of means, being un- 515
willing for their money to lie idle, will either take up business themselves, or lend their money to those who will, whereby commerce will be quickened to the great advantage of the state. Add Ludovicus

¹ [For *epist.* read *epigr.*—Tr.]

Septalius, *De Ratione Status*, Bk. II, chap. xv. Grotius on *Luke*, vi. 35, holds that

the rate of lawful usury should be set, not by the profit which the borrower makes, but by the loss sustained by the lender, just as in buying and other contracts the valuation must never be based on what profit accrues to the recipient, but on the loss to the seller or giver. And as much is lost as a man does and can gain from his money in accordance with his manner of life, deduction being made for the risk, which is greater in some cases and less in others.

This I admit, in so far as no one who has lent his money can complain of wrong, if the borrower has made some great and unforeseen gain from the loan. Yet I can unquestionably demand with full right a higher rate of usury from him who will profit greatly by the transaction, than from him who gains but little.

10. It is easy to answer the arguments advanced against usury. There is no point to the statement that the loan of a consumable thing (*mutuum*) should by its nature be gratuitous, since that of a non-consumable thing (*commodatum*) is also of that nature. But the reply is, that just as I can allow another the use of my property in two ways, either gratis or at a rent, of which the first is a loan, and the second a letting, so what prevents me from lending my money to another gratis or for a fixed charge? But if a man would still maintain that it is only properly a loan (*mutuum*), when money is lent gratis, that will only mean that when we stipulate a return for our money, the contract should be given some other name, not that it is unlawful.

The further objection is also of no value, namely, that money is a barren thing (compare *Matthew*, xxv. 24), and of no such use to life as clothing, dwellings, and cattle¹, and that it is therefore improper to demand anything in return for its use. For although money does not reproduce its kind, yet after an eminent price has been set upon money, it is, by the aid of men's industry, made most productive in securing for itself things that are fruitful both in nature and for the state. Therefore, usury is listed not among natural but among civil fruits. On them Seneca, *On Benefits*, Bk. VII, chap. x, passes this severe stricture:

I see there letters of credit, promissory notes, and bonds, empty phantoms of property, ghosts of sick avarice, with which she deceives our minds, which delight in unreal fancies; for what are these things, and what are interest, and account-books, and usury, except the names of unnatural developments of human covetousness? [. . .] What are your documents, your sale of time, your blood-sucking 12 per cent. interest? These are evils which we owe to our own will, which flow merely from our perverted habit, having nothing about them which can be seen or handled, mere dreams of empty avarice. (S.)

Aristotle, *Politics*, Bk. I, chap. vii [I. x], is also quite unfair to usury:

The most hated sort <of money-making>, (he says), and with the greatest reason, is usury, which makes a gain out of money itself, and not from the natural use of it. For money was intended to be used in exchange, but not to increase at interest. And this term usury,

¹ [For *instrumenta* read *iumenta*.—Tr.]

which means the birth of money from money, is applied to the breeding of money because the offspring resembles the parent. Wherefore of all modes of making money this is the most unnatural. (J.)

But the reply can be made to this theory, that for money to be put out at interest is not at all contrary to its use. For he who borrows money surely does it *μεταβολῆς χάριν* (for the purpose of bartering), and dominion was introduced at the outset, so that each man's property might be of immediate service to himself. Nor is it contrary to nature to rent one's own property to others.

It is a little more subtle when some say that in consumable commodities dominion is not distinguished from use, and so the use of 516 a thing cannot be allowed a man without dominion over it as well, and, *vice versa*, it is vain to grant dominion without use. For example, just as the substance of grain, meat, and wine is destroyed when they are taken over for the uses of men, so money perishes morally, when I claim it for my uses, inasmuch as it is removed from my estate. And so, they argue, since in usury the use cannot be distinguished from the thing itself, nothing can properly be required for the use, but it is enough if the things themselves are returned in their kind. The reply to this is that it is conceded that the usufruct of consumable things is not distinct from their substance. See *Digest*, VII. v. 1 and 2. Yet it does not follow from this fact that therefore the right to use up a consumable thing, with the obligation to return it in its kind after a time, is an act that cannot have a price placed upon it. For every loan has this condition, that it need not be returned save after a time; and yet if money is lent for a time, I can for that period spend it for other fruitful things, or make a profit from it in some other way. Thus, if I have to restore some necessities of life after a period, the advantage to me lies in the fact that I am not forced to exchange or sell my things on bad terms, for instance, to secure food, and that my money, which would have been spent on such things, I can in the meantime invest in a more lucrative way.

In this connexion we should mention, in passing, what Aristotle, *Economics*, Bk. II, chap. i, says to the effect that, when Cypselus vowed all his possessions to the gods of Corinth, he paid a tenth the first year and so on for ten successive years. Although he did not in fact meet the letter of his vow unless one be allowed the favour of lightening a rash promise by some qualifying interpretation. The saying of Cato, in Cicero, *On Duties*, Bk. II, at the end, that he regarded usury a crime equal to brigandage or homicide, is to be understood as of that extortionate usury, whereby citizens of slender means are reduced to extremities, and fuel is fed to an unquenchable avarice. The same Cato, *On Farming* [preface], says: 'Our ancestors considered, and so ordained in their laws, that, while the thief should be cast in double damages, the

usurer should make fourfold restitution.' (H.) Yet he himself, as we are informed by Plutarch, *Cato the Elder* [xxi], dealt in bottomry not without considerable shrewdness. Thus Augustus justly censured some Roman knights because they had borrowed at a low rate of interest, and let the money out at a high rate. Suetonius, *Augustus*, chap. xxxix. Appian, *Civil Wars*, Bk. I [liv], says that the early Greeks and Romans abhorred usury: 'It seems that the ancient Romans, like the Greeks, abhorred the taking of interest on loans as something knavish,¹ and hard on the poor, and leading to contention and enmity; and by the same kind of reasoning the Persians considered lending as having a tendency to deceit and lying.' (W.) And we also feel it unworthy of a Christian to take anything as interest on small sums from those whose need we ought to meet as an act of charity. See *Ecclesiasticus*, xxix. 1 ff.; *Psalms*, xv. Nay, the manner in which the Greeks aided their poor friends deserves especial commendation. Friends formed associations, which had a common chest to which individuals made a contribution every month. From this they lent money without usury in case one of their number fell into adverse fortune, which he was to pay back when his affairs took a turn for the better. This contribution was called *ἐρανος* [a loan of kindness].

11. What we have said is further confirmed by the fact, that even those who attack usury approve some contracts which in effect amount to usury. Thus let us suppose that Gaius is given money to buy a farm. Seius wants the same farm but has no money. At his request Gaius
 517 purchases the farm and then rents it to Seius. No one denies the justice of such a contract. But if Gaius should lend Seius the money to buy the same farm, and the latter should pay as much in rent as he would give in interest on the loan, there appears no wrong in such a transaction. Nay, the latter contract is more to the advantage of Seius than the former, since by it he has secured the ownership of the farm. Likewise, if a person lends his money to an upright man, on the arrangement that he will not demand a fixed sum as usury, but will be satisfied to receive an equal share of the profits made from that money, no one will hold that there is any injustice in this contract. But, so far as equity is concerned, it is the same, if, in place of an uncertain profit, he stipulates for a fixed and moderate usury charge.

Among the Mohammedans also usury is forbidden by the laws of the Koran, although the Moors have a kind of pact whereby a man who has taken a loan to carry on some transaction and make a profit, gives the creditor one-half of the gain, while if the loan has been lost, he is obliged to return to him only the principal. If but a part of the loan has been lost, the balance is made up from the gain on what is left. Likewise, no fault is held to attach to the case of *anticresis* [reciprocal

¹ [For *κατηλέειν* read *κατηλίκον*.—Tr.]

usage], whereby a man gathers the fruits from a pledge in return for a loan. Add *Digest*, XX. ii. 8. Why, then, is it not permissible in exchange for a loan which has no pledge attached, to accept something which corresponds to the fruits of a pledge? Usury was forbidden among the Persians, but reciprocal usage was lawful, even under a commissory clause. Add Olearius, *Itinerarium Persicum*, Bk. V, chap. xxxvi.

Grotius, Bk. II, chap. xii, § 21, rejects the term usury, but retains the thing itself, when he writes:

There are certain advantages which approach the character of interest, and commonly seem to be interest, although they are agreements of another kind; such are agreements for making good the loss which one who lends money suffers because he misses the use of the money for a long time; and likewise the loss of gain on account of a loan, with a deduction, of course, in view of the uncertainty of expectations (that is, because such expected profit may be lost or decreased by a number of causes), and of the effort which it would have been necessary to put forth (if the person himself had handled the money). So again it is not, in fact, usury if something is demanded for the expenses of the man who lends to many and keeps cash on hand for this purpose, as well as for the danger of losing the principal, in case proper security is not taken. (K.)

And yet the moderate usury which we take for a loan not to a poor man but to one who will make a profit from it, we demand for the most part because our gain from that money ceases when it leaves us, and because it is worth some compensation for us to have in place of the thing only an action for it; and so we come in for some share in the profit made from our money, which we were not obligated to lend to another either on grounds of justice or on grounds of humanity. And so what wise man would quarrel over words? And who will not laugh at those who claim that they do not require usury but only what the loan costs them?

Furthermore, this superstitious subtlety does not square with the laws of jurisprudence; for according to these that which is agreed upon beforehand is fixed usury, while any other loss is regularly required under other causes, such as delay, or the fact that the thing owed us was not returned at the proper time. The measure of this loss is the actual damage done to us, however it may be, although, because its amount can be fixed only with difficulty, it is often reduced to regular rates of usury. See *Digest*, XXII. i. 17, § 3. And yet if it be permissible to require compensation for delay, or because the gain ceases for us and a loss follows, when money is not paid at the time agreed upon, why is it not permissible to fix in advance some charge, for the reason that our money is for the while in the hands of another, when we were under no circumstances obligated, out of favour to him, to suffer a loss or forgo a profit. Add Bacon, *Essays*, chap. xxxix.

12. Finally, since it is obvious that men cannot be found who are 518 willing to lend gratis as much money as the general standard of living,

and trade, as it is now carried on between most civilized nations, demand, different devices are worked out or allowed by which the decrees of canon law upon usury have been evaded. Among these should be classed the 'purchase of yearly income', where in return for money some immovable thing is made over to me in its acknowledgement, from which I can receive a payment in money or fruits, and this either for ever, or for a fixed or unlimited period, or for the lifetime of the creditor. Some of these incomes can be recovered by the debtor upon payment of the loan, and some cannot. Nay, sometimes when the thing whereby the income was guaranteed has been lost, the obligation to pay it still lies upon the person of the debtor. But no one can fail to see that this purchase of a yearly income differs from usury only in name and appearance. Add François Hotman, *Observations*, Bk. II, chap. i; Ioannes Labardaeus, *Historiae de Rebus Gallicis*, Bk. VI, p. 393.

Even the popes themselves observed the value of low charges of usury, and permitted it under the high sounding name of 'mountains of piety', as they call it, the rules for which are in general that as much as three *scudi* shall be given poor persons without pledge and usury, but pledges may be taken for larger sums, and a little paid each month. If the pledge is not redeemed within one year, it is sold at auction, and anything in excess of the debt is returned to its owner. Yet according to Lampridius, *Alexander Severus* [xxi], Alexander Severus was no less pious in his exaction of usury: 'He loaned out public money at four per cent., but to many of the poor he even advanced money without interest for the purchase of lands, the loans to be repaid from their profits.' (M.) A similar practice, save that nothing is given without a pledge and gratis, prevails in what is called 'Lombardy', a name derived from the fact that those who used to charge interest in France were for the most part Lombards and Jews, whom public hatred afterward expelled from the kingdom. See Henri Estienne [Henricus Stephanus], *Apology for Herodotus*, Bk. I, chap. vi. After long discussion usury was finally approved in Belgium as being advantageous to the state and legal, and those who exacted it were even admitted to the priesthood.

To what extent the law of usury is evaded by merchants, through what they call *cambia sicca* [dry exchange], is known to those who follow that calling. Here belongs also the contract which they designate by the Spanish word *Mohatra*, whereby a man in need of money buys goods of a merchant at a very high price, to be paid at another time, and immediately sells them back to the same man at a low price, paid at once. See Montaltius [Pascal], *Lettres Provinciales*, viii, and the remarks thereon by Wendrock, n. 3. More tolerable is that contract where goods are purchased dearly, although a fair length of time is agreed upon for the payment of the price, and then they are immediately sold more cheaply

to a third party for immediate payment. With this money a man can either avoid a loan upon hard terms, or make such profits in the meanwhile, that, at the expiration of the period, the debt can be paid with no inconvenience. This kind of contract, as Olearius, *Itinerarium Persicum*, Bk. III, chap. vii, records, is common in Muscovy.

Yet those civil laws are worthy of entire commendation, which do not allow men free play in the exaction of usury, but set for them a fixed rate, save that it does not appear unjust to exact a little higher interest when a loan is required for but a short period. See Leo, *Novels*, lxxxiv. Among these laws should be listed one of Egypt, in Diodorus Siculus, Bk. I, chap. lxxix, which forbade increasing the principal by usury more than twofold, and allowed a creditor to exact payment only from the property of his debtors, but on no account to enslave them. The law held that goods belonged to those who had either gathered them by their labour or had acquired them on some other just title, but that the bodies of men were owed to the state, to be used in the services of war and peace, as they were best fitted.

CHAPTER VIII

ON PARTNERSHIP

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|---|---|
| 1. The ways in which a partnership is formed.
2. Money and labour may be balanced in several ways. | 3. Irregular partnership.
4. Partnership in all goods. |
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It is a contract of partnership when two or more men unite their money, property, or labours, to the end that any profits made therefrom may be divided between the individuals *pro rata*. See *Digest*, XVII. ii. 83. Any loss also, that may result, is borne by the individuals *pro rata*. See *Digest*, XVII. ii. 52, §§ 3-4; XVII. ii. 60, § 1. Therefore, if all contributed an equal amount of money, the individual shares in loss and profit will simply be equal, but when they have contributed unequally, each will receive his share *pro rata*, according to the laws of geometric proportion. Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xvi: 'In a commercial association the larger contributors are the larger recipients.' (W.) In the same sense is to be explained *Digest*, XVII. ii. 29. The same will obtain if two or more men only contribute equal labours, or if one contributes labour and the other money, or if each contributes both.

2. Now if, upon dissolving partnership, each partner has contributed only money, it is clear that each will receive upon division as much as he had contributed. But when labour and money have been contributed, it is a matter for inquiry to determine on what basis the balancing is to be made. For when labour is contributed on the one side, and only the mere use of money on the other, he who contributes the money does by no means admit his partner to a share in the ownership of that money, but only divides with him *pro rata* the profit which results from the union of the money and the labour. And just as in this case he who contributed only labour receives nothing upon the dissolution of the partnership, so it is for the other as the owner that his investment is preserved or lost. In such a partnership it is not the investment which is compared with the labour, but the risk of losing it, and the profit which could with some reason be expected from it. And so, when profits are to be distributed no comparison is to be drawn between labour and investment in such a way, for example, that if one contributed labour worth 100 units of value, and the other an investment of 1,000 such units, the former shall receive but one-tenth of the profits. But the labour is to be compared with the amount of risk to which the money is exposed, and with the gain which could have been expected with some probability; and when these last are valued at

100 units, they shall share equally in the profits. Although the easiest way is to reckon the risk and hope of profit in terms of the common rate of usury which is usually given for money lent. Thus, if we reckon the interest at six per cent., they will share equally in the profits in case one has contributed labour worth 60 units and the other 1,000 units in capital.

But the method is different when labour is contributed along with money in such a way, that he who contributed labour also secures a share in the dominion of the money as well. In such a case the price of the labour is held to be something added to the investment, and the partner contributing labour is understood to have a share in the total investment in accordance with the worth of his labour, since the money and labour have united, as it were, into one mass. It is presumed that the money of one partner has been spent on raw material, and the labour of the other on handling and working it up. Let us suppose, for example, that I give a weaver 100 units of value with which he buys wool from which he weaves cloth, and his labour is likewise worth 100 520 of the same units. It is generally recognized that we have equal shares in the cloth, and when it is sold the money received will be divided equally, nor will I be able first to withdraw the money contributed at the outset, and then divide with him only what is left over. Compare Grotius, Bk. II, chap. xii, § 24.

3. It should also be noted that it is not unjust to form a partnership in which one of the members shares in the profits but not in the losses. See *Digest*, XVII. ii. 29, § 1. To be sure, such will be an irregular partnership, and a contract of partnership combined with insurance against risk. Equality will be preserved in it, if he who has assumed the whole risk will draw a greater share in the profits, in proportion as he has insured the other members entirely or in part against the uncertainties of chance. But that a man should bear the loss without the gain is contrary to the nature of partnerships, since they are never entered into but for some advantage. See *Digest*, XVII. ii. 29, § 2.

4. But it also happens that men form a partnership of all their possessions. Such a partnership continues for so long as each member, in accordance with his status and the laws of frugal economy, can take from the common store what is required for the reasonable needs of himself and his dependants. But in view of the fact that many things may arise to make the members unwilling to remain for any length of time in such a partnership (see *Digest*, XVII. ii. 70), it is well to determine at the outset what share in the profits each member should receive upon its dissolution. In this connexion Grotius, *loc. cit.*, observes, that regard should be had not to what has actually come from this or that man's contribution, but to what could with some probability be expected, that is, that the shares in the profits are usually set

according to whether it is hoped that much or little will result from each man's investment or its accessions, but not that each person shall receive his original investment plus its earnings. For the purpose in several men pooling their property is that they may share in the profit which comes from another's goods.

Now although the interests of peace require that no man should be forced to remain in a partnership against his will, yet in view of the fact that a high degree of mutual good faith is required between partners, a man should not dissolve a partnership hastily and to the prejudice of his associates. See *Digest*, XVII. ii. 65, §§ 3 ff. Cicero, *For Sextus Roscius* [xl], makes some weighty remarks on the maintenance of good faith among partners:

In less important matters, to deceive one's partner is a most shameful thing. And rightly; because he who has communicated an affair to another thinks that he has procured assistance for himself. To whose good faith, then, shall a man have recourse who is injured by the want of faith in the man whom he has trusted? But those offences are to be punished with the greatest severity which are guarded against with the greatest difficulty. We can be reserved towards strangers; intimate friends must see things more openly; but how can we guard against a companion? for even to be afraid of him is to do violence to the rights of duty. Our ancestors therefore rightly thought that he who had deceived his companion ought not to be considered in the number of good men. (Y.)

Add Quintilian, *Declamations*, cccxx.

CHAPTER IX

ON CONTRACTS SUBJECT TO CHANCE

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| 1. Pacts mixed with chance. | 5. A contract in games. |
| 2. They are found in peace, | 6. On a contract of lottery. |
| 3. As well as in war. | 7. On the 'pot of fortune'. |
| 4. A contract of wager. | 8. On a contract of insurance. |

WE turn now to those contracts in which an agreement is entered 521 into on an uncertain outcome, and which depend upon some unknown chance, or in which the parties agree to, and, as it were, stand by some uncertain eventuality by the outcome of which they agree that they will abide. Now although some of them can be understood without reference to price, yet since most of them are entered into about things that have been valued, it has seemed best to bring them into this part of our discussion.

2. These pacts, mixed with chance or fortune, are used publicly and privately. They occur publicly in war as well as in peace. In peace many nations use a divisory chance, in selecting judges, in assigning provinces, and in distributing offices, when the candidates are equal both as regards right and the qualities or abilities necessary for the exercise of that function; for otherwise, if they have unequal rights, those who have the better are wronged, while if they differ in abilities it is the state that suffers. For, as Isocrates, *Areopagiticus* [23], says: 'In appointing by lot, chance has the decision.' (F.*) And Callimachus, *Hymn to Zeus* [62-3]: 'For equal chances should one cast lots.' (M.) Philostratus, *Life of Apollonius of Tyana*, Bk. III, chap. ix [30]: 'The lot has no discernment, for a worse man might be as easily chosen by lot as a better one.' (C.) All these ways of choosing presuppose a pact or promise on the part of those who have voluntarily had recourse to them, that they are willing to abide without complaint by whatever chance may decide. See Justin, Bk. I, chap. x; Bk. XVIII, chap. iii. But when a superior uses the lot in a matter which he could have settled by virtue of his authority, he voluntarily agrees to give up this prerogative and submit to the decision of the lot.

Now the purpose of lots is not and should not be the use of an unusual method in order to find out the will of God, except where by His law He has strictly commanded their use (*Proverbs*, xvi. 33), but to put an end to disputes and discords (see *Proverbs*, xviii. 18), and that he, who could otherwise by his authority make an end of wranglers, may avoid the odium of the party who is disappointed in his hope, and stop complaints about the injustice of a decision or the motives of a superior.

Yet it is absurd to use a lot, or anything allied to it, in disputes where punishment awaits the loser, since punishments should follow only upon a wicked deed, and one that has been established by clear proofs; and no matter how a lot falls it cannot show that a thing was or was not done by a certain party, and *vice versa*, nor is it suited to the actual truth of a question. But in case a number are equally guilty and it is not desirable to punish them all, there is nothing to prevent choosing by lot those who shall bear the guilt.

Also in private transactions the lot is used most often to assign the parts of an inheritance as well as to apportion some indivisible benefit or burden upon one of several who have an equal right or obligation. Add *Numbers*, xxxiv. 13; *Joshua*, xiv. 2; *Psalms*, xvi. 6.

3. Such pacts are used no less in war, not only when the decision of a whole war is made to depend on the result of a contest between entire armies, or two or more champions from each side (see Grotius, Bk. III, chap. xx, § 42), but also when some leader must be assigned a dangerous post, which several are qualified to undertake, and no one of them has a legitimate reason to avoid. See Homer, *Iliad*, Bk. VII, line 171. Nay more, practically all formal wars, certainly those where a peaceful agreement has been rejected by both sides, and the gage of battle taken up, appear to suppose an agreement that he upon whose side the fortune of war has rested can impose his entire will upon the conquered. And this is the real reason why pacts of peace cannot have thrown up to
522 them the exception of fear; for whoever resolved to take up war against another, when he could have settled the controversy by peaceful negotiations, is understood to have left the decision of the issue to the dice of Mars, and it is, therefore, idle for him to complain of any terms which the fortunes of war have meted out to him. And this is the further reason why the custom of nations holds that the belligerents mutually in a formal war are upon an equal footing so far as concerns the justice of the war, when they come to make peace, and why the damage caused by either side is forgiven, as if it had been done upon agreement.

A similar agreement is entered into by those who leave the decision of their disputes to the outcome of duels. Among the results of this covenant is the circumstance that the slayer is not obligated to make amends to the wife and children of his opponent for the loss caused by the latter's death, inasmuch as each of them, willingly and by agreement, entered a combat the law of which was either to kill or be killed. But since these combats, when entered into by individuals out of boldness, are directly opposed to the purpose of civil judgements, they are justly restrained by the most severe penalties. Yet quite absurdly, and contrary to the genius of civil judgements, duels were formerly permitted, either to clear one of the accusation of a crime, or

to prove one's right which had been put in question. See *Decretals*¹, V. xxxv; Lindenbrog, *Codex Legum Antiquarum*, *passim*, and his *Glossary* under the words *campio* and *duellum*. So formerly in Germany there was unjustly left to the decision of a duel the question of right, as to whether an uncle, or a nephew by an elder brother now deceased, should be first in an inheritance. In Sigebert of Gembloux, on the year 942.

4. Among contracts of chance are also included wagers when some future event, or the outcome of some event already past but not known to either of the parties, or of another thing, is affirmed by one party and denied by the other, each of them putting up a pledge, which shall go to him whose claim is found to agree with the event or thing. These wagers appear to be reciprocal promises or conditional bargains, which have an element of chance, because it does not depend upon the contracting parties whether or not the event takes place. The riddle proposed by Samson in *Judges*, xiv. 12 ff., appears to belong more to a jest than a wager, since it was a contest of wits, to decide whether he could state the case more obscurely, or the others solve it more cleverly. But Samson's comrades used trickery, since they solved his riddle not by their own wits but with the connivance of his wife. Although it is perhaps contrary to the nature of such contests to make a riddle out of some private fact, and not on some thing or event of common knowledge, for it is almost impossible to ascertain such particular facts by conjecture.

5. Here belong all kinds of games in which a prize is played for, and which involve an agreement that partakes more or less of chance. And, indeed, there is little chance in plays which involve a challenge of wit, dexterity, cunning, or strength, inasmuch as they are uncertain only because it is not yet entirely clear what strength or cunning is on each side, and because something unforeseen frequently interposes (see Vergil, *Aeneid*, Bk. V, line 328), or, finally, because the wit and strength of men are not always put forth with the same vigour. Many are compounded of chance and wit, as games of cards and the like. Other games are ruled almost entirely by chance, like that of dice. All of these have in them nothing that is naturally unfair, for people play them with mutual consent, each person exposes his wager to an equal risk, and the play is for our own property, which we have a perfect right to dispose of. 523

Yet since it is to the interest of the state that a man shall not misuse his property, and a man can easily run through his wealth by such agreements and games, when the play is for large sums, 'when men go to the hazard of the gaming-table not simply with their purses, but play with their whole chest staked' (E.) [Juvenal, *Satires*, I. 89 f.]; because also 'other games are wont to waste that precious thing, our time' (W.), Ovid, *Tristia*, Bk. II [483-4]; and since many other mis-

¹ [For *it*. read *it*.—Tr.]

fortunes can arise therefrom, it lies, therefore, within the province of the governors of states to ascertain how far games should be allowed, and what sums should be wagered. See *Digest*, XI. v, together with the comments by the expositors of the Roman law; Photius, *Nomocanon*, Tit. XIII, chap. xxix; Selden, *De Jure Naturali et Gentium*, Bk. VI, chap. xi. It should, however, be noted in general, that it is right to grant more favour to games which allow less chance and more skill, and *vice versa*. The Koran, in the Chapter on the Table, forbids, along with wine, games that involve chance, on the ground that they contain the seeds of quarrels. But in every kind of game and contest the words of Ambrose, *On Duties*, Bk. III, chap. iv, hold good: 'For those who run in a race are, as one hears, instructed and warned each one to win the race by swiftness of foot and not by any foul play, and to hasten on to victory by running as hard as they can, but not to dare to trip up another, or push him aside with their hand.' (R.*) This is drawn from the saying of Chrysippus in Cicero, *On Duties*, Bk. III [x. 42].

6. There is also a common game of chance which they call *lottery*, in which several persons contribute to the purchase of a thing, and then decide by lot to which one it shall belong. Here there is a combination of two contracts, for with respect to him who thus lays out his property for those casting for it, it is a kind of sale, while with respect to the others it is a contract of divisory chance, in that it is agreed between them that the lucky one shall alone have the thing and the rest shall lose what they contributed. The rule under which this contract operates is that the entire sum contributed shall equal and not exceed the value of the reward, and that all who cast the lot shall be exposed to an equal chance of gain or loss.

7. It is called a *pot of fortune* when a certain number of tokens or tickets, some inscribed and some blank, are cast into a bowl, and one is charged for the privilege of drawing them out, the drawer receiving what the writing describes. This contract is very similar to buying in hope, although it clearly includes an element of chance. The rule for it is that the value of all the tickets together should not greatly exceed that of the things described on them. I say 'not greatly', for there must be some expense, and it is possible that some very valuable articles are drawn at the first, and, since most of the rest of the tickets are then blank, no one comes to draw them. Such pots of fortune are sometimes employed to collect money for use upon public works, or to relieve those in want, in view of which the price of all the tickets is usually much greater than that of the things there exposed. This excess bears the character of a kind of voluntary contribution or alms, given in a cheerful manner. Add Martin Delrio, *Essay on Magic*, Bk. IV, chap. iv.

But in general the equity of games requires not only that the things exposed to risk on each side should be equal, but that the risk of

loss and the hope of gain should likewise be in proportion to the thing for which they contend. For instance, in a game which depends on physical or mental skill, it is right for one whose skill is twice as great as that of the other to hazard twice as much. So, for example, there are ten men who each hazard one gold piece, and play on the terms that the highest thrower shall win all. It may appear unfair that he who has risked one piece should gain the other nine. Yet it should be borne in mind that he ran nine chances of loss to one of gain. For this reason some have said that it is foolish to fear lightning, for not even one out of 2,000,000 men is struck by lightning; and so regard should be had not merely to the greatness of the evil but also to the likelihood of it happening. 524

8. Related to these contracts is insurance, or a contract to avoid risk, whereby a man upon the receipt of a certain sum takes upon his own shoulders and guarantees the risk which goods will undergo in being transported to other places, and that chiefly by sea, and, if they happen to perish, the insurer is obligated to make good their value to the owner. This contract is null if either party had prior knowledge, the insurer that the thing insured had already reached its destination, the insuree that it had already been lost, for the substance of this contract is a loss considered to be uncertain, or an uncertain risk; but if the insurer knew that the thing had arrived safely in port he undertakes no risk. Yet when the owner of the merchandise knew that it had already been lost, a risk cannot be assumed by the other, for a thing not existing is not subject to a risk.

The price to be paid for assuming such a risk must be fixed on the common rate, or by agreement between the two parties. It is clear that the more numerous and serious the risks to which a thing is subjected, the higher the price that can be required. Thus more can be demanded if the sea is infested with enemies or pirates, than if only the uncertainties of storms are feared, and on the same score, more in winter than in summer. Add Loccenius, *De Jure Maritimo*, Bk. II, chap. v.

We have mentioned that contract in this connexion for the reason that, on the part of the insurer, it is chiefly concerned with chance. An instance of insurance, although gratuitous, is given by Livy, Bk. XXIII, chap. xlix, where those who take the contract for transporting clothing and food to Spain demand 'that the state should bear all losses of the goods they shipped, which might arise either from the attacks of the enemy or from storms'. (S.) The fraud that entered into this transaction is set forth by the same author, Bk. XXV, chap. iii.

CHAPTER X

ON ACCESSORY PACTS

1. The two kinds of accessory pacts.
2. The variety of added pacts.
3. If an accessory pact is base, it is invalid.
4. Sometimes it disorganizes business.
5. When added at once¹ it is valid, provided other things are equal.
6. When added after the time a negative pact causes exception.
7. Its force when affirmative.
8. On a trust.
9. A surety cannot be held for more than the principal debt;
10. But he can be held more securely.
11. What benefits of law belong to a surety.
12. On bail.
13. The use of pledges.
14. A pledge is either fruitful or barren.
15. Whether a pledge can be secured by usucapion.
16. How a mortgage differs from a pledge.

525 AFTER principal contracts, which subsist by themselves, we must now turn to accessory pacts, which are not entered into of themselves and alone, but are only added to others. They can be conveniently divided into two classes. Some are added to other contracts so that they affect their simple nature in several ways, by adding something which they did not otherwise contain, or by subtracting something which was naturally in them. These are usually called by the lawyers *additional pacts*. Others contribute some stability and security to contracts already determined and defined.

2. The expositors of the Roman law on *Digest*, II. xiv. 7, § 5, are accustomed to distinguish in additional pacts between those which are added before the contract was finished, or else immediately thereafter, with the result that they seem to merge, as it were, with the principal contract; and those which are added after an interval. Then they inquire whether they are added to contracts made in good faith, or to those of strict law. And lastly, whether they affect the essentials of a contract; or what is natural, or, finally, what is accidental to it. The first are those without which a contract is in no way intelligible; the second regularly attend a contract, even though not expressed, although the essence of it can be expressed without them; the last do not flow from the essence of a contract, but can be included or not at the pleasure of the parties concerned. Nay, they feel that it makes some difference as to whether they are added to increase or to diminish the obligation.

3. On all these the following conclusions can be formed. I. A pact which so affects the essentials of a contract as to make it contrary to laws and good morals is invalid. For we have shown above that shameful agreements have no force. Thus it would be an invalid pact if a

¹ [For *contenti* read *continenti*.—Tr.]

bride should want to add to the marriage contract that she be allowed to receive other men as well; or if a steward should try to add to his engagement the privilege of fraudulently making away with his master's property. So it would be absurd for those who make a pact to wish to make a declaration that they did so because of unjust coercion and fear; or for a person in any kind of contract whatsoever to proclaim that he is not at all to answer for any fraud. Add *Digest*, XVI. iii. 1, §§ 7, 35.

4. II. If a pact so affects the essentials of a contract that it passes fully into another form of business, inquiry must be made into what was the intention of the parties to it. For if they really wanted to do what they expressed in their words, it is clear that the added pact is null, since no one can at the same time desire things mutually destructive and inconsistent. Thus men would be foolish if they claimed that they really would complete a sale and yet would at the same time add a clause to the contract that the buyer is obligated never to part with the price, or the seller with the article; or if they would let a house with the pact that the tenant should have dominion of it; or if they should form a partnership on the condition that neither any profit nor any loss would come to them from their common undertaking.

But if the contracting parties made the change in all seriousness, but either erred in the wording through inexperience or for certain considerations preferred to speak incorrectly, what is done will stand, provided the whole undertaking be not opposed to the laws, nor will the action be null because of some impropriety in the wording. Here belong *Digest*, XVIII. i. 80, § 3; XIX. v. 4 and 6¹; XVII. ii. 5, § 1; XVI. iii. 1, § 8; *Institutes*, III. xiv, § 2 at end.

5. III. Pacts which are added at once to any contracts, whether 526 they lie outside the essence of the contract, or have some effect on what is natural to it, or invest the contract with some features incidental to it, are valid, provided they are not in opposition to the laws. For since it is understood that the parties have the power to dispose of such things, they will be held to that to which they freely consented. Here belong, *Digest*, XVI. iii. 1, § 6; [*ibid.*] 24 and 26, § 1. *Institutes*, III. xxv, §§ 1, 2; *Digest*, XVIII. i. 7, § 1; XVIII. i. 79; XIX. i. 11, § 1; II. xiv. 7, § 5. Thus although the delivery of the article is otherwise natural in buying and selling, the contracting parties can agree otherwise in an added pact. So also the remedying of a defect can be either increased or diminished beyond what the common nature of every contract otherwise requires. And the same will obtain in consensual contracts, if even after their completion, but before their execution, a pact is added, since the result is as if a new contract were entered into. See *Digest*, II. xiv. 7, § 6; II. xiv. 58; XVIII. i. 72; XVIII. v. 2, 3; *Code*, IV. xlv. 1.

On pacts immediately added, which concern the natural qualities

¹ [For '46' read '4. 6'.—Tr.]

of contracts or their basic principles, further information can be gained from *Code* [*Digest*,] II. xiv. 11, 13; XIX. i. 6, § 1; *Code*, IV. xlv. 2. Here belongs also everything that is said in the sections, *Digest*, XVIII. iii, and XVIII. ii; likewise the pact on selling back in *Code*, XIV. xlv. 2; and the privilege of returning a purchase if unsatisfactory in *Code*, XIV. xlv. 7. Here can be referred that kind of loan whereby a certain sum of money is placed at interest, on condition that the interest be paid a certain man so long as he live, while upon his death the principal shall be his who took the loan, since otherwise the nature of a loan is that it can be recovered by the original lender or his heirs.

6. IV. Pacts added after an interval to any contracts, provided they be negative, and detract somewhat from the obligation, and so are to the favour of the debtor or defendant, are valid when other considerations are equal, and aid the defendant by way of exception. Thus some time after the actual contraction of a loan, the creditor and debtor can agree on postponing the payment, changing its place, on the kind of money in payment, on foregoing interest, &c. *Digest*, XVIII. i. 72; II. xiv. 7, § 5.

7. V. By natural law, in so far as an action is allowed by a bare pact, even pacts added to contracts after an interval, when they increase an obligation and so benefit the plaintiff, can be valid. For the reason why the Roman law in the passages just cited denies this, is because an action is not allowed by a mere affirmative pact, which principle the law of nature does not recognize. Thus, if we suppose that I have bought something to be delivered at a certain time, and it be agreed later that the delivery shall be made sooner, nothing prevents the delivery being required by the later pact. Thus suppose I have rented you my dwelling for two years, and we afterwards agree that the lease shall expire after one year, surely the tenant will have to leave the house at the end of that time, although the rent for the second year cannot be required. Likewise, I do not see why, if a pact on a loan can defer the time of payment, it cannot also hasten it. See *Digest*, XIII. v. 3, § 2. Nay, even if the debtor loses the advantage gained in making an earlier payment, still no injury will be done him if he made the pact of his own accord. Yet it is clear that his obligation cannot be increased against his will, and so whatever is naturally added to his obligation by the later pact, must be subtracted somewhere else. Thus, if my creditor wants me to pay at some other place than the one agreed upon, I can
 527 for my part rightly demand that I be permitted to deduct as much from the payment as it meant to me to have settled with him at the former place.

But it is also clear that it is opposed to the nature of onerous and bartering contracts, that at the outset or later a pact be added to them, which so increases the obligation of one of the parties that an inequality

thereupon arises in the contract. This would happen if a buyer and seller should have agreed at the first on a price as being a fair one for an article, and then afterwards agree that the buyer pay more than it is worth. Unless it be a mixed contract of buying and selling, there seems to be no way in which the additional charge can be required as from the purchase. Compare Arnoldus, Vinnius, *Tractatus de Pactis*, chaps. ix ff.

8. Under this head I think can conveniently be referred a *trust*, whereby we make over to a person some thing as his own, on the condition that he return it to us. This I should put among additional pacts rather than among principal contracts, for the reason that it is always added to a transfer already made of something to another. And it appears that the word trust is given to this pact for the reason that, although he who otherwise has the dominion of some thing made over to him can dispose of it as he pleases, and therefore either keep it indefinitely for his own use or turn it over to some one else, still, by the addition of such a pact, we place such trust in his honour and fidelity as to feel that he will not use his dominion otherwise than agreed upon, and will be quite willing to return it to us. And so among the Romans the regular formula for that pact ran: 'That among honest men there be fair dealing, and without fraud'; in Cicero, *Topics* [x] and [*Letters*] to his Friends, Bk. VII, ep. xii, and *On Duties*, Bk. III [xvii. 70]. And since so much faith, as it were, was concerned in such a relation, by the Roman laws infamy attended the man who had been judged guilty of a breach of trust. Cicero, *For Roscius the Comic Actor* [vi]: 'If there are any private actions of the greatest, I may almost say, of capital importance, there are these three—the actions about trust, about guardianship, and about partnership.' (Y.) *Idem*, *Topics* [x]: 'If a guardian is bound to behave with good faith, and a partner, and any one to whom you have entrusted anything, and any one who has taken a trust.' (Y.) *Idem*, *For Caecina* [iii]: 'If any one, when he has given security, has defrauded a person, he is condemned by the natural course of justice.' (Y.) In what negotiations a trust was interposed among the Romans is shown very fully by the expositors on the Roman law. On a father who receives in trust (*pater fiduciarius*) see Gaius, *Institutes*, Bk. VI. So also a trust was contracted in connexion with the emancipation of children touching the property of their fathers. See *Institutes*, III. ii, § 8; *Code*, VIII. xlviii. 6. On a possession in trust see Budaëus on *Digest*, I. ii. 2; Gregorius Tholosanus, *Syntagma Juris Universi*, Bk. XXIII, chap. v, § 2. On a guardianship in trust (*tutela fiduciaria*) see Bachovius on *Institutes*, III. ii. On a trust concerned with a pledge see Isidore, *Etymologies*, Bk. V, chap. xxv; Cujas, on Paulus, *Receptarum Sententiarum*, Bk. II, tit. xiii. So also a kind of trust is involved in things given on faith (*fideicommissa*). See *Institutes*, II. xxiii pr., and the remarks thereon of Bachovius and other

expositors. Other examples of a trust are to be found everywhere. Livy, Bk. XXXII, chap. xxxviii:

When Philip now perceived that he must decide the matter in the field, and collect his strength about him from all quarters, being particularly uneasy in respect to the cities of Achaia, a country so distant from him, and also of Argos, even more, indeed, than of Corinth, he resolved, as the most advisable method, to put the former into the hands of Nabis, tyrant of Lacedaemon, in trust, as it were, on the terms that, if he should prove successful in the war, Nabis should re-deliver it to him; if any misfortune should happen, he should keep it himself. (E.)

So also in Paulus Warnefridus [Paulus Diaconus], *History of the Lombards*, Bk. II, chap. vii: 'Alboin turned over Pannonia to his friends the Huns on this understanding, that, if ever the Langobards might have to come back, they should return to their own land.' In Curtius, Bk. V, chap. ix, Nabarzanes urges Darius to make over his kingdom to Bessus for a time: 'At the happy termination of our perplexities he will retransfer to you, his liege sovereign, the chief authority assigned to him on trust.' (A.) Diodorus Siculus, Bk. IV, chap. xxxiii: 'Hercules took Sparta by storm, and restored Tyndareus, the father of the Dioscuri, to the kingdom upon this condition, that, inasmuch as he had gained it by conquest, he should keep it, and thereafter deliver it up entire to Hercules' posterity.' (B.) Boethius, *On Cicero's Topics*, gives the following example: 'If a man, fearing the uncertainties of the time, should entrust his farm to a more powerful friend, on the agreement that he was to restore it when that period of uncertainty was past.'

Likewise, if any one among the Turks has made an oath that he will divorce his wife, he is still bound to do so even if he afterward repent. But in order to take her back he enters into a trust with a friend of his whereby the latter will marry her and immediately after the ceremony divorce her. For a woman cannot return to her former husband unless after her divorce she has married another man. Monconys, *Voyages*, Bk. I, p. 465; compare Ad. Olearius, *Itinerarium Persicum*, Bk. V, chap. xxiii.

Yet it will not be proper to make a trust so as to evade the law; for instance, if a man who does not pay taxes should be willing for another's goods to be made over to him for a time, so as to avoid the tax-collectors.

9. Now in pacts which add security and stability to other pacts already fixed and completed, the most common is that one man may take upon himself an obligation of another by way of security, so that in case the principal debtor does not pay, he will. Now men usually obligate themselves in behalf of others in three chief ways: (1) In obligations that concern things and actions which can be valued, and this chiefly between private citizens; (2) in cases of crime, that the defendant will meet the charge against him, which is properly called

bail; (3) in public obligations where guaranty is made by sponsors and hostages.

Some remarks have already been made (Bk. V, chap. ii, § 10) which will help to the understanding of suretyship. To what has been said we add that by suretyship, we assume the obligation of another as a kind of security, so that in case some negotiable thing which is owed in some transaction is not paid by him, it is met by us ourselves; yet we have recourse to the principal debtor and may require of him our cost and loss. But since suretyship is only an addition to another contract, the surety can naturally not be obligated for more than was the principal debtor. And so if the latter owes conditionally, the former cannot owe anything until the condition has been fulfilled, nor can he be obligated more in time and place than the latter. It is also fair that whatever exceptions the debtor had, as proceeding from the transaction, also hold for the surety. See *Digest*, II. xi. 6; II. xiv. 32; III. iii. 51; XIV. vi. 9, § 3; XVI. ii. 4, 5.

Those who order a man to give credit to another are the same as sureties, for in so doing they are understood to interpose their own faith. But in case a man orders a second to credit a third with 1,000 units of value and the last would take only 500, the first is not obligated to the second for more than the third received. For the force of such an order is, 'You may credit him on my guaranty up to 1,000 units of value'. Yet nothing in such a case prevents the surety from being obligated for less than the principal debtor; so he may, for example, come in for only a part of the debt, or go surety for all of it, but under a condition, or postpone the time of payment, or designate a place more convenient for himself.

The end of suretyship forces the further conclusion that the surety should be a man of means and one worthy of confidence, whom the creditor can easily be quit of in his suit, which, indeed, is implied by the creditor's having accepted him. So in Homer, *Odyssey*, Bk. VIII [351 ff.], when Neptune offers to go sponsor for Mars, Vulcan rejoins: 'Evil are evil folk's pledges to hold. How could I keep thee bound among the deathless gods, if Ares were to depart, avoiding the debt and the bond?' (B. & L.)

10. Yet it is not unreasonable that the surety should be obligated more efficaciously and, as it were, more securely than the principal debtor. For of his own accord he offered himself so as to give greater security to the principal contract, and without him the other party would not have agreed to it. And often necessity forces a man to enter a contract, while in the case of a surety it is only his liberality of spirit, his display of kindness, and confidence in his wealth, that engage him in another's business. Therefore, it is not without reason that creditors are sometimes more incensed at sureties than at principal debtors. For

the former were the cause of their crediting the latter, and that man is not without blame who unnecessarily shouldered a burden which he should have known he could not bear. And so wise men everywhere warn those who would avoid unnecessary evils, against too lightly entering upon suretyships. *Proverbs*, vi. 1 ff.; xi. 15; xvii. 18; xxii. 26-7; xxvii. 13; *Ecclesiasticus*, xxix. 24, 27. 'Go surety, but ruin is by thy side' is a saying of Chilon [Diogenes Laertius, I. 73]. Nay, the Roman laws kindly undertook, by the *SC. Velleianum*, to protect the tendency of women in this respect. Here belongs the fact, that, by the same laws, a debtor was allowed to clear himself of the entire debt by giving over his property, although it might be less than he owed, while this was not allowed to sureties, since they are accepted to the end that, if the debtor should be insolvent, the creditor can recover his property from them. Although otherwise this method of freeing oneself from a debt by parting with one's possessions is unknown to natural law, unless it be that humanity orders, if a man is unable to pay his debts because of some blow of fortune and not because of luxury or slothfulness, that it should be enough if he is stripped of his possessions and not be forced to pay the balance in his person.

But the obligation of a surety becomes more binding than that of a principal debtor, if what the latter has merely promised, the former has taken upon himself by an oath or under a stated penalty. Thus it is the custom in some places that, if the payment is not made at the appointed time, the sureties must appear at a certain place and not leave it until the creditor has been satisfied; and this they call *obstagium*. Yet this pact is in general forbidden because of abuses that have arisen.

11. But since suretyship is an addition to another's debt, it is natural that the principal debtor should first be approached, and only when the debt cannot be secured from him should recourse be had to the surety. Quintilian, *Declamations*, cclxxiii: 'The danger in which a guarantor is makes him deserve our pity; kindness hurts him, good nature ruins him. [. . .] The creditor cannot in any decency apply to the guarantor, unless he cannot recover from the debtor.' The Roman laws call this the 'benefaction of release and posteriority' (*beneficium excussionis et ordinis*). But where the debt must be paid by the surety, the creditor will transfer to him all the right which he had against the debtor, that is, he will cede to the surety his claims to action, if these may perhaps be more efficacious or favourable than what the surety can urge in his own name against the defaulter; and the creditor will by all means turn over pledges left as partial security, for these also must be transferred to the surety.

But if several men have acted together as sureties for one man, and no one of them has guaranteed the whole amount, it appears that they can naturally be called upon to divide it and each pay only his share,

unless it happens that one of them cannot do so. In that case his share will fall upon the rest, since the prime reason for calling upon several is that in case one or more of them come up wanting, the creditor may be satisfied by the rest. Add also Phaedrus, Bk. I, fable xvii.

Expromissores, or those who assume the entire obligation of another and undertake to pay it in their own name, are different from sureties, and so are looked upon by him to whom something is owed as principal 530 debtors. Whether they can recover from the other what is thus required, and how they can go about it, must be decided by the nature of the negotiations which they have with the person for whom they paid, for this is sometimes a free donation, sometimes a commission, a loan, a compensation, or something of this nature.

It is not unusual for a surety also to protect himself by another surety, that he will recover, by means of the latter, what he pays out to the creditor, when the principal debtor proves insolvent. This second person is called a surety of indemnity. His obligation toward the first surety and his right or action against the principal debtor is the same as that of the first surety against the principal debtor and the creditor.

12. It should be noted regarding bail, which intervenes on behalf of the offences of others and the obligations resulting therefrom, that many of the ancient writers held a man to be so far the master of his own life that, by his own consent alone, he could pledge it for the life of another, with the effect that he could even lay it down for another's crime. Andocides, *On the Mysteries* [*Orations*, I. xlv], relates that Mantitheus¹ and Asephion sat by the altar humbly praying that they be not tortured, and that they be tried upon giving bail, and that scarcely had they been granted this, and bail secured, before they leaped upon their horses and fled to the enemy, 'leaving behind their sureties who were under obligation to undergo the same suffering which the men whose surety they had gone ought to have suffered'. The story of Damon and Pythias (who is called Phintias by Diodorus Siculus in *Excerpta Peiresciana*, p. 244 [X. iv]) as given in Cicero, *De Senectute* [*On Duties*, III. x], is known to all. Manilius, *Astronomica*, Bk. II [vv. 586-8], says of them: 'Two only have availed to follow the bail furnished for the engagement.² Once only has ever surety prayed that the accused might fail to return, once only has the accused feared lest his surety should set him free.' (G.*) The same is related of Maerus and Selinuntius, by Hyginus, *Fables*, cclvii, and a similar story is to be found in Martinus, *Historia Sinica*, Bk. IV, chap. xi. Add Quintilian, *Declamations*, xvi, which is entitled *Amici vades*.

Yet it does not square with the rules of vindictive justice, as it should be carried out in society, for men to furnish bail to the end that

¹ [For *Mantitheum* read *Mantitheum*.—Tr.]

² [Modern texts have a very different reading here.—Tr.]

they may of their own consent meet the corporal punishment which should otherwise be inflicted upon the guilty person, unless it happen that a man has taken another's place in guile, so that the latter may be enabled to flee from justice. For in that case it is just that he pay as much as it would have meant to the magistrate for the criminal not to have escaped punishment¹, and the penalty sometimes can be set at death, especially when the fugitive from justice is likely to commit many crimes thereafter. See 1 *Kings*, xx. 39.

But in general such a vicarious death is illegal in a civil court, both because no man is granted such great power over his life that he can throw it away by his own consent, and with no benefit to the state, in order that another may not suffer what he deserves, and because such a practice defeats the purpose of penalties, which is to cure the guilty or to deter others. For he who gave bail was not himself guilty nor did he by so doing take the guilt upon his own head. Nor will he who sees an innocent man suffer be deterred from sin, but he will either be touched with pity, or lost in admiration of a love and constancy that did not forbear to face death for another. Add Antonius Matthaeus, *De Criminibus*, XIV. ii. 13 ff. on *Digest* XLVIII.

It appears, therefore, that bail can properly be furnished in crimes, either to assure the judge before whom the case is tried that the damage done by the crime will be met and the fine paid, or to guarantee the presence of the defendant, in case he is not present, so that no decision shall be made against him when absent and undefended, as though he were already guilty, or when he is present and in prison, to prevent him pleading his case in chains. Yet in any case it would be best for the
531 magistrate to fix in advance the sum of money which the surety must pay in case the defendant escape the trial by flight, so that he may consider whether his resources will allow him to lay so great a sum on the fidelity of the accused.

The obligation of hostages, in view of the fact that it is scarcely ever taken cognizance of apart from treaties and civil government, will be treated more conveniently in a later connexion.

13. It also happens frequently that some thing, by way of a pledge or pawn, is handed over or assigned to the creditor, as security for the debt until it has been paid. The purpose in this is not only that the debtor may be induced to pay his debt from a desire to recover his property (see *Code*, IV. xxiv. 35, § 1), but also that the creditor may have some means of recovering his loan when it is not paid, and that by holding fast to the pledge he may be able to avoid the troubles involved in recovering his loan at law. Therefore, it has been customary for the pledge to be of equal or greater value than the loan. Moreover, since pledges are invented for the security of debts which have an ordinary or

¹ For *poene* read *poenas*.—Tr.]

eminent price, it is fitting that the pledges be of the same character as the debts. And so we cannot approve the custom of the Egyptians who were in the habit of using as pledges the mummies of their parents, despite the fact that he who failed to redeem them was under the greatest disgrace and was denied burial after death. Diodorus Siculus, Bk. I, chap. xciii. It seems inhuman as well to forbid the burial of debtors, and by that disgrace to force their kinsmen to pay what they were otherwise not obligated to.

It may be observed, in passing, that in the kingdom of Pegu wife and children can be pledged to creditors. But if the creditor has lain with the wife or daughter thus pledged, he forfeits his loan and is forced to restore the pledge, although liable to no further penalty. Caspar Balbus, *Viaggi*.

14. Things given in pledge are either fruitful or barren. Regarding the former it often happens that there is added a pact of ἀντίχρησις [reciprocal usage], that is, the creditor may receive all the fruits of it in lieu of interest, or but a part of them, anything over and above the interest being restored to the owner. Regarding barren pledges it is customary for an agreement to be added that, if they are not redeemed within a certain time, they belong to the creditor. And this is not unfair by the law of nature, especially when the pledge is not worth more than the debt and the interest for the time, or if any additional value is returned to the owner. Although the Roman laws forbade this practice, because poor people and debtors under stress of necessity may easily be stripped of their possessions by avaricious creditors, for they might pledge things worth much more than their debt. It is proper also to agree, that, when the money is not paid on the appointed day, the pledge should be sold, as it were, at a fair price set at that time, or already agreed upon by an honest man, or even that the pledge properly valued at that time should be given in payment.

In general, just as the creditor should return a pledge upon payment of the loan, so in the meantime he owes it no less care than his own things, and unless there is an added pact of reciprocal usage, and the thing be made worse by use, he cannot avail himself of it against the owner's wish. Therefore, if it receives any hurt, or should perish by any fraud of his or lack of at least common diligence, the risk and loss lie upon the holder.

15. The view is generally held that pledges cannot be appropriated by usucapion, the reason being that the redemption of a pledge is an action which cannot be exercised often, but only once, when it was proper. A further consideration is that usucapions are mostly introduced to put a stop to the bringing of endless suits, and to prevent dominions of things from remaining undetermined. But there need be no fear of this in regard to pledges, for no question can arise regarding their owner, inasmuch as they are merely held for a time as belonging

to another; and since it is obvious why their owner leaves them with the creditor, it cannot be presumed that he is abandoning them.

Nevertheless, it appears that there are cases when the debtor is fairly prevented from redeeming his pledge. Such an instance is given by Grotius, Bk. III, chap. xx, last section [60], where a man wished to pay but was prevented at the time and has passed the matter by in silence for a period long enough to lead to the conclusion that he has consented to the loss. Moreover, if an indefinite delay in payment will bring loss to the creditor, it is not unfair for him to keep the pledge as payment¹, especially when a long passage of time brings about a change in the value of his money. And this happens when the creditor receives far less than he gave, in case the redemption of the pledge takes place at a much later time. For instance, when a man has lent another 1,000 units of value a hundred years ago, receiving in pledge, with a pact of reciprocal usage, a farm worth that amount, and in the meantime the value of money has depreciated one-half, in case the 1,000 units of value are returned, the creditor receives a sum with which he can now purchase scarcely half the farm, although at the time of the contract he could have purchased it all.

16. The Roman law regularly draws a distinction between a pledge, properly so called, and a mortgage, the former of which is the actual transfer of a thing, while the latter is the mere assignment of some property, usually immovable, from which the creditor can recover his loan in case payment is not made. For it is not convenient for movable things to be obligated by a mere mortgage, since they can easily be removed and thus can offer no security to the creditor.

Regarding this distinction it should be observed that a mortgage can have a useful place among citizens of the same state. For since the necessity frequently arises of securing a loan, the payment of which is often put off for some time, and since there are never enough movable things that can constitute a sufficient pledge, it would be too great a hardship to be forced to hand over immediately immovable things such as houses or farms. (Compare also *Exodus*, xxii. 26-7; *Deuteronomy*, xxiv. 6; *Job*, xxii. 6; xxiv. 3; *Proverbs*, xx. 16; *Digest*, XX. i. 6, 7; *Diodorus Siculus*, Bk. I, chap. lxxix; *Code*, VIII. xvi. 8 thereon.) Therefore, it was enough for an immovable thing to be designated to serve as a guarantee to the creditor, which cannot be carried off, and of which the judge can always offer immediate possession.

But for those who live in natural liberty mere mortgages are of no value. For when a debtor refuses to pay his loan the possession of the mortgage will have to be claimed by force and arms. And yet those who live in such a state were always permitted to lay hands on any property of a debtor, even without the assignment of a mortgage.

¹ [For *solitum* read *solutum*.—Tr.]

CHAPTER XI

THE MEANS BY WHICH OBLIGATIONS ARISING FROM PACTS MAY BE MET

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| <ol style="list-style-type: none">1. The most natural way of meeting an obligation is to fulfil what was agreed upon.2. What if a man pays a debt for one who knows nothing about it?3. To whom must it be paid?4. What must be paid?5. To whom and by whom may compensation be made?6. Where such a thing may take place.7. A debt is discharged by a release. | <ol style="list-style-type: none">8. To what extent an obligation is discharged by mutual dissent.9. A breach of faith by one party releases the other from his obligation;10. Also a change of the status on which an obligation was based. 53311. To what extent an obligation is made void by time.12. The obligations which cease with death.13. On delegation.14. On confusion.15. On renewal. |
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It remains for us to see in what ways obligations arising from pacts are met. Among these the most natural is the fulfilment of what was agreed upon, for when that is performed there is no further business of concern to the parties. But it should be observed that some obligations so inhere in a person that they cannot rightfully be fulfilled by another, and that others allow a vicarious labour, so that it is of no consequence to him to whom something is owed what person performs it. These last are for the most part contracts in which an agreement is made on the performance of some things by hired and common labour, and such as can be furnished by one man as well as another; and also those on the furnishing of consumable things and any others about the provenience of which we are unconcerned, so long as they come into our hands. Therefore, although in such contracts it is of course the natural thing for the debtors themselves, or those whom they have commanded to do so, to pay or deliver what was agreed upon, the creditor should nevertheless raise no objection if some one else wishes to pay in the name of the debtor ('for what a man pays in his own name and not that of the debtor, does not release the debtor,' *Digest*, V. iii. 3), and if he accepts it he will be able to demand nothing further of the other.

In this connexion we should note regarding a surety that, if the principal debtor has paid, he as well as the surety is released. But if the surety has paid, the principal debtor is released from the creditor, but he becomes at once indebted to the surety, even though the latter may have made the payment without his knowledge.

2. But when the question is raised as to whether and how far a man, who is neither the surety for another nor his agent, can recover what he pays for him, it is customary to distinguish between a payment made against the other's will and actual orders, and one made only without

his knowledge. In the former case he certainly has no right of recovery. For how can a man lay upon me against my will an obligation which arises from consent? Yet since it is presumed that no one rashly throws his money away, it must be seen, further, whether or not he wished to make the creditor a present of what he paid. If he did, the debtor is in no way concerned with it. If he did not, nothing is left for us than to say that he did it in order to transfer to himself the right and action of the creditor against the debtor. And although the creditor may chance not to have known at first that the payer was doing this, and to have accepted the money as if paid in the name of the debtor, yet when the payer cannot of himself recover from the debtor what he paid for him, equity demands that the creditor should either return to him what he accepted, keeping meanwhile entire his action against the debtor, or yield to him such action; especially since it is presumed that he who

534 made payment for another believed that his payment would be acceptable to the debtor. This was the reason why the Roman laws accorded such a person an 'action for business transacted', *Digest*, III. v. 43, 48. Yet since the debtor can raise the exception that it was not agreeable to him for another to pay in his name, and that he is unwilling to owe him for this kindness, the simplest thing for him is to infer that his creditor yielded his action to the one who paid for him against his will.¹ But if a man has been at expense to the advantage of another's property without his knowledge, or has put some labour upon it, it is right for him to keep his hands upon that property as a pledge until he has been recompensed for his outlay, unless the improvement is such as can be taken back.

3. Now the payment and any fulfilment of an obligation should be made to the very one to whom it is owed, or to one whom he has delegated to receive the debt in his name. But if a man has by mistake made payment to another, he in no way ceases to be indebted to his creditor on that score, but he will be able to recover what he has paid, on the ground that it was not owed. It is likewise presumed that he who receives a payment has the handling of his own property and knows what is being done. For otherwise it would be held a rash throwing away of money rather than a payment, if one gave what was intended to serve a man's use, to a person who either carelessly neglected that end, or was entirely ignorant of it.

4. Furthermore, payment must be made of the very thing agreed upon, not of another in its place (add *Digest*, XLVI. iii. 99); in its entirety, not mutilated, not merely a part of it, without division; at the place and time agreed upon, especially when it is to the creditor's interest that it be paid or performed here and not elsewhere, now and not at another time, for the time is also a part of the price. See Martial,

¹ [Reading with Barbeyrac 'pro invito' instead of 'pro ignorante'.—Tr.]

Bk. VI, ep. xxx. Although it may be that by a new agreement another thing can be substituted for that which is owed, or some change made as to place and time. Creditors often find it necessary to agree to such substitution or change, when, because of the inability or knavery of the debtor, they feel it better to get something rather than nothing, somewhere else rather than nowhere, after a time rather than never. Although equity sometimes requires that either the time be deferred for the debtor, or his payment be made in instalments, when the debt cannot be paid at the time or all at once. So when the Athenians once vowed to Diana that they would offer up to her as many she-goats as they killed of the enemy, and were unable to collect so many victims from the whole land, they decided to offer up 500 annually. Xenophon, *Anabasis*, Bk. III [ii. 7]. On other common observances as to the time of payment, see *Digest*, XLVI. iii. 105. Often, also, when the matter has been brought before a judge, there appears no other way of ending the suit than for the debtor to be ordered to pay some equivalent in place of the thing agreed upon.

It is also quite obvious that only he who is owed something can make a reduction in the debt or dispose of it, and that this power does not belong to the creditor's steward or agent without his authority. But when the debtor's steward has treated with the creditor and satisfied him with a smaller sum than was actually owed, the profit will go not to the steward but to his master; and it is a form of theft or speculation if a debtor's steward who has arranged with the creditor for a smaller sum tries to enter the full amount on his report and pocket the difference.

A debt is regarded as paid if the pledge has either itself been accepted as payment, or been taken in trust by an added agreement, or if it has been sold and the price taken in lieu of the debt. But if a man, being hard pressed by several notes, has paid a part, it is held in his favour that the more pressing burden is met by that payment. See 535 *Digest*, XLVI. iii. 1, 3, 4, 5, 7, 8; XLVI. iii. 89, § 2; XLVI. iii. 97. But the method of payment which Vitellius is said to have used, and which is mentioned in Xiphilinus, *Epitome of Dio*, is clearly without precedent. When he was setting out for Germany his creditors scarcely let him go even when he furnished sureties, but upon his succeeding to the purple and returning to Rome they went into hiding. But he had them hunted out, and saying, 'I have brought you safety in return for your loans,' he demanded back the instruments of his contracts.

5. Another very common manner of terminating obligations is by compensation, which takes the form of a mutual contribution between a debtor and the creditor (*Digest*, XVI. ii. 1), that is, when a debtor ceases to owe anything because the creditor himself on his part clearly owes him a thing of the same kind and value. For since, in consumable

articles especially, 'as much' means 'the same', and when it is a mutual debt I must at once return as much as I received, the most convenient way of reducing useless payments is for each to make the payment by keeping what is already his. Especially since some inconvenience attends practically every collection, and it is surely thoughtless for me by an unnecessary payment to render it all the more easy for another to make some delay in paying what he owes me. See *Digest*, XVI. ii. 2, 3.

But it is obvious that compensation can take place only between those who are mutual creditors and debtors, and I cannot as payment foist off on another against his will what is owed me by some third party, unless there happen to be such a partnership between certain men that their obligations and rights are held in common. Thus, if there is a partnership between two men in all their possessions, and I owe one of them the same amount of money as the other owes me, I can properly offer compensation to him when he requires of me my debt; for their possessions are held as a unit. Nay, if there is a partnership between men in one thing only, compensation will take place if both the credit and debit be concerned with the same matter upon which they formed a partnership, because with regard to it they are understood to stand as one person. So also what I owe the heir of my debtor and, *vice versa*, what the creditor of him whose heir I am owes me, can be paid by compensation. It is clear that compensation can be opposed¹ in the case of a creditor even against his will, since it is surely bold of you to demand of another what you refuse to turn over to him.

Now since compensation has no place among those who are not mutually indebted to each other, it follows that, if I owe another something, I cannot force upon him the credit of him whose agent I am, so long as that credit has not been transferred to me. For although a man puts me in charge of his affairs, I cannot thereupon number his things among my own, and with them release myself from my own debts; especially since a creditor often prefers to have as his debtor some one other than myself. Nor do I, in committing my affairs to a man, want at once to take upon myself his burdens and obligations as well. For example, if Gaius has ordered me to require his loans of Seius to whom I myself am in debt, neither will Seius be able to hold up compensation of my debt to Gaius, against his will, and for that reason refuse to pay—for what has Gaius to do with my debts?—nor can I substitute myself for Seius as debtor to Gaius. Thus the debtor of a ward cannot claim for compensation what the ward's guardian owes him, nor can the guardian pay his debt by offering to his creditor in compensation what the latter owes the ward. See *Digest*, XVI. ii. 23.

On the other hand, those are right who say that, if a surety by reason of his suretyship is called upon by the creditor to pay, he can use

¹ [That is, one debt can be set off against another.—Tr.]

in compensation not only what the creditor owes him, but also what he owes the principal debtor, even without the latter's knowledge and consent. For if the principal debtor had himself paid, the creditor 536 would have been obliged to allow compensation for what he owed him, and why, therefore, may not the surety have the same advantage? And a debtor would be held lacking in honesty if he wanted to prevent his surety from enjoying compensation for his debt, since he is obligated anyway to return to him what was paid on his behalf.

6. Compensation regularly takes place in consumable commodities of the same kind, the time for the payment of which is now at hand or is past, but not of those owed in the future (see *Digest*, XVI. ii. 7). Therefore, there can properly be no compensation of quantities with quantities of a different kind or quality, for instance, a bushel of wheat for a bushel of oats, a jar of Rhine wine for a jar of Spanish; nor of a different species, as this horse for this ox. Nor can things of a different kind be used in compensation, as a sheep for a goose; nor species with a kind or quantity, such as Bucephalus for an ordinary nag, or a jar of oil. Yet the expositors of Roman law allow compensation between bodies owed in general, that is, when the same kind of thing of the same quality is owed on each side; for instance, if I have promised you a horse in general, and you have been made heir of one who willed me a horse in general, compensation will take place between us. Yet it is possible, in the other cases, for each debtor to agree to have a value put upon different things, and then to square their debts by compensation. Although it often happens, even in reciprocal debts, that an obligation is not so much removed as suspended by retention, whereby I keep to myself what I should have given another, until he has paid what he first owed me. But no compensation can be effected in work for work, or work for goods, when the actual time has arrived in which these must be exchanged, for such a thing is opposed to the scheme of the agreements, and renders them entirely useless.

But if each party releases the other from the work or the goods that he owes, the obligation ceases on another basis, that, namely, of mutual disagreement. Just as the fact that I am not obligated to do something when the other party, who should have done it first, has failed in his part, is not to be referred to compensation, but to the consideration that the condition upon which I was obligated to do it does not exist. But if works have not been performed at the appointed time through neglect, it appears that they can have a value put upon them, and then be equalized by compensation. But I can also oppose an equivalent damage done to me by the creditor to my debt, as well as a fine to be paid me, which the judge has imposed upon my creditor for an injury done to me. Grotius, Bk. III, chap. xix, § 19, well observes, also, that, if two litigants strike a bargain while their suit is still being tried,

neither the action on which the suit was based nor the damages and costs of the suit can be opposed or struck off against what the bargain is about. For instance, I am at law with a man over a will, and while the trial is on I sell him my house. He cannot use the inheritance against me in payment nor his expenses in claiming it, since it is not yet established that the inheritance is his, while the nature of the transaction shows that we agreed with no thought of the suit, for otherwise nothing would have been done.

On that kind of compensation whereby a debt of gratitude for a kindness is cancelled by a subsequent injury done by the same party, see Seneca, *Letters*, lxxxix; *On Benefits*, Bk. VI, chap. iv ff. In the same way equal injuries committed by both parties can properly be squared by compensation, provided the interest of the magistrate in them is in no way affected.

7. An obligation is also fulfilled when it is forgiven by him to
537 whom something was owed, and to whose interest it is that the obligation be met, for it is an accepted thing for a man to be able to yield his own right. And whatever right from the obligation has been transferred to another is understood to return again to us by reason of his forgiving it. And just as no obligation is contracted at the outset, if the other to whom a thing is offered rejects it, so it does no longer bind me when the other of his own accord has loosened the bond by which I was held. Yet it should be added that the obligation is fulfilled, provided no third person is concerned, for if one is, the other cannot alone remit it, although the obligation be immediately concerned only with him.

Such a release is made either expressly or tacitly. To the first manner belonged, according to the laws of the Romans, *acceptilatio* [discharge], whereby a man acknowledged that he had received what he in truth had not; and also the 'stipulation of Aquileius', whereby, through a kind of novation, the obligation of some things was first reduced to an agreement, and then removed by a discharge. All these niceties are entirely unknown to the law of nature, by which, no matter how a thing has been contracted, an obligation ceases upon the mere consent of the other, properly expressed.

It is held a sign that I have made a present of an obligation, if I knowingly turn over to the debtor (not for the sake of a deposit or the like) instruments or writings without which debts cannot be proven. *Digest*, II. xiv. 2. But if there exist other instruments by which the debt can be equally well proven, the debt is not held to be forgiven by the relinquishment of only one. But the teaching of the Roman laws, that the return of an instrument is considered the conclusion of a tacit pact with the debtor not to seek recovery of the debt, is a subtlety likewise unknown to natural law, according to which an obligation,

even when a thing has been contracted, can be removed not only by actual payment but also by the mere remission of it.

An obligation is held to be tacitly discharged if the creditor prevents or hinders the debt from being possible of fulfilment. Thus when I have agreed with a man to let him know when he is to do some work for me, I shall be held to have rescinded the undertaking if I fail to tell him, and also when I get another to do the work in his stead.

8. Just as obligations in which only one of the parties is obligated are met in the former ways, so those that involve both parties are dissolved by mutual dissent, provided the matter has not been begun. For it appears in the highest degree natural that if something was by itself able to produce an obligation, its opposite can also dissolve it, when another thing has not intervened which forbids an obligation once contracted from being broken off. For there is no doubt that in a certain kind of transaction a positive law can forbid any going back on what was once decided, even when nothing has yet been performed on it. But if the performance has already been begun, and one party has contributed something, then mere disagreement does not appear sufficient to destroy an obligation (see *Digest*, XVIII. v. 2, 3), but for the obligation to be dissolved it is necessary for him who has already performed some of his share, and for whom something had to be done by the other party, to remit the other's share, or have his contribution balanced in some other way. See *Digest*, II. xiv. 58.

9. Furthermore, an obligation is not so much paid by the faithlessness of another party as broken off, and so when one party does not perform what is agreed upon, the other is not obligated to perform what he agreed to in exchange and in consideration of the other's performance. For whoever promises another something by a pact, does so not absolutely and gratis, but in consideration of what the other has undertaken to perform; and so the performances of each for the other take on the form of a condition, as if it had been said, 'I will perform 538 my part, if you perform yours first.' But it is fixed that whatever is built upon a condition falls to the ground when the condition does not appear. Thucydides, Bk. I [cxxxiii]: 'It is not those who fight in self-defence that break a treaty, but those who attack others unprovoked.' (S.) Hence the scrupulousness of the Hindu, in Philostratus, *Life of Apollonius of Tyana*, Bk. III [xx], if it is not a mere tale, was more than he owed: 'Although that other had violated every law and principle of morality by carrying off his wife, he yet did not break his oath, and so noble, he said, was his pledged word, that, in spite of the injury he had suffered, he would not do anything to harm that other.' (C.) See Grotius, Bk. III, chap. xix, § 14. But what has been mentioned has place, if he who should have performed first, or at least simultaneously with the other, has not done his part. For the question whether and

how far the mere fear that, when I have performed my part, the other will play me false, can free me from my obligation, has been discussed before.

But what right will attach to the parts of things already performed, when a contract has been broken off before it is fully completed? This question will have to be answered in accordance with the different cases. For if I have what I owed first, and the other man undertakes to evade his share, I will have the right to use every lawful means to force him to fulfil the contract. But if, after I have met part of my obligation, I am loath to keep on to its conclusion, I cannot require the other to return to me what I have done, or to pay me for it; but unless I am willing to finish what I agreed to do, he will be able to keep without hindrance what he received of me. Nor can the old saying be applied here: 'One should not grow rich to the loss of another'; for no consideration is taken of a man's loss which he has brought upon himself by his own guile. And so often as he to whose interest it was that the terms be carried out is to blame for their not being fulfilled, it is the same to the other as if they had been fulfilled. Nor if I later repent of my breach of faith and wish to continue my agreement is the other forced to accept it, since the single violation of the pact has broken it off and has freed the other from any obligation attaching to it, while it can only be renewed by a new convention. Thus, for example, should I engage the services of a man for a year, paying him in advance, and before the end of the year dismiss him through no fault of his, he is not required to return to me the wages of his services for the balance of the time. But if what has been performed by both parties is equal, neither of them, even then, will be allowed to break the pact before the time agreed upon, and if one does, the other will be able either to require him to finish his part, or to exact of him what it was worth to have the pact exactly carried out.

10. Obligations also expire when the person, whether of the agent or the recipient, changes the status¹ upon which alone they were based. Thus a magistrate who undertakes the defence of subjects is no longer bound, if he has left his office, and he who has promised a magistrate obedience is no longer bound, if he has ceased to be a subject, or the other is no longer a magistrate. But the power of destroying an obligation is not to be attributed to a change in the matter of the undertaking, which would have prevented the obligation being undertaken, if it had existed at the time when the contract was made, and if it does not so exactly square with the present state of the subject; provided it does not make such matter incapable of being performed. For unless such a change was inserted at the first as a condition of the pact, the right thus irrevocably acquired will hold fast, even though it may mean

¹ [For *status* read *statum*.—Tr.]

some trouble to the other party. For whoever entered a contract without compulsion and of his own accord, may blame himself for not taking precautions at the outset for eventualities which could probably have been foreseen. Thus when a people absolutely subjects itself to a king, even though it afterward reverse its decision and have a greater leaning toward another form of government, it cannot on that score release 539 itself from obedience to the king. In the same way many men would have chosen to go unmarried, if they had known beforehand the inconveniences of married life, but when some chance has induced them once to assume that bond it must be endured.

11. Obligations, the duration of which extends over a certain length of time, expire with its passage, and if it is desirable that they be extended, a new agreement is required, which is not always understood to have been made expressly, but sometimes only tacitly. See *Digest*, XIX. ii. 13, § 11; XIX. ii. 14. Still for an obligation to cease after a certain period of time, and yet not exert its force within that period, is absurd. Therefore, an obligation amounts to nothing, whereby I shall owe you 100 pieces of gold during a period of three years, and yet you can demand the sum of me neither during that period nor at its end.

But it is another matter if I say, 'Unless you require the debt within three years I shall owe you nothing,' for that is a condition added to an obligation, whereby the latter vanishes if the former does not appear. So also it is customary for a surety to obligate himself only for a certain period, to the end that the creditor shall press the debtor early, and while he can still pay, and that he be not involved for ever.

12. Finally, obligations which are rooted in a man's person are dissolved at his death, since when the subject is removed the accidents also must be extinguished, and performance is rendered impossible by nature. Yet see Valerius Maximus, Bk. II, chap. vi, § 10; and Pomponius Mela, Bk. III, chap. ii [3], in speaking of the ancient Gauls says: 'Reports upon business and demands for the collection of debts used to be taken to the dead.'¹ Thus in Japan the Buddhist priests persuade their devotees that whoever gives them money in this world will receive tenfold hereafter, and for this reason give their creditors receipts which the latter carefully preserve and command to be buried with them. See Bernhard Varenius, *De Religione Japoniae*, p. 35. Yet it commonly happens that the obligations of deceased persons are continued communicable through their survivors, so that the latter take their place. And this is so either because the survivor voluntarily takes upon himself the fulfilment of such an obligation, either out of consideration of the dead man's reputation, or for other reasons, or because some obligation from the dead man's property had to be satisfied,

¹ [So from the correct reading *deferabatur*. Pufendorf with *differabatur* has the meaning 'were put off until death'.—Tr.]

which passes to the heir together with that property, burdened, as it were, with a natural mortgage.

But if a man dies and does not leave behind as much as he owes, it appears that the action of the creditor against him goes into the same grave. For what can a man do with a lifeless corpse? Here belongs the law of Solon given by Plutarch, *Solon* [p. 189 E], which forbids the heaping of insults upon the dead. Add *Digest*, XLVII. x. 1, §§ 4, 6; XLVII. x. 27. Although it was a custom among the Egyptians for the bodies of debtors to be buried in the dwellings of their creditors, which were afterwards redeemed by their heirs and accorded honourable burial. It was also customary for children to pledge the bodies of their parents, but those who did not redeem them were objects of the deepest scorn and upon death were forbidden burial. See Diodorus Siculus, Bk. I, chaps. xcii-xciii; Lucian, *De Luctu*; Herodotus, Bk. II.

13. By delegation I substitute my debtor to my creditor with the latter's consent, so that the former pays the debt in my place, that is, he pays what he owed me to my creditor. In this case the consent of the creditor is required, but not that of the third person, the debtor, whom I can delegate to the other even without his knowledge and consent. For it is of no consequence to whom a man pays a debt, but of great concern from whom he demands a debt.

540 14. We need add little on confusion, for since the same man cannot be his own creditor and debtor, it is clear that if a man becomes the heir of his debtor his action perishes, since it cannot find an object against which it may exert itself.

15. Now a novation appears to be peculiar to positive civil law, and to have nothing to do with the law of nature and nations. For old obligations can, indeed, be remade by agreement of the parties concerned, so that, for instance, the loss of a thing because of delay on the part of the debtor need not be charged to him, that a fine or interest because of delay need not be owed, that pledges be returned or sureties released, since the creditor declares that he will henceforward be satisfied with the mere faith of the debtor, &c. But those who dwell in the simplicity of the law of nature need not imagine that in this case another obligation has taken the place of a former obligation that has ceased, for, as a matter of fact, nothing has been done here other than that either the creditor has renounced a part of his right, or different claims are blended into one. But that one action should by some privilege take precedence over another is a creation of positive law; since by natural law the things that are owed with equal efficacy can also be required with equal efficacy.

But what the Roman laws record upon a novation which takes place by a test at law (which they call 'necessary', and the former kind 'voluntary'), can after a manner be applied to natural law. That is, as

in a court of law he who has won his case has an action of judgement against his opponent, whereby he requires what the judge has allowed him, however his former right may have stood; so when a controversy on some matters is left to the arbitrament of war, not only can that first claim over which the war arose be taken up again, but also whatever, at the conclusion of the war, was included in the terms of peace.

CHAPTER XII

ON INTERPRETATION

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| <ol style="list-style-type: none"> 1. The reason of this order. 2. The necessity of right interpretation. 3. Words are regularly to be understood in their common usage, 4. And words applying to an art according to that art. 5. The sense is sought by conjecture if the words are ambiguous, 6. Or contradictory, or apparently so. 7. Conjectures are sought from the matter at hand; 8. From their effect; 9. From allied considerations, origin, or even place. 10. How the sense may be gathered from the reason of the law. 11. Some words have a broad and a strict significance. 12. Some things are favourable, and some odious. 13. Rules are formed from such distinctions. | <ol style="list-style-type: none"> 14. An example of two who arrived together at a goal. 15. How the statement that a man may not wage war without permission of another is to be interpreted. 16. On the words, 'Carthage will be free'. 17. A conjecture which means an extension of a law. 18. On such as are made in evasion of a law. 19. A conjecture because of which a law is restricted, and that either because of an original defect of the will of the lawgiver; 20. (An observation on such a conjecture.) 21. Or because of some case arising that opposes his will, being either unlawful; 22. Or too severe, considering the reason of the act. 23. What if different laws seem in some case to be opposed to one another? |
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541 AFTER a discussion of pacts in general, and partly in particular, we will now turn to their interpretation. For since in all obligations which are sought by men from one another, certain signs are used, indicative both of the intent of the contracting parties and of the laws and sections of the pacts, and since such signs can sometimes be taken in different senses, it is highly necessary to have in mind definite rules, in accordance with which their true sense is arrived at. And although we must discuss further on such particular pacts as presuppose civil government, and most of what must be said belongs to laws, yet since it does not appear convenient either to divide this material or to postpone it to the end, we will not be judged to have sinned too wantonly against the rules of method, if we discuss the whole subject at this point, following almost *κατὰ πόδα* [in the very footsteps] of Grotius, Bk. II, chap. xvi, who has handled the presentation of this subject most precisely.

2. Now if we consider the end for which obligations are contracted, every man who has voluntarily bound himself is obligated for what he had in mind. For it is presupposed that he undertook the obligation freely and of his own accord, and on a matter which he was under no necessity beforehand of performing. Therefore, there seems no way in which a man can be obligated for any more than he himself

wished. This is the sense in which is to be taken the statement of Cicero, *On Duties*, Bk. I [xiii]: 'In a promise, what you thought, and not what you said, is always to be considered.' (E.)

Moreover, the nature of man is such that his inner acts are in themselves not open to the gaze of another, and can differ from his outer acts and signs. And yet it must be clearly established what every man is bound to, or what can lawfully be required of him. For otherwise an obligation will be made void, if every man could free himself by inventing for his own use the sense he wishes and by maintaining that his idea was different from that which another understood. Therefore, reason dictates that he to whom a promise is made had the right to force the promisor to what the right interpretation of his signs suggests; for a man's thoughts are primarily for his own use, while signs are for the use of others. Otherwise the matter would serve no end and have no result, which in moral matters is held absurd. Here belongs the old formula regularly found in treaties, as given in Livy, Bk. I, chap. xxiv: 'Without fraud, as they have been this day clearly understood.' (F.) The norm and measure of proper interpretation is the inferring of what is in a man's mind by means of the most probable signs; and signs are of two kinds, exact words, and other words of conjecture, which are considered either separately or jointly.

3. About words the rule is as follows: If there is no sufficient conjecture which leads in any other direction, words are to be understood in their proper and so-called accepted meaning, one that has been imposed upon them, not so much by their intrinsic force and grammatical analogy as by popular usage, 'which is the final authority and is the law and norm of speech' [Horace, *Art of Poetry*, 72]. Quintilian, *Institutes of Oratory*, Bk. I, chap. vi: 'Custom is the surest preceptor in speaking; and we must use phraseology, like money, which has the public stamp.' (W.) Dio Cassius, Bk. LIX [LVII. xvii]:

When Tiberius had used in an edict a word that was not Latin, Ateius Capito declared: 'Even if no one has previously used this expression, yet because of Tiberius it should be enumerated among the primitive usages', but was interrupted by one Marcellus, who said, 'Caesar can give Roman citizenship to men, but not to words.' (F.*)

When Procopius, *War of the Vandals*, Bk. I [xi. 3 f.], had said that the emperor raised an army partly from his own nation and partly from his allies, he adds:

Now at an earlier time only barbarians were enlisted among the *foederati*, these, namely, who had come into the Roman political system, not in the condition of slaves, since they had not been conquered by the Romans, but on the basis of complete equality. For the Romans call treaties with their enemies *foedera*. But at the present time there is 542 nothing to prevent any one from assuming this name, since time will by no means consent to keep names attached to the things to which they were formerly applied, but conditions are ever changing about according to the desire of men who control them, and men pay little heed to the meaning which they originally attached to a name. (D.)

Themistius, *Orations*, iv [xxiii, p. 286 c]: 'The value of this term Sophist, like the value of coinage, declined in later times.' According to Polybius, Bk. XII, chap. iv [XII. vi], the Locrians, upon arriving from Greece at the extreme tip of Calabria, found the country already occupied by Siculi. The latter, terrified at their coming, received them and made a treaty with them on the following terms: 'The Locrians would be friendly with the Sicels and share the country with them, as long as they stood upon the ground they then stood upon, and kept heads upon their shoulders.' (S.) When this had been agreed upon the Locrians came to take the oath, first putting some earth in the bottoms of their sandals and fastening some heads of garlic on their shoulders, so that it could not be seen. Afterwards they shook the earth out of their sandals and threw away the heads of garlic, and when the first opportunity was given drove the Siculi out of that region. We are informed by Thucydides, Bk. V [xlii], that the Boeotians struck a treaty with the Spartans by which it was agreed among other things that they would deliver up Panactum to the Spartans, and this they did but only after they had razed it. When Leucippus had requested of the Tarentines the use of a place for a day and a night, and would not return it at their demand, he kept replying to them when they asked for it by day that he would return it if they came back that night, and at night he kept putting it off until the next day. Strabo, Bk. VI [i. 15]. Thus they say that when Mahomet, the emperor of the Turks, overran Euboea he promised a certain man that his head would be safe, and then had him cut in two.

When a petty king of India had fled to the king of Persia, and the king of India, sending an ambassador, demanded that he be given up, the king of Persia, while the ambassador was being shown in, had the fugitive put in a basket and hung from a tree, and then denied that he was upon his land. Ad. Olearius, *Itinerarium Persicum*, Bk. IV, chap. xxx. So some one or other persistently denied that he had laid hands upon a priest, for he had only cudgelled and kicked him. Thus when Temures agreed with the garrison of the city of Sebastia that no blood would be shed if the city were handed over, he evaded the letter of the agreement and ordered the captives to be buried alive.

But just as such cavillings are too obvious and frivolous, so, as Cicero, *On Duties*, Bk. III [xxxii], properly says, they 'do but fasten, not absolve perjury'. (E.)

4. As to terms used in the arts, which the common sort scarcely comprehend, it should be observed that they are explained in accordance with the definitions of those who are skilled in the art. Cicero, *Academic Questions*, Bk. I [vii]: 'As for the dialecticians, they have no terms in common use: they use technical terms entirely. And the case is the same with nearly every art.' (Y.) An illustration may be seen in the

word 'army', if, for instance, it is stipulated in a treaty that one shall not cross another's borders 'with an army'. In this case the question to be decided is what kind of a body of soldiers comes under that name. Grotius feels that an army should be defined as such a number of soldiers as would dare openly to invade the territory of an enemy, or even to face an attacking enemy in the open field; for historians regularly contrast what is done lawfully with an army, with that done by stealth and after the manner of bandits.

Yet a general definition cannot be given as to how great a body everywhere and always constitutes an army; we must rather take into consideration the strength both of the enemy and of ourselves. If small states are concerned, modest forces, which in the affairs of great nations will be considered only bands of foragers, can pass as armies. 543 Therefore, when Vegetius, *De Re Militari*,¹ Bk. III, chap. i, says that 'an army is a body composed of legions as well as auxiliaries, along with cavalry, collected for the purpose of waging war', he is not describing an army in general but only one as the Romans then regarded it. For there are also armies composed only of citizens, or aliens, or allies, as well as only of infantry or cavalry. Cicero, *Paradoxes*, chap. vi, gives the saying of M. Crassus, that 'a man was not rich unless he could support an army from his own income'; and he defines an army as 'six legions and large forces of auxiliaries'. Polybius, Bk. VI, says the Roman army usually consisted of 16,000 citizens and 20,000 allies, although among them a smaller number would sometimes suffice for the name. In *Digest*, III. ii. 2, § 1, a man who commands even one legion is said to be in command of an army.

But another question may be raised in connexion with this term: Whether, namely, he who has led a large number of soldiers through another's territory, not in a body, but in small bands, has violated the treaty which I have mentioned. In this case, since a man is said to have an army, whether he has it mustered in one place, or has so dispersed his forces that he can gather them together in a short time, it must be considered further to what end such an agreement was made. For if the only thing in mind was that no danger might arise to us, the treaty does not appear to be violated when the troops pass through in scattered detachments and are not mobilized within our territory. But if the treaty looks to the security of a neighbour, that he be not attacked through our territory, the treaty will be violated by conceding a passage, even though the soldiers are in small troops.

The same can also be applied to a *fleet*, if it be stated in a treaty that a man may not himself sail in a certain part of the sea with a fleet, or allow another to do so. For here not only the number of the ships is considered, but also their size, and the maritime strength of the

¹ [The correct title is *Eptoma Rei Militaris*.—Tr.]

peoples who are concerned. Here belongs the remark of Florus, Bk. I, chap. xi:

There are extant also spoils taken from Antium, which Maenius put up on the rostra in the forum, after capturing the enemy's fleet, if a fleet, indeed, it could be called; for there were only six beaked vessels. But this number, in those early days, was sufficient for a naval war. (W.)

Add Alberico Gentili, *De Jure Belli*, Bk. III, chap. xx. Thus, if it has been stipulated about a fort that, for example, it be not erected within a certain distance from a country's borders, we often understand by the word a redoubtable and powerful structure, as well as a fortified spot, which, although made up of insignificant works, can ward off a hostile force. And so if the purpose of the agreement was that no fortified spot should threaten our borders, the pact is clearly violated if defences be thrown up only of earth and equipped with mere huts for soldiers. Add Alberico Gentili, *loc. cit.*, chap. xxi.

But if the terms of arts are defined in different ways by different peoples, it aids in the avoidance of disputes to express in simple language what meaning the word is given in that place.

5. When simple words or phrases admit of several meanings, recourse must be had to conjectures to elicit the true sense. The rhetoricians call this ἐξ ἀμφιβολίας [ambiguity], but the dialecticians are a little more exact in calling it ὁμωνυμία [equivocality] if it is one word that admits different meanings, and ἀμφιβολία [ambiguity] if it is a phrase. An example of the former can be found in Tertullian, *De Velandis Virginibus*, chap. iv, where he maintains that the word 'women' in 1 *Corinthians*, vii, should be made to include virgins also. Although sometimes the word woman is opposed to a virgin, as when Cicero says, 'To-morrow she will be a woman'. An example of the latter kind is found in Cicero, *On Invention*, Bk. II [xl], where a man had put the following clause in his will: 'Let my heir give his mother-in-law a hundred weight of silver plate, at pleasure.' Whereupon the mother-in-law demanded the best and most cunningly worked, but the heir claimed that only those were owed her which he himself wished to give. The ambiguity could have been avoided by the addition of the word 'his' or 'her'. Although it is a rule of Roman law that the option regularly lies with the legatee. And this is agreeable with natural equity. For if the option had to lie with the heir, there was no need of adding the clause 'at pleasure', for when I am ordered absolutely to perform some things, and I can meet my obligation in different ways, the choice is understood to be in my hands. But when a clause about option is added, it is presumed to work in favour of him who is to receive something, that another may not foist upon him some worthless object. See author of the *Ad Herennium*, Bk. I [xii]; Quintilian, *Institutes of Oratory*, Bk. VII, chap. ix.

As to that well-known decision of the Duke of Ossona, Viceroy of Naples, whereby he assigned the entire inheritance to the son against the priests who had been designated as heirs, with the added clause, that they should give to the son 'what they pleased', it is defended not so much by the strict letter of the law, as by hatred for the avarice of men who are intent upon the property of others. Here belongs the reply of Charles V to the ambassador of the French king, when he asked for the dukedom of Milan: 'Of course the same thing pleases me as pleases my brother, the king of France,' which reply the ambassador forwarded with all haste to his master, as if the request were granted. Marselaer¹, *Legatus*, Bk. II, chap. xxxix.

6. Conjectures must also be used to elicit the real meaning when there occurs *ἐναντιοφάνεια*, or a contradiction in terms, so that the parts which seem to oppose each other may be reconciled, provided that is possible. For when there is a sure and clear contradiction of terms, a later agreement of the contracting parties will take precedence over earlier ones. *Digest*, I. iv. 4 pr.; *Decretals*, I. iii. 3. Livy, Bk. IX, chap. xxxiv: 'When two laws are contrary the new always repeals the old.' (S.) For no man can will contrary things at the same time, and such is the nature of acts which depend upon the mere will of the agent, or by which no right is secured for another, that they can be superseded by a new act of the will. Yet it is sometimes required, for a change of will to effect the annulment of an act, that it be only of one of the parties, as by the civil laws in the case of wills and the like; while sometimes it must be by both parties, as in pacts, which, if not opposed by law, can be dissolved only with the consent of both parties to them. Upon which grounds, by the way, it is clear on what basis Lycortas could have excused his thoughtlessness, in that when he went to renew a treaty of the Achaeans with the king of Egypt, he did not mention specifically which of several treaties then existing between them he came to renew. For he should have said that all the treaties had been renewed, in so far as they were agreed on them, and that of those on which they disagreed, the last one was the object of his errand. See Polybius, *Selections on Embassies*, xli [XXIII. ix].

As an illustration of two laws which appear contradictory, one is, 'Let the statue of a tyrannicide be placed in the gymnasium'; the other, 'Let no statue of a woman be erected in the gymnasium.'² But it is a woman who kills a tyrant. I should pronounce in favour of the woman. For the reason of the first law is that a youth, who is being trained for virtue in the gymnasium, may by the sight of such honours be incited to emulate them, while that of the second is that the virtues usually found in women are not such as a man need copy. But since, in

¹ [For *Marselar* read *Marselaer*.—Tr.]

² [The instance is taken from Quintilian, *Institutes of Oratory*, Bk. VII, chap. vii. 5.—Tr.]

the case before us, a woman surpassed the daring of her sex, she deserves a statue in a gymnasium all the more, as thereby the weakness of her sex can stir men to even greater rivalry.

There is another example in Cicero, *On Invention*, Bk. II [xliv]:

There is a law that he who has slain a tyrant shall receive the reward of men who conquer at Olympia, and shall ask whatever he pleases of the magistrate, and the magistrate shall grant it to him. And there is another law, 'When a tyrant is slain the magistrate shall
545 put to death his five nearest relations'. Alexander who was tyrant of Phœria, a city in Thessaly, was slain by his own wife, whose name was Thebe, at night, when he was in bed with her; she, as a reward, then demands the life of her son whom she had by the tyrant. Some say that according to this law that son ought to be put to death. (Y.)

The following is put forward as an illustration of how two sections of the same law appear to be contradictory. 'Let the victim of rape choose either the death of her assailant or marriage. But there is a man who raped two women, of whom one chose his death and the other marriage with him.' In this case the purpose of the law will point out the path to decision. For the reason of allowing the woman to choose the death of her assailant was not because it was believed that many such would choose in that way, but the legislator undertook to favour the poor woman lest she be forced to go forever single in case her assailant, after the flame of his love had died out, should begin to scorn her, as one who would not deny another with so much persistency what she had granted him contrary to the laws, nor would it be easy to find a man who would knowingly be willing to marry one who had been deflowered by another. Therefore, she will be preferred who chose to marry her assailant, for this squares better with the end of the law which looks more to the benefit of the woman than to the punishment of the assailant. Moreover, this decision leaves at least one of them an opportunity for an honourable marriage, while if their assailant is killed, both of them would have to go unmarried. And the principle also applies here, that, when the considerations on both sides are equal, the milder judgement should prevail. Although most of the speakers in M. Seneca, *Controversies*, Bk. I, cont. v, appear to take the opposite view.

The following is an illustration of when the words of the same law clash only in a particular case. The law runs: 'Let a brave man choose what he will have. But there are two brave men who demand the same maiden.'¹ Now since they both cannot attain their desires, the question is which is to be preferred. The reply is, he who was the first to make her his choice; and in case they both chose her at the same time, the matter must be committed to lot. For the indefinite liberty of choice, in the law, must be restricted by the provision that the desire of the brave man can be conveniently satisfied.

¹ [This law is mentioned in Seneca, *Controversies*, Bk. X, cont. ii; Quintilian, *Institutes of Oratory*, Bk. VII, chap. vii. 4; Gellius, Bk. IX, chap. xvi; Marius Victorinus, p. 298, 1 ff. (Holm's *Rhet. Lat. Min.*), but the cases are all different from this one.—Tr.]

Another illustration is given by Philostratus, *Lives of the Sophists*, Bk. I [xxvi], on Secundus. Let him who raised a revolt be punished. The same man raised a revolt and then quelled it; whereupon he requests a reward. On this point Secundus emphatically held: 'In matters where you have done wrong pay the penalty; but where you have done right take the reward, if you are able to get it.' And, indeed, in such cases the obvious obscurity of the words forces one to seek refuge in conjectures.

Yet sometimes the conjectures are so obvious that the real sense forces itself through, even in opposition to the more widely accepted and common meaning of the words. Such a case the rhetoricians term *περί ρητοῦ καὶ διανοίας*, 'the letter and design of the writing'. A common law in illustration of this is the following: 'Let any alien who mounts the walls be put to death. But in a siege one does so and hurls down the enemy that was preparing to scale them.' Opposed to the alien is τὸ *ρήτόν* [the letter], in his favour the *διάνοια* [design], which must without question carry the decision. For the purpose of the law was that no alien should ascend the walls to discover where was the easiest way into the city; which consideration has no bearing upon the case before us. Add *Digest*, XXXIX. iv. 15.

But it should be noted that sometimes an *ἀντινομία* [a contradiction] is assumed where there is none; as when words are taken by others not in the strict meaning in which they were delivered by the speaker. A notable illustration occurs in Josephus, *Antiquities*, Bk. X, chap. x, where king Zedekiah puts no trust in the words of the prophets Jeremiah and Ezekiel, because he held that they were contradicting each other. For the former affirmed that he would be carried off to Babylon, while the latter denied that he would ever see the land of Babylon with his eyes. Yet the prophets fully agreed with one another, for he was in fact carried off to Babylon, yet after his eyes had been put out.

7. Now three considerations are established by Grotius whereby 546 conjectures of the will are suggested, when the words are obscure or ambiguous: by the subject-matter, by the effect, and by the circumstances.

On the first the lawyers speak everywhere of how 'words should be understood in accordance with their subject-matter'. They advance illustrations from *Digest*, XIX. ii. 15, § 4; XXXIX. ii. 43; *Code*, IV. xlix. 17, where, if a seller has promised a purchaser that he will undertake to defend him in his purchase against every comer, he is still not understood to have promised to defend him from extra-judicial violence. I should also judge that this rule can be applied to the vow of Jephtha (*Judges*, xi. 31), and that of Agamemnon, as given in Cicero, *On Duties*, Bk. III [xxv]: 'When he had vowed to Diana the loveliest thing that should be born that year in his kingdom, he sacrificed

Iphigenia, than whom, indeed, nothing lovelier was born that year' (E.), for whoever speaks of a sacrifice is presumed to have in mind an object suitable for sacrifice. Add Everard, *Loci Legales* [*Topica Juris sive Loci Argumentorum Legales*], xl, which treats of the subject-matter.

Likewise, if a truce be made for thirty days, it is to be understood of days which are defined by a space of twenty-four equal hours, not of such as are of the period during which the sun is above the horizon. Therefore, it was a frivolous cavil of Cleomenes who agreed with the Argives upon a truce of some days, and then, upon ascertaining that they were sleeping during the third night in the security of the truce, attacked them, killing some and making captives of others. And when he was accused of perjury he denied that he had included in the truce the nights as well as the days; Plutarch, *Laconian Apophthegms* [223 A]. Strabo, Bk. IX [ii. 4], records that the Thracians employed a similar deceit against the Boeotians. It was in vain also that the Egyptian king Mycerinus endeavoured to convict of falsehood the oracle which had promised him only six years of life, by lighting lanterns during the night and thus enjoying his pleasures by night as well as day, as if by turning his nights into days he could stretch the six years into twelve. Herodotus, Bk. II [cxxx].

Thus the word 'arms', which sometimes means instruments of war, and sometimes armed soldiers, must be taken in the former or latter sense according to the subject-matter. For instance, if it has been agreed that a man shall not take up arms against a third party, clearly it is understood of soldiers and an army; but if it is agreed in the terms of surrender of a garrison that the arms shall be surrendered or left in the place, the soldiers are allowed to leave, but their instruments of war are to be left behind. Add Alberico Gentili, *loc. cit.*, Bk. III, chap. xx. So also when the Plataeans promised to return the Theban captives, they dishonestly returned them not alive but dead, Thucydides, Bk. II [v-vi], for the terms concerned living men and not corpses. [Ovid, *Tristia*, III. xi. 27-8]: 'Hector was alive whilst he fought in war, but once bound to the Haemonian steeds he was not Hector.' (W.) It is said that when Pericles had covenanted with some of his enemies that they should put away their iron, he afterwards accused them of breaking their agreement because they had not put away the iron brooches which they carried in the edges of their clothing. Quintilian, *Institutes of Oratory*, Bk. VII, chap. vi [8]: 'Let him who is caught with steel in his hand at night, be sent to prison; a magistrate sent to prison a man who was found with a steel ring.' (W.)

It was a dishonest trick of Q. Fabius Labeo, when king Antiochus had to deliver over by the treaty one-half of his warships, to cut all his ships in two and so deprive the king of his whole fleet. Valerius Maximus, Bk. VII, chap. iii; although Livy, Bk. XXXVIII, chap. xxxviii, makes

no mention of the cutting of the vessels. According to Polyænus¹, Bk. VI [xv], the Campanians made a treaty with their enemy, which contained the stipulation that the latter would give up one-half of their arms, and then after breaking all their arms in two they told them to take half of them. In Xiphilinus, *Epitome of Dio's History*, on Caracalla [year 217], two soldiers, on being ordered to divide a skin of wine which they had got on a foraging expedition, drew their swords and cut it in two. Likewise, Rhadamistus swears to Mithridates that he will not do him injury with poison or sword, and then smothers him in a mass of clothing. Tacitus, *Annals*, Bk. XII [xlvi].

8. Often also the effects and consequence show the genuine meaning of words. For when words, if taken in their plain and simple meaning, will produce an absurd or even no effect, some exception must be made from their more generally accepted sense, that they may not lead to nothingness or absurdity. *Digest*, I. iii. 19. There is an illustration in Guicciardini, *History of Italy*, Bk. V, p. 134, of a treaty whereby Louis XII, king of France, took over the protection of Bologna and its petty king Bentivoglio, respecting, however, the rights of the pope. But a little later Louis cavils at this in another manner, 'becoming a pettifogger, not a king'. *Ibid.*, p. 146. Thus in Thucydides, Bk. IV [xcviii], the Athenians absurdly deny that the place upon which they are encamped with their army is Boeotian soil. By a similar evasion Alexander got out of the conditions proposed by Darius, who had offered him all the land lying between the Euphrates and Hellespont. But Alexander replies: 'He offers liberally all that is on the other side of the Euphrates. Where is it, then, that you speak to me? Why, I am already across the Euphrates. My camps, therefore, are already past the limits of the gift which he promises. Drive me from where I am already, so I may know that what you are granting is really your own.' Curtius, Bk. IV, chap. xi [19]. As if it were the same thing to hold a place by means of armed camps and to possess it in peace and with the consent of the former owner.

Louis XII agreed with the papal legate that the appointments to bishoprics which would fall vacant in France by the death of their incumbents would belong to the king. It happened that a French bishop died at Rome, to whose place the pope appointed a man and the king no less quickly another, which gave rise to serious disagreement. But I for my part would not hesitate to decide in favour of the king, for it makes no difference, for an office to be called vacant, in what place its holder dies, while were that exception admitted the right of the king could be evaded in a number of ways. See Marselaer, *Legatus*, Bk. I, chap. xxxviii. Compare Everard, *Loci Legales*, viii, *ab absurdo*, where he recounts that there was a law of Bologna, that whoever drew blood

¹ [For *Polyænus* read *Polyaenus*.—Tr.]

from another person in a public square should suffer the most severe penalties. On the basis of this law a barber was once informed upon, who had opened a man's vein in the square. And the fellow was in no little peril because it was added in the statute that the words should be taken exactly and without any interpretation. In Quintilian, *Declamations*, cccxxxii, the following case is proposed:

A poor man and a rich man were friends. The rich man in his will made another friend his heir, but ordered that the poor man be given as much as the poor man was in his will giving him. The poor man's will is opened; he had made the rich man heir to all his estate. He demands the whole inheritance of the rich man. The designated heir is willing to give only as much as the total property of the poor man amounts to.

And surely it can be an argument on behalf of the written heir that, unless he received something, the man's decision would have no effect, which was one of the main reasons why the *Falcidian Law* and *Pegasian Decree* assigned the heir at least a fourth part, for in this way both heirs, the legatee as well as the heir in trust, are cared for. As for the interpretation of civil laws the statement of Cicero, *On Invention*, Bk. I [xxxviii], regularly holds true: 'One ought to refer all laws to the advantage of the state, and interpret them on the basis of the common weal, not according to the form which they take when spelled out in letters. For no one wants the laws to be observed for the sake of the laws, but for the sake of the state.'

9. A great light is cast upon the interpretation of obscure phrasings and words if they are compared with others which have some affinity with them; with those passages, for instance, where the same writer discusses a similar subject, or with their antecedents and consequences. For since in a matter of doubt the will is supposed to have been consistent with itself, it follows that, when a man in one place has expressed himself clearly on some matter, it is presumed that he is consistent with
548 himself at another place and time, unless a change clearly appears. Cicero, *On Invention*, Bk. II [xl]: 'The intent of the writer must be inferred from his other writings, his deeds, words, temper, and life.' Thus, if a man stipulates that some wheat be given him, without mentioning the measure, the stipulation is imperfect. *Digest*, XLV. i. 115. But if it appear from his former transactions that he thought of and acted upon wheat of a certain kind and quantity, that shall be held as expressed in his stipulation. *Digest*, XLV. i. 94; Ziegler on Grotius, *loc. cit.*, § 7.

A famous instance is the single combat between Menelaus and Paris in Homer, *Iliad*, Bks. III-IV. It had been agreed that Helen should go to the victor, but when Paris fell he looked to his safety by flight. Agamemnon accordingly announced that Menelaus was the victor, and that seems to have been the decision of Jove also, when he says (Bk. IV, line 13): 'But of a truth the victory belongs to Menelaus, dear to Ares.' (L.L. & M.)

It may be added that the stronger argument belongs to him who offered the condition, for they who accept it when offered have no right to add anything. Now the condition was not concerned with slaughter and death, but with victory, for Helen was to go to the stronger, that is, the one who conquered. There was no question of which was the nobler, for it often happens that a nobler man is slain by his inferior. On the other hand it is claimed that in decrees, laws, treaties, pacts, the later always takes precedence over the earlier. But the last condition was expressed by Agamemnon, since he mentions that the vanquished shall be slain (*καταπέφνη*) [III. 281]. And Priam also had taken his words in the same way: 'But Zeus knoweth, and all the immortal gods, for whether of the twain the doom of death is appointed.' (L.L. & M.) The first condition is comprehended in the second, for he who slew has surely conquered, but he who has conquered did not necessarily slay. And Agamemnon did not remove the condition as given by Hector, but explained it; he did not change it, but added what was the most important point, namely, that victory should lie in the death of the other contestant. For that is unquestioned victory, while the other point admits of some dispute. 'Now as, when there are laws really contrary, the judges take that side which is plain and indisputable, and mind not that which is obscure; so in this case, let us admit that contract to be most valid which contained killing, as a known and undeniable evidence of victory.' (G.) Plutarch, *Symposiacs*, Bk. IX, *quaest.* xiii.

10. But the main point in interpretation is the reason for the law, or that cause and concern which moved the lawgiver to have the law passed. And if any confuse this with the mind of the law, they go far astray, for the latter is nothing other than the true meaning of the law, to seek out which the reason for the law is called in for assistance. And it is the greatest aid to this end, if it be established that the will of the lawgiver was moved by some reason as the single cause, which is no less true in pacts than in laws. So in this case the old saying holds good: 'When the reason for the law ceases the law itself ceases.' But when there were several reasons for a law, the rest do not cease immediately upon the cessation of one, nor are they less valid to sustain the efficacy of the law. Nay, sometimes some general reason appears to urge one thing, while the will of the lawgiver in accordance with its liberty determines otherwise, and so his subjects are bidden to regard his will as the reason. And although it may sometimes depart from the laws of prudence, yet such a will clearly set forth is sufficient to give rise to an obligation.

Now from what has been set forth it is a justifiable conclusion that a donation because of marriage has no force, and when once made can be recalled or reclaimed when the marriage is not consummated,

especially if the fault lie with the one to whom the present was made. Although, otherwise, in donations between the living, the reason for the present does not have the force of a condition, unless it has been expressly stated, so that when the reason ceases the gift may be recalled. Thus the Olynthians were justified in refusing to return the territory which Amyntas, king of Macedon, had given them, when he had been defeated by the Illyrians and had given up hope of defending his kingdom. See Diodorus Siculus, Bk. XV, chap. ix.

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Yet in certain cases a law can assume the form of a condition. See *Code*, VIII. lv. Thus Cicero, *For Caecina*¹ [xix], on the interdict *unde vi*, in which were these words among others, 'whence thou, or thy household, or thy agent', rightly argues that, although a single servant is not a household, yet if he alone has ejected me, it is quite clear from the reason of the law that I should be restored, and that it makes no difference whether it be an agent or some one else who has ejected a person, provided it be in my name. He adds [xx]:

There is no different law for this single case, according to whether it was your agent who drove me away—such a man as is legitimately considered the agent of one who is not in Italy, who is absent on business of the state, being for the time a sort of master, that is, a deputy possessing the rights of another, or whether it was one of your labourers, or neighbours, or clients, or freedmen—or any one else who committed that violence and wrought that expulsion at your request, or in your name. (Y.)

Add *Digest*, I. iii. 12.

The case proposed by the author of *Ad Herennium*, Bk. I [xi], should also be decided upon the reason for the law:

There is a law that those who leave a ship because of a storm are to lose everything, while the ship itself and everything on board belongs to those who stay by it. Now in terror before a tremendous storm all the sailors left a ship and took to a boat, with the exception of one sick man, who was so ill that he could not leave and flee. Accidentally the ship got safe to port. The sick man is in possession. The former owner seeks to recover.

The reason, certainly, for such a law was that he who had exposed his life to peril in order to save the ship should enjoy some reward. But the sick man cannot claim this, since he neither remained on the ship for that purpose nor did he help in any way to save it.

II. It should be observed, further, that there is many a word which allows a more loose or a more strict interpretation, and this results from a number of causes. Often the name of the genus attaches itself to one of the species, as in terms of adoption and relationship. In names of animals where they are not common gender, the masculine denotes also the feminine, and *vice versa*. Sometimes also the application of a word in an art is more inclusive than in general usage, as 'death' in the Roman law extended to exile, while in common usage it means only the separation of the soul from the body. To this you

¹ [For *Caecinna* read *Caecina*.—Tr.]

may also refer the ambiguity in the word 'mine' and 'thine', which Martial, Bk. II, ep. xx, has played upon:

Bought verses for his own doth Paul recite,
For what you buy you may call yours by right. (W.)

Idem, Bk. VI, ep. xii: 'Fabulla swears that the hair which she bought is her own. Does she perjure herself, Paulus?' (W.)

12. The further point is to be noted that, among promises and pacts, as well as among privileges, some are favourable, some odious, some intermediate or mixed. Those are favourable which contain equality, that is, in which the condition of each party is equal, and the interests of each party are equally looked after, and which look to their common advantage. And the greater this advantage is and the more widely it extends, the greater the favour of the promise. Those also are favourable which preserve partnerships and all kinds of acts. The words of Quintilian, *Institutes of Oratory*, Bk. VII, chap. iv [10], apply here: 'The plea of escaping loss is much better than that of aiming at advantage.' (W.) So also greater favour extends to those that make for peace than to those that make for war, and to those of a defensive than an aggressive war.

On the other hand those are odious which burden one party only, or one more than the other; also such as carry with them punishments, and which make certain acts void, or effect some alteration in previous conclusions, as well as such as uproot friendship and society.

But if one is mixed, for instance, if it changes some former conclusion, yet in the cause of peace, it will be judged to be now favourable, and now odious, in accordance with the greatness of the good or change; yet, other things being equal, the consideration of favour should be given first place.

13. On these distinctions Grotius builds the following rules: I. In cases not odious words are to be taken in accordance with their exact significance in popular usage; and if the same word admits of several meanings in popular usage, the broadest one should be chosen. For instance, the masculine should be taken for the common gender, so that if two neighbours agree that each can hunt on the other's 550 property all game except bucks, it is reasonable to include under that name the does as well. In matters of this kind an indefinite term will have a universal force; for instance, if it is agreed in articles of peace that the prisoners are to be restored on both sides, this is to be understood of each and every prisoner. Thus Cicero, *Pro Caecina* [xxv], maintains that in the interdict *unde vi*, the words 'whence a man is ejected', should be extended to him who is forcibly forbidden from coming into what is his own. Add *Digest*, XLIII. xvi. 3, § 8. Nor is this sense repugnant to the nature of the word and it is highly in favour of a man for him to be restored to possession of what is his own, for to

eject a man from his possession is to prevent his being able to maintain thereafter a possession once acquired. Add *Digest*, XLIII. xvi. 3, § 5. But for a man to keep possession it is not necessary that he never set foot outside his door; and therefore it amounts to the same thing whether a man puts me out while I am on my place, or prevents my return when I come back after a short absence on other matters. Add *Digest*, XIX. ii. 29.

It is also due to the force of this rule that, in a case of doubt, when the matter is favourable, a year commenced upon is held completed, when no one's right is thereby injured. See Bussièrès, *Historia Francica*, Bk. XIX, p. 39. It was against this rule that, according to Suetonius, *Caligula*, chap. xxxviii, Caligula offended, 'in ruling that Roman citizenship could not lawfully be enjoyed by those whose forefathers had obtained it for themselves and their descendants, except in the case of sons, since "descendants" ought not to be understood as going beyond that degree'. (R.) Add *Digest*, L. vi. 4. And I wonder whether Dido did not use too broad a favour when, after purchasing as much land as could be covered by an ox-hide, she ordered it cut in the narrowest strips possible and so secured more land than she had asked for. Justin, Bk. XVIII, chap. v; Vergil, *Aeneid*, Bk. I, line 371, with the remarks of Cerda. With equal cunning Ivor asked for as much land as could be surrounded by a horse's hide, and then cutting it into narrow thongs, he got a space large enough to build a city on. Saxo Grammaticus, Bk. IX; Polydorus Virgilius, *Historia Anglica*, Bk. V.

II. In favourable cases, if he who speaks is skilled in law, or avails himself of the advice of such as are, the words are to be taken in a broader sense, so that they not only signify what is their meaning in common usage, but also include the force which is used in the discipline of law, or which the civil law has imposed.

III. No recourse should be had to meanings of a word that are plainly improper to it, unless otherwise some absurdity would follow, or the pact or law be rendered useless. For the nature of such undertakings requires that what is in one's mind should be expressed plainly and clearly, and it is presumed that this is regularly done.

IV. On the other hand words will have to be understood in a stricter sense than their proper signification otherwise requires, if that is necessary in order to avoid a breach of equity or an absurdity.

V. If to avoid a breach of equity it is not necessary for words to be taken within their strict signification, nevertheless, if there is a distinct advantage in restricting them, they should be held within the most narrow limits of their proper signification, unless circumstances counsel otherwise.

VI. In odious cases figurative speech can be admitted to some extent in order to avoid a burden. Therefore, in a donation and the

cession of a man's right, words, however general, are usually restricted only to such things as are likely to have been in mind. Here may be referred the passage in Cicero, *Topics* [iii]:

It does not follow, if a man has bequeathed to his wife all the money which belonged to him, that therefore he bequeathed all which was down in his books as due to him; for there is a great difference whether the money is laid up in his strong box, or set down as due in his accounts. (Y.)

Flavius Vopiscus, *Aurelian* [xxv]:

So Aurelian, when he was getting ready to set out for the Orient, promised the people two-pound crowns, if he ever returned; and although the people hoped for crowns of gold, which Aurelian neither could nor wished to give, he made the crowns out of loaves of bread which are now called *siliginei* (wheaten), and gave them to the citizens individually.

Nay, it is a rule in court that, if a general statement precede, and 551 this is followed by a detailed enumeration of the parts, that which was not especially stated is not held to have been changed. So when only one party to a treaty has promised assistance, such, it is understood, should be sent at the expense of the party which asked for it, unless there has been an express agreement to the contrary. Likewise, a treaty which is entered into for the defence of a kingdom, when its sovereign is in possession of it, is not extended to its recovery after he has been ejected. See Guicciardini, *History of Italy*, Bk. XV, p. 433 b.

Sometimes even the loathing felt for a person excuses a strict interpretation, which borders on cavilling. An illustration can be found in the case of Tarpeia, the betrayer of the Roman citadel, who had bargained to receive what the Sabines carried on their left arms, meaning their bracelets, and was buried beneath their shields. See Plutarch, *Romulus* [xvii].

14. Grotius shows the application of these rules in one or two examples. The question is raised whether a prize offered to him who was the first to reach a goal should go to both of two who reach it together, or to neither. Certainly the word 'first' signifies both him who precedes all others and him whom no one precedes, understanding that sometimes there may be equals in degree. We say, therefore, that if the participants set the prize as a kind of wager, and arrived at the goal together, neither can require something of the other. So when the spectators of a race between two contestants lay a wager, as they often do, upon the victory of one or the other, nothing is forfeit when the race is a tie. But when some prize is proposed by a third person, to quicken the zeal of the contestants, it is better that they who tied join in sharing the prize, if it be such as can be divided, or else enjoy it together; or, failing in these expedients, lots may be cast for the prize, or the contest run again. For it is surely unfair for both to be deprived of the prize

because neither was worse than the other. Moreover, the rewards of virtue regularly demand a somewhat liberal interpretation.

Yet those umpires decide more generously who give full prizes to such as tie in any event, when some prize was owed the contestants by their promise or by law. See Livy, Bk. XXVI, chap. xlviii. Yet when Augustus paid one million sesterces to the robber Coracota, who surrendered himself to the emperor upon hearing that such a sum had been put upon his head, he did it because of his highmindedness, rather than because it was due the man. Dio, Bk. LVI.

15. In the terms of peace drawn up after the Second Punic War there was the following article: 'The Carthaginians shall not wage war in Africa or outside Africa without permission of the Roman people.' Livy, Bk. XXX, chap. xxxii; Polybius, Bk. XV, chap. xviii. The same article was also in the peace granted by Flaminius¹ to Philip. Livy, Bk. XXXIII, chap. xxx. The question here is whether 'to wage war' is to be understood only of an offensive war or of a defensive one as well. Surely only the first can be answered in the affirmative, since the article is odious and connected with a diminution of the sovereign power, and it is too great a hardship to go further and limit that part of a man's natural liberty whereby he is allowed to defend himself against whoever offers him violence. Add Livy, Bk. XLII, chap. xli, towards the end. Such an interpretation is suggested also by the purpose of the Romans, which was not to expose either the Carthaginians or Macedon to injuries at the hands of their neighbours, or to guarantee the security of those nations with their own forces, but only so to restrain them that they would not be able to extend their territory and increase their strength through war. Add Livy, Bk. XLII, chap. xxiii. We are informed that in the treaty of the Romans with king Antiochus the following article was expressly inserted:

552 If any of the cities or nations, against whom it has been hereby provided that Antiochus should not make war, should commence war against him, it shall be lawful for Antiochus to war with them. (S.) (In Polybius, *Selections on Embassies*, Bk. XXXV, chap. iv, and in Livy, Bk. XXXVIII, chap. xxxviii, it is given as follows): If any of the allies of the Roman people shall make war on Antiochus, let him have liberty to repel force by force, provided he does not keep possession of any city either by right of arms, or by admitting it into a treaty of amity. (M.)

16. The Romans had promised the Carthaginians, 'Carthage will be free.' Later they demanded that the city be destroyed and a new one built back from the sea, giving as their reason that the area in which the city was situated was not Carthage. Appian, *Punic Wars* [lxxx and lxxxix]. But even though in this case the liberty which the Romans had promised the Carthaginians could not be understood as unimpaired, since already not a little had been taken from their sove-

¹ [For *Flaminius* read *Flaminius*.—Tr.]

reign power, enough liberty at any rate was understood to have been left them that they were not obligated at another's command to destroy their native country with their own hands and migrate elsewhere. Indeed, liberty or *αὐτονομία* [autonomy] is an attribute of a people, not of a city, in so far as a city consists of buildings and walls, and as Nicias says in Thucydides, Bk. VII [lxxvii]: 'For men, and not walls and ships in which are no men, constitute a state.' (J.) Add Justin, Bk. II, chap. xii, § 14. Yet since it was 'Carthage will be free', not the Carthaginians will be free (by which statement the Romans might have given more colour to their fraud), common sense at any rate suggests the meaning that the people in the city of Carthage, as it then stood, would enjoy liberty, and therefore the very houses of the city deserved to be respected. Although Polybius [XXXVI. iv] records that the senate promised the Carthaginians 'freedom and the enjoyment of their laws; and moreover, all their territory and the possession of their other property, public or private'. (S.) It seemed at once suspicious to the Carthaginians that no mention was made of their cities. But in any event it is clear that the Romans were guilty of more than Punic perfidy.

17. There are also other conjectures, arising outside of the signification of the words in which a promise or pact is couched, the effect of which is that their interpretation is sometimes to be extended and sometimes restricted. Yet it should be observed that it is easier to find reasons which lead to the latter course than to the former. For just as in all things the lack of one single cause is enough to prevent an effect from following, while all must agree for it to be produced, so in acts giving rise to an obligation, the lack of one cause is enough to restrict an interpretation, while all must agree if it is to be extended.

And such an extension proceeds with much more difficulty than when we said just now, that, in a favourable matter, words sometimes admit another signification, although one less common. For since the sole use of words is to express the sense of one's mind, it is not unlikely that the mind of the person speaking has been expressed by that sense of the words which is not far removed from common usage. Yet here such conjectures are sought as will show that the mind of the person speaking was other than anything his words lead one to suppose; and such conjectures should surely be the most certain possible.

Nor can a law, for instance, be extended to some case with which a reason squares, that is similar to the one which is in that law, but the reason must be the same. Nay, not even this is always enough; for sometimes the mere will of the lawgiver determines itself at its pleasure, and this is enough to produce an obligation. And so for such an extension to be rightly made in a law, it must be clearly established that the reason under which the case comes is the sole and efficient cause which

553 moved the lawgiver, and that the same reason was so considered by him in its generality, that he would have wished it to apply also to the present case, had he foreseen it or thought about it; and that, because otherwise the law would have been useless or unjust.

Here should be referred what is laid down by the rhetoricians *περί συλλογισμοῦ* [upon reasoning], when a thing which is not covered by any special law is, through identity of reason, inferred from a similar thing on which the law has a specific ruling¹; or in the words of Quintilian, *Institutes of Oratory*, Bk. VII, chap. viii [4]: 'When what is not written is deduced from what is written.' Where he also lists the following illustrations: 'It is not lawful to receive a plough in pledge; a man received a ploughshare. It is not lawful to export wool from Tarentum; a person exported sheep. Let him who has killed his father be sewn up in a sack; a man kills his mother. Let it be unlawful to drag a man from his house to the judgement-seat; a man drags another from his tent.' (W.) Add *Digest*, IX. ii. 7, § 7. Here belongs a case defended by Lucian in his speech entitled *The Tyrannicide*, [Preface]: There is a law that the assassin of a tyrant shall be rewarded.²

A man forces his way into the stronghold of a tyrant, with the intention of killing him. Not finding the tyrant himself, he kills his son, and leaves his sword sticking in his body. The tyrant, coming, and finding his son dead, slays himself with the same sword. The assailant so claims that the killing of the son entitles him to the reward of tyrannicide. (F.)

Erasmus defends the opposite position. And yet reason leads to the conclusion that the reward is due not merely to the man who slew the tyrant with his own hand, but to him who did something from which the death of the tyrant directly resulted. As Lucian says in the same passage [xi]: 'What is the difference between killing him and causing his death?' (F.) For there is no question that the lawgiver would have decreed the reward also to the latter kind of tyrannicide, had such a case occurred to him.

There is a law that whoever kills his wife shall be put to death. A certain man in France, wishing to get rid of his wife, kept his mule without water for three days and on the fourth, while passing through the fields as if on a pleasure jaunt put his wife upon the back of the famished creature. And when it came near a stream it rushed into it in such haste that the woman was thrown into the water where she perished. Here you may apply the line of Seneca, *Hercules Oetaeus* [859-60]:

Whate'er can work my death is sword enough. (M.)

Thus the brethren of Joseph vainly believed that their sin would be less if they threw him into a pit to die of hunger, than if they cut him down. Josephus, *Antiquities*, Bk. II, chap. iii.

¹ [For *statuum* read *statutum*.—Tr.]

² [This sentence is not in Lucian at this point.—Tr.]

There is a pact between two neighbouring nations, at a time when there was no other kind of fortified place, that in a certain region no spot should be surrounded by walls. Such a spot shall not be surrounded even by an earthen rampart, if it is established that the sole reason for forbidding the construction of walls was that the place might not be made capable of resisting attack.

A man's will runs thus: 'Let Titius be my heir if my posthumous child', which the testator, of course, expected, 'dies.' But it happens that no child is born after his death. In that case Titius will be his heir, because it is certain that the testator's desire, that he make Titius his heir, was moved by the sole consideration of his coming offspring; and so, had he known that a posthumous child would not be born, he would have written him in as his heir unconditionally. Add *Digest*, V. ii. 28. M. Seneca, *Controversies*, Bk. IV, cont. xxvii [IX. iv. 9]: 'Many things are understood in a law, although they are not excepted. The wording of a law is restricted, the interpretation is broad; and some things are so obvious that they need no exception.' Cicero, *For Caecina*¹ [xviii]:

What? was this case sufficiently provided for by the terms of the will? Certainly not. What was the thing, then, that influenced the judges? The intention; and if it could not be understood though we were silent, we should not employ words at all: because it could not, words have been invented not to hinder people's intentions, but to point them out. (Y.)

Idem, *On Invention*, Bk. II [xlii]: 'Not all exceptions are provided for in written terms, but certain obvious ones are tacit.' Lysias, *Orations*, II [xi. 4], *Against Theomnestus*: 'It would have been too much 554 trouble for the lawgiver to have written down all the designations which have the same meaning, but what he said about one he wanted to have understood of all the others.' *Idem*, *Orations* I [X. 7f.], *Against Theomnestus*. Thus the law in *Exodus*, xxi. 33, is properly extended to any kind of tame animal, and the word 'pit' to any excavation. Quintilian, *Declamations*, cccxxxi:

Those who worded the laws could not possibly have had foresight sufficient to enable them to cover every variety of crime. For despite all their precautions rascality would have got the best of them, and the law would have become so complicated and voluminous that in place of uncertainty, as at present, we should have had ignorance. They therefore undertook to include the general kinds of crime, fixing their attention upon the essential equity. And therefore we frequently find things that are not contained in the words of the law, but are contained in its essential power and force.

Add Libanius, *Declamations*, xxxi.

18. An excellent use is found for interpretation when it is extended to prevent frauds which are so often concocted by scheming men in evading the laws, as well as to dispose of all kinds of cavils. *Digest*, I. iii. 29, 30; X. iv. 19; XXXV. i. 76; XLVIII. v. 33, § 1. Frauds of this

¹ [For *Caecinna* read *Caecina*.—Tr.]

kind the expositors of the Roman law divide into four kinds: one, they say, takes place in the commutation of things (*Digest*, XIV. vi. 3, § 3; XIV. vi. 7, § 3); one in the commutation of persons (*Digest*, XXIV. i. 5; add Livy, Bk. XXXV, chap. vii); another in the commutation of contracts (*Digest*, XXIV. i. 5, § 5); and the last in the manner of making contracts (*Digest*, XVI. i. 8, § 14).

The illustration of Licinius Stolo, in Valerius Maximus, Bk. VIII, chap. vi, is well known:

When he had provided by law against any one holding more than 500 jugera of land, he himself got hold of 1,000, and in order to conceal his guilt made over one-half to his son. He was accused on this score by M. Popilius Laenas, and was the first to be hit by his own law, teaching us thereby that nothing ought to be laid down as a rule for others, except what a man has previously enjoined upon himself.

The same story is told by Pliny, Bk. XVIII, chap. iii. In the argument of Quintilian, *Declamations*, cclxiv, there is a case of fraud against the *Voconian Law*: 'Let no one give more than one-half of his goods to a woman. Now a certain man made two women his heirs, each to one-half of his estate. His relatives accordingly contest the will.' Frauds to evade the *Lex Papia Poppaea* are given by Suetonius, *Augustus*, chap. xxxiv; *Tiberius*, chap. xxxv, at end; Tacitus, *Annals*, Bk. XV, chap. xix. The evasion which the Romans used, to avoid the performance of private rites, which thereupon passed to the heir with the estate, is set forth by Salmasius on Plautus, *Bacchides*, Act IV, sc. ix [976], under the words, *coemtionalem senem*.

Ammianus Marcellinus, Bk. XXII, chap. xvi, tells us that the Rhodians once had a right to the taxes from the island of Pharos. When their tax-gatherers came to collect them, the queen detained them on the excuse of celebrating holidays, joined Pharos to the mainland by moles, and then drove them away, maintaining that they could demand taxes from islands, but not from the mainland.

Thus, among the Athenians, according to Lactantius, *On False Religion*, chap. xx [*Divine Institutes*, I. xx]: 'When a harlot, by name Leaena, had put to death a tyrant among them, because it was unlawful for the image of a harlot to be placed in the temple, they erected the effigy of the animal whose name she bore.' (C.)

Because it was¹ forbidden the Rhodians to tear down trophies, they covered over with a building one which had been set up to their shame by Artemisia. Vitruvius, *De Architectura*, Bk. II, chap. viii.

There is a clever turn in Plutarch, *Pericles* [xxx]. When the Spartans asked that the decree of the Athenians be rescinded, whereby the Megarians were excluded from their markets, and Pericles pleaded a law 'preventing him taking down a tablet on which the decree was inscribed', one of the ambassadors replied, 'Well then, don't take it

¹ [For *esset* read *esset*.—Tr.]

down, but turn the tablet to the wall; surely there's no law preventing that.' (P.)

When the king of Portugal wished for certain reasons to forbid the clergy the use of mules, and they pleaded their privileges, he forbade all the workers in iron under pain of death to shoe any mule, whereupon the clergy quit using them of their own accord. 555

Another instance of cavilling is related by the author of the *Ad Herennium*, Bk. II [xxviii]:

Sulpicius had successfully opposed the passage of a law to permit the return of exiles, who were not permitted to plead their own cases. Later on he changed his mind and proposed the same law himself, claiming, however, that it was a different law, because of a change in designations; for now he did not use the term 'exiles', but claimed to be restoring the 'forcibly ejected'. As though the question had been what those persons were called by the Roman people, or as though every one was not called an exile when once the interdict of water and fire had been passed against him.

We may add the custom of Tiberius given by Tacitus, *Annals*, Bk. V [ix], and Suetonius, *Tiberius*, chap. lxi: 'Since ancient usage made it impious to strangle maidens, young girls were first violated by the executioner and then strangled.' (R.)

According to Herodotus, Bk. VI [lxxxix], when the Corinthians were forbidden by law to give away their ships, they sold them to the Athenians for five drachmas each. Add *Digest*, XLIV. vii. 54.

According to Tacitus, *Annals*, Bk. II [xxx]:

As there was an old decree of the Senate which forbade the torturing of slaves in regard to a capital charge against their master, Tiberius showed his cunning as the inventor of a new principle of law, by ordering the slaves to be sold singly to the agent of the Treasury. In this way testimony might be extracted from the slaves against Libo without infringing the rule of the Senate. (R.):

although Dio, Bk. LV, ascribes the evasion to Augustus. Critias used a more impudent cavil against Theramenes. Xenophon, *Greek History*, Bk. II [iii. 20].

It was a petty fraud when some men, in order to avoid the name of gamesters, which was branded by the laws, wanted to be called dice-throwers, 'between whom', as Ammianus Marcellinus, Bk. XXVIII, chap. ix, says, 'there is as much difference as between thieves and robbers'.

Tiridates, when ordered by Nero to put aside his sword, refused, but fastened it in the scabbard with a lock¹. Xiphilinus, *Epitome of Dio's History* [LXIII. ii. 4].

Buchanan, *History of Scotland*, Bk. XIV, tells us that

Robert Carncrosse, a man of great wealth, purchased a holy office of the king, who was at that time in need of funds, getting around the law which forbade the sale of such offices by a new kind of fraud. For he lost a heavy wager to the king that the latter would not present him with the next office to fall vacant.

¹ [Really 'with nails'.—Tr.]

During the reign of Philip Augustus of France, in a battle with Otto IV, Philip, the bishop of Beauvais, would not take up the sword, but to avoid shedding blood fought with a mace, slaughtering many of the enemy as though they were victims. Did the prelate excuse himself in this way or make a mockery of his vows? Bussières, *Historia Francica*, Bk. VIII.

19. But when there is a restriction of the interpretation of words in which an undertaking is expressed, it is due either to an original defect in the will of the speaker, or to the repugnancy of some unexpected case to what he had in mind. That is, sometimes words are spoken generally, and some limitation or exception must be added to them, either because he who spoke them was unwilling at the outset that they be extended to certain cases, or because a case which arises later runs counter to his design.

There is understood to be an original defect in the will of the speaker: (1) From an absurdity which would otherwise follow from it. For no man in his senses should be believed to will what is absurd. And I am inclined to think that the famous dispute between Protagoras and Euathlus ought to be decided on this principle. Gellius,¹ Bk. V, chap. x; Diogenes Laertius, Bk. IX [56]; Apuleius, *Florida*, Bk. III [18]²; Sextus Empiricus, *Against the Mathematicians*, Bk. II [p. 81]. For although it appears that they had reached the general agreement, that no reward is due the teacher so long as his pupil has not won a case, yet if the latter has been ordered by the judge in an action about the matter to pay it, he will by no means be able to protect himself by an exception of such a pact. For, in entering upon the pact, this was not thought of, and it is absurd for a man to have drawn up such a pact as would prevent what was owed him by the pact from being possible of attainment.

556 They tell a similar story of Aristides, who had promised a denarius to the one who would tell him the truth. A sophist replied, 'You will not give me the denarius you promised.' There is a question then what Aristides should do. For if he gives it, he does so to him who did not tell the truth, while if he does not give it, the other has spoken the truth, and Aristides is not keeping his promise. And so the rule of the lawyers should come in here: 'In a general statement the person of the speaker always constitutes an exception.' So Epimenides the Cretan cannot be accused of falsehood in his own statement [*Titus*, i. 12], 'The Cretans are always liars.' Nor can the statement of Lucretius, Bk. IV [471-2], be affirmed: 'Moreover, if any one thinks that nothing is known, he does not even know whether that can be known, since he declares that he knows nothing.' (R.) For he who declares, 'Nothing can be known', does but declare that he knows only this one thing, that nothing is

¹ [For *Galicum* read *Gellium*.—Tr.]

² [The reference by book is false.—Tr.]

known. Apuleius, *Apologia* [§ 80]: 'Any man is a fool to say that he isn't saying anything, because the same person in saying that he isn't saying anything, is saying something, and by his very assertion undermines the faith in his own assertion.' Add Lactantius, Bk. III, chap. vi, where he goes on to say that in the schools the following illustration of an inconsistency is usually given: 'A man dreamed that no faith should be put in dreams.' Now whatever genius sent him this wanted him to believe that dream only and none thereafter. So also in the illustration proposed by Gellius, Bk. IX, chap. xvi, the restriction should be made that the law may not deprive brave men of their rewards.

(2) A man's will is held to have been defective at the outset, when the reason ceases which alone fully and efficaciously moved it. For when a reason is added to a thing contained in a law, or when we are sufficiently satisfied about it, the thing is no longer considered by itself but in so far as it comes under that reason. An illustration is in *Digest*, XXXVII. xiv. 6, § 2, where a patron is forbidden to require an oath of a freedman not to marry or bring up children, and it is added:

Although in the law no person be excepted, yet it is to be understood that the law has in mind those only who can bear children. Therefore, if a man should lay such an obligation by oath upon a sterilized freedman, one must say that the patron may not be punished under this law.

For the reason of the law was that a patron in satisfying his avarice should not be able to prevent the increase of offspring, which cannot be expected of a eunuch.

(3) Or from a defect in the subject-matter. For the subject-matter should always be understood as being held in mind by the speaker, even though the words may seem to afford a wider connotation. For instance, if a fief is granted to a man for himself and his male descendants, the expression is not understood to cover grandsons by his daughter, because that opposes the nature of such a grant, which plainly excludes women and their offspring.

20. On the second head Grotius [II. xvi. 25] remarks: 'Many things are often included under reason not from the point of view of existence, but in relation to their force from the point of view of morals. When such a case arises, no restriction ought to be made.' (K.) His meaning is that a covenant, where the parties had in mind some reason, such as the avoidance of a risk or an inconvenience, is valid not only in cases where that object would have followed, but also in those in which it could probably or without too great difficulty arise. For instance, if two nations have agreed, by a treaty, that no army or fleet shall enter a certain place, in case the reason for the agreement was that no damage might thereby actually be done to either one of them, it will still not be permitted to bring a fleet or army there, although

there be no intention of doing any harm. For it is enough that damage may easily be done the one by him who enters that place, and they wished by that pact to avoid not only loss but the probable fear of loss. Thus, if there is a law that no one shall walk the streets at night with torches, a man is not excused if he says that he is using them with such care that no one will be damaged by them.

The question is often discussed whether promises carry with them
 557 a tacit condition, provided things remain in the place where they are. This must in general be denied, for since such a condition is odious, as making a promise void, it is not to be lightly presumed when it has not been added, unless it happen to appear most clearly that the present state of things is included in that single reason which we have mentioned. Thus we often read in histories that ambassadors left their duties and returned home from their post, because such a change had taken place in the affairs of the nation to which they were appointed that the entire cause for their mission had ceased. See Tacitus, *Histories*, Bk. II, at the beginning, where Titus returns after the murder of Galba.

21. That a case which later arises is inconsistent with the will of him who designed something is concluded from two considerations: either (1) by natural reason, or (2) from some expression of his will.

When the will is to be judged by natural reason, Aristotle, *Nicomachean Ethics*, Bk. V, chap. x, feels that the intellect should possess as its own virtue or peculiar endowment what he would call γνώμη or εὐγνωμοσύνη, as he would say, 'right understanding', or 'an understanding of what is right'; and the will ἐπιείκεια, or 'a desire to follow equity'. Compare *Digest*, XLVII. ii. 61, § 5. In the same work (Bk. V, chap. xiv; compare *Magna Moralia*, Bk. II, chaps. i-ii) he defines equity as the correction of that point in which the law, because of its universality, is wanting; that is, as a skilful interpretation of a law, through which it is shown by natural reason that some special case is not comprehended under a universal law, because in that case an absurdity would follow. And this should be applied, with due consideration for their differences, also to wills and pacts. And in this connexion Grotius on Campanella's *Politica* has made the further important observation, that equity can have no place in natural law, since nature does not speak more universally than her law requires; but that the law of nature, not as it is of itself, but as it is too little universally stated by men, can be in need of the interpretation of ἐπιείκεια [equity]; in the statement, for instance, that every man should have his own returned to him, we understand one who uses reason, and provided there be nothing to interfere from the side of a superior right. Seneca, *Controversies*, Bk. IV, cont. xxvii [IX. iv. 9=passage quoted, p. 553]: "In a law", you say, "there is no exception." But many things are understood in a law,

although they are not excepted. The wording of a law is restricted, the interpretation is broad; and some things are so obvious that they need no exception.' Quintilian, *Declamations*, cccxxxi:

Those who worded the laws could not possibly have had foresight sufficient to enable them to cover every variety of crime. For despite all their precautions rascality would have got the best of them, and the law would have become so complicated and voluminous that in place of uncertainty, as at present, we should have had ignorance. They therefore undertook to include the general kinds of crime, fixing their attention upon the essential equity. And therefore we frequently find things that are not contained in the words of the law, but are contained in its essential power and force.¹

Now since laws cannot possibly foresee all cases, nor mention them, by reason of their infinite variety (Xenophon, *The Cavalry Commander* [ix. 1]: 'To write out all that a man ought to do is no more possible than to know everything that is going to happen' (B.)), those to whom it falls to apply the general decrees of the law to special cases need some liberty, which will allow them to take from the law those cases which are surrounded by special circumstances, and which the lawgiver himself would have excepted if he had been present, or had foreseen them. See *Digest*, I. iii. 3, 4, 5, 6, 10, 11, 12, 13.

There is an illustration in Cicero, *On Invention*, Bk. II [xxxii]:

Among the Rhodians there is a law that any warship found inside the harbour shall be confiscated. Once when there was a great storm at sea, the violence of the winds forced such a vessel into the harbour of Rhodes against the intentions of the sailors. The public treasurer demands possession of the ship in the name of the people. The captain denies the claim that it should be confiscated. (Again [II. xlii]): Although a law forbade the opening of the gates at night, a certain man opened them in time of war and let troops into the city so as to keep them from being destroyed by the enemy, if they remained outside, because the enemy was encamped close to the walls.

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Yet this liberty may not be indulged in too freely, lest a man set himself up as the arbiter of the acts of another, for sometimes the law-givers wish adherence to the strict letter of the law, as is stated in *Digest*, XL. ix. 12, § 1: 'This, indeed, is very² severe, but that is the way the law is written.' Add *Law of the Visigoths*, Bk. II, tit. i, chap. 12. Rather it is always required that sufficient proofs be available. Among these the most certain is when it appears that it is illegal, that is, contrary to the laws of nature and of God, for one to follow the exact letter of a law; for since no one can be obligated to do such things, it is presumed that no one in his senses wished to obligate another to that. 'Some περιστάσεις [circumstances] are so fraught with violence that to wish to keep the law in them is to sin against higher laws.' Grotius on *Esther*, iv. 16. Add Valerius Maximus, Bk. III, chap. vii, n. 1; chap. viii, n. 6.

Furthermore, equity is secured in another sense when, for instance, it is said that a cause is settled on grounds of what is just and good, that

¹ [Already quoted above, p. 554.—Tr.]

² [For *per quam* read *perquam*.—Tr.]

is, when the rigour of the law is tempered somewhat in favour of the defendant. So also private individuals are said to show equity, when they grant some favour, and do not insist too strictly on their right against their opponents.

Finally, causes are said to be settled on grounds of what is just and good, when there is no civil law on the case, or no attention is paid to its ἀκρίβεια [harshness], but a decision is reached by accepting the judgement of good men.

22. Another consideration on account of which a universal law should be restricted is when it is not absolutely unlawful in itself and under all circumstances to follow the express letter of the law, and yet in considering the latter from a human standpoint, it seems too severe and unbearable, either from the common condition of human nature viewed absolutely, or from a comparison of the person and thing concerned with the purpose of the act. For some things appear intolerable to all men, some to certain persons; some undertakings are of such a nature that it is foolish to go to great trouble over them. And the considerations in such cases are all the stronger, not only if law is positive, and the matter in it does not make it probable that the lawgiver requires its observance, if that be attended with some inconvenience from without, but also if the neglect of the law in a case where its observance would be a hardship does not border on effrontery and scorn towards the lawgiver. Add Grotius on *Matthew*, xii. 3.

Therefore, it is without doubt a foolish religious scruple of the Abyssinians to enfeeble themselves so much by fasting during Lent that they are weakened in both mind and body, and so cannot resist the enemies who attack them at that time. It is said that because of this habit their country is overrun at that period with impunity. Francisco Alvarez, *Descriptio Aethiopiae*, chap. xiii.

Thus, if a man has lent a thing for some days, he can require it during that time, if he needs it badly, because an act so kind¹ is of such a nature that it is not to be supposed that a man intended thereby to obligate himself to his own great inconvenience.

Thus, if a ruler has promised aid to an ally, he will be excused so long as he is threatened at home, and needs his forces for his own defence. For since every prince is obligated first of all to protect his own subjects, in all promises which he makes to outsiders he understands this condition: in so far as the safety of the state permits.

So also a grant of immunity from taxes and tribute is to be understood of fixed and regular payments, and not of those extraordinary ones which are required by a present and urgent necessity, and are absolutely essential to the state. Hence it appears that the following was a rather off-hand remark of Cicero, *On Duties*, Bk. I [xxiv. 10]:

¹ [For *beneficia* read *benefici*.—Tr.]

'You are not to perform those promises which may be prejudicial to the party to whom you promise, nor if they may be more hurtful to you than they can be serviceable to him.' (E.) For whether the thing promised will be useful to the person to whom it was made, does not always lie in the province of the promisor to decide, unless he happen to have authority over the other, or is entrusted with the duty of looking after his safety. And some hurt or burden to the promisor is not enough to relieve him of the obligation of his promise (for every fulfilment of a gratuitous promise entails some burden), but only such as should, from the nature of the act, be considered an exception. Such a one is given by Cicero in the passage cited above: 'If you should promise to appear as the advocate of another person while his cause is pending, and in the meantime your son was to be seized violently ill, it would be no breach of duty in you not to perform what you promise.' (E.*) Add Seneca, *On Benefits*, Bk. IV, chap. xxxv. 559

23. Finally, there are also other signs of the will which show that a certain case ought not to come under a law or pact framed with universal application. That is, suppose words in another connexion do not, indeed, directly oppose the present law or pact (for that would be a case of ἀντιρροπία [contradiction]), but clash with it in some special case that arises under unusual circumstances, and upon an unexpected turn of events. Or, what amounts to the same thing, it may be that there are two pacts or two different laws which are not opposed, and can and should be kept and observed at different times, and yet cannot be satisfied when, for some reason, they must both be observed at the same time. Compare Charron, *De la Sagesse*, Bk. I, chap. xxxvii, n. 5. In such a case, therefore, certain rules must be observed, that it may be known which law or pact yields to the other, when both cannot be satisfied at the same time. The following are approved by Grotius [II. xvi. 29].

(1) '*That which is only permitted yields to that which is commanded.*'¹ Author of *Ad Herennium*, Bk. II [x]: 'A command is of greater force than a permission.' 'For that which is enjoined is necessary, and that which is allowed is optional,' as the same author² expresses it, *On Invention*, Bk. II [xlix]. Quintilian, *Declamations*, cccclxxiv:

The law which forbids is more powerful than that which permits. The former, moreover, is reserved in the power of the magistrates, and one magistrate who forbids can do no more than all who allow. For with one who permits you have left your freedom of choice; with one who forbids you are subjected to punishment.

For a permission allows the liberty of performing or omitting, while a command involves a necessity of doing, and in this case removes the liberty of omitting.

¹ Slightly modified from the exact form in Grotius.—Tr.]

² [On Invention, however, was written by Cicero. The identity of the author of *Ad Herennium* is unknown. The first sentence quoted here is from the *Ad Herennium*, the second from *On Invention*.—Tr.]

(2) 'That which is to be done at a definite time should have preference over that which can be done at any time.' (K.) That is, when the fulfilment of two obligations comes at one time, of which one can properly be met at but a given time and that the present, and it is of no consequence at what time the other is met, the latter is put off to another time and the former will have to be fulfilled at the time fixed. But it appears from this principle that things which cannot be done at the same time, and of which none can be postponed, should not be laid upon one and the same person. In point is what Plutarch, *Roman Questions* [cxiii], has to say on the reason why no Flamen Dialis could hold a magistracy: 'Since the priests have fixed, the kings variable duties, irreducible to order, it was found impracticable, if both functions were called for simultaneously, for the same man to attend to both, so that often, when both were urgent, he would neglect one or the other.' (R. *) For it appears that the priests of that age had not yet made that great discovery, how to gather all the honour and profit from a sacred office, and pass the administration of it and the labour involved over to clerks.

(3) *An affirmative precept yields to a negative.*¹ That is, when an affirmative precept cannot be satisfied but through the violation of some negative one, the fulfilment of the affirmative precept will have to be omitted or deferred until it does not coincide in time with the violation of the negative. The reason for this is to be sought in the nature of affirmative and negative precepts, because the obligation of the latter is constantly uniform and equally efficacious, while the former presuppose an opportunity for their performance which is not understood to be present when something cannot be done without violating the law. And so such things are held morally impossible, when matters stand in that way.

560 Because of this no one can injure another, or break faith, in order to further the interests of those who are near to him, or to secure means for a display of gratitude and generosity. It would be a strange kind of piety to steal leather and thus give shoes to the poor by way of alms. Cicero, *On Invention*, Bk. II [xliv]: 'For it often happens that the law which forbids something appears by some exception, as it were, to amend the law which commands something.' (Y.) Thus Mohammed forbids in the Koran the giving of alms from ill-gotten possessions. I am uncertain whether Shah Abbas of Persia did right in being willing to devote no money so gladly to charitable purposes as the income from bawdy-houses, which, he said, was paid willingly enough, while practically all other funds were wrung from his subjects with groans. Still it is not seemly to give to the poor money collected in such a fashion. Ad. Olearius, *Itinerarium Persicum*, Bk. V, chap. xxxi; Marius Victorinus,

¹ [A paraphrase of Grotius.—Tr.]

Expositio in Ciceronis Rhetoricam, Bk. II [xlix, p. 298, l. 22 Halm]: 'The authority of a law which prohibits is greater than that of a law which enjoins; because every law which prohibits is stronger, for the reason that it corrects the law which permits or enjoins.' Here also belongs in a way some statements made by Leo of Modena, *De Ritibus Hebraicis*, Pt. V, chap. v, § 1: Women were forbidden what was denied men by a negative precept; but as to affirmative precepts, the Rabbis declared that women were not bound by all those which have a certain designated time, because of the weakness of the sex, and the fact that they live under the government of their husbands.

(4) *'Among agreements and laws which are otherwise equal, that should be given preference which is most specific and approaches most nearly to the subject in hand.'* (K.) For generals are applied to a specific thing through particulars. Cicero, *On Invention*, Bk. II [xlix]: 'For that which has been drawn up with reference to some particular division of a subject, or for some special purpose, appears to come nearer to the subject under discussion, and to have more immediate connexion with the present action.' (Y.) But what Grotius adds on prohibitions, to the effect that those which have a penalty attached are preferred to such as do not, and those which inflict a graver penalty to those which carry a lighter, is after all not so clear. For a prohibition which is strengthened by no penalty, express or arbitrary, appears to have no force at all. And the rule that of two evils the lesser is to be chosen, cannot properly be applied to moral evils or sins. Therefore, I do not see how his rule can stand, unless it be in the sense that, when a case arises where one of two prohibitions must be broken, the one the violation of which involves less loss is understood to be permitted. The following may serve as an example. There is a law that no one shall appear armed in public on a holiday; and another that no one shall stay indoors upon hearing the signal used to indicate a riot, but shall present himself armed to the magistrate in the square. Now a riot breaks out on a holiday. In such a case the decision must be that the second law constituted an exception in relation to the first, as though it ran thus: Let no one appear armed in public on a holiday, unless he is called out by the magistrate on account of a riot.

(5) *Of two duties which conflict at the same time it is reasonable that the one should yield to the other which can show more worthy and useful reasons.*¹ For this exception is understood to be added to the lesser as an obligation that it shall be done, if that is possible, by means of the more important obligation.

(6) *When two pacts, one sworn to, the other not, cannot be fulfilled at the same time, the former will yield to the latter, unless the latter is added to the sworn pact by way of an exception or limitation.*¹

¹ [Only a paraphrase of Grotius.—Tr.]

For an oath, when added to a pact, excludes such tacit restrictions and exceptions as are not necessary in the nature of the thing, while pacts without an oath allow them more easily. In Euripides, *Medea* [743-4], when Medea asks of Aegeus that he receive her into his country and not hand her over at the demand of her enemies, she wishes his promise confirmed by an oath. To this Aegeus accedes, saying,

Since for myself is this the safest course,
To have a plea to show unto thy foes. (W.)

561 Many further illustrations could¹ be added for this.

(7) *An obligation, imperfectly mutual, binding both parties gives place to one perfectly mutual.*² Thus what is owed on contract should be paid before that which is owed on a gratuitous promise, a rule of gratitude, or some other virtue, if both cannot be met at the same time. And so when Phocion was repeatedly asked for a contribution for a public sacrifice he replied: "Ask from these³ rich men; for I should be ashamed to make a contribution to you before I have paid my debt to this man here", pointing to Callicles the money-lender.' (P.) Plutarch, *Phocion* [ix, p. 745 CD].

(8) *The law of benefaction, when all else is equal, yields to the law of gratitude*, although each implies only an imperfect obligation. For a debt of gratitude is more favourable than one of kindness, since the former requires you to return because you received, the latter to be the first to give; and so in such a case the object for beneficence is understood to be lacking, because the necessity for gratitude conflicts with it. And this holds so far that a kindness, even though it be owed to those nearest to us, should rank after a gratitude, unless the former happens to be joined with some more pressing debt.

(9) *In the case of laws which emanate from subordinate powers, the law of an inferior power yields to that of a superior, when both cannot be met at the same time.* Therefore, it is better to obey God than men (*Acts*, iv. 19); and the commands of kings outweigh those of heads of households.

(10) *According as the matter of one law surpasses another in nobility, usefulness, or necessity, so the one regularly outweighs the other.*

(11) *The closer the bond by which a person is drawn to us, the more do services owed him outweigh those due others, all else being equal.* *Galatians*, vi. 10; *1 Corinthians*, viii. 13; *1 Timothy*, v. 8; Cicero, *On Duties*, Bk. I [xvii], where he discusses the grades of human society. Here belongs also the remarkable passage of the same author, *On Invention*, Bk. II [xlix]:

From contrary laws a controversy arises, when two or more laws appear to be at variance with one another. In this manner: there is a law 'that he who has slain a tyrant

¹ [For *est* read *et*.—Tr.]

² [This and the following are not in Grotius.—Tr.]

³ [For *Hocce* read *Hocse*.—Tr.]

shall receive the reward of men who conquer at Olympia; and shall ask whatever he pleases of the magistrate, and the magistrate shall grant it to him'. There is also another law—'When a tyrant is slain, the magistrate shall put to death his five nearest relations.' Alexander, who was tyrant of Pherae, a city in Thessaly, was slain by his own wife, whose name was Thebe, at night, when he was in bed with her; she, as a reward, demanded the liberty of her son whom she had by the tyrant. Some say that according to this law that son ought to be put to death. The matter is referred to a court of justice. [. . .] First it is requisite to show the nature of the laws, by considering which law has reference to more important, that is to say, more useful, honourable, and necessary matters. From which it results, that if two or more, or ever so many laws cannot all be maintained, because they are at variance with one another, that one ought to be considered the most desirable to be maintained which appears to have reference to the most important matters. Then comes the question also, which law was passed last; for the newest law is the most important. And also, which law enjoins anything, and which merely allows it; for that which is enjoined is necessary, and that which is allowed is optional. Also one must consider by which law a penalty is appointed for the violation of it; or which has the heaviest penalty attached to it; for that law must be the most carefully maintained which is sanctioned by the most severe penalties. Again, one must inquire which law enjoins, and which forbids anything; for it often happens that the law which forbids something appears by some exception, as it were, to amend the law which commands something. Then, too, it is right to consider which comprehends the entire class of subjects to which it refers, and which embraces only a part of the question; which may be applied generally to many classes of questions, and which appears to have been framed to apply to some special subject. For that which has been drawn up with reference to some particular division of a subject, or for some special purpose, appears to come nearer to the subject under discussion, and to have more immediate connexion with the present action. Then arises the question, which is the thing which according to the law must be done immediately; which will admit of some delay or slackness in the execution. For it is right that that should be done first which must be done immediately. (Y.*)

ON THE MANNER OF SETTLING DISPUTES IN A STATE OF NATURAL LIBERTY

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| <ol style="list-style-type: none"> 1. What is owed others should be performed voluntarily. 2. In a natural state there is no judge. 3. Disputes which cannot be settled by conversations between the parties should be referred to arbitrators. 4. There is no pact between the arbitrators and the parties. 5. Arbitrators when in doubt are under- | <ol style="list-style-type: none"> stood to be bound in their decisions by the law. 6. It is not enough for arbitrators to have pronounced on possession. 7. On mediators of peace. 8. What if documents have been lost? 9. On witnesses. 10. On the execution of a judgement. |
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THE law of nations requires that men voluntarily perform and do for each other what they, for any reason, owe others, and freely offer to make good any damage which has been done to others. In case damage or offences proceed from malice, the same law further requires the guilty party to show that he repents in all seriousness of the deed, to give his word that he will not offend in the future, and to cultivate friendly relations. And just as this repentance, when it is not elicited by violence but springs voluntarily from a consideration of justice, can serve as sufficient evidence of a change of heart on the part of the offender, so when reparation of the damage has been offered and guarantees taken for the future, the injured person on his side should freely pardon the other when he requests it and is penitent, and should live with him thereafter on peaceful terms. But if a man through malice or desire for revenge spurns such approaches, he will be responsible for the breach of peace and the altercation that follows. The speech of C. Pontius in Livy, Bk. IX, chap. i, is excellent on this point. For it is inhuman and brutish to be unwilling to be satisfied with nothing less than retaliation upon the offender, and for ever to nurse injuries once received. It is a sinister remark that Plutarch attributes to Cato the Elder, in his life of him, when, on meeting a youth in the forum after the conclusion of a trial in which the young man had had an enemy of his dead father branded with infamy, he clasped his hand and said [*Cato the Elder*, xv. 3]: 'These are the sacrifices we must bring to the spirits of our parents, not lambs and kids, but the condemnation and tears of their enemies.' (P.)

2. But besides the fact that not all mortals are endowed with so good a nature that they are willing of themselves to meet their duty, disputes frequently arise over the fact and amount of the debt, the rating of a damage, the competence and exercise of certain laws, the

fixing of boundaries, interpretation of pacts, and other claims. Now among those who live in natural liberty there is no judge who may by his authority settle and dispose of the disputes that arise. This is the meaning borne by those words of Thucydides, Bk. I [lxxvii]: 'Those who may use might have no need to appeal to right.' (S.) Indeed, Hobbes, *De Cive*, chap. i, § 9, makes each man in a natural state the judge of his own affairs. But that statement only allows this meaning: whoever does not have a superior by whom he is controlled, conducts his affairs at his own discretion, and decides by his own judgement upon the means that concern his own preservation. For even though another man may try to decide them, yet since he has no authority to force his⁵⁶³ opinion upon me, whether and how far I am willing to accept his counsel will depend upon my own judgement and decision, and thus I will ultimately be responsible for the ordering of my own actions, which must, of course, be properly governed according to natural law.

Furthermore, although in this state it lies with each man to neglect or defend his right, and either to say nothing about or to avenge an injury, yet in an undertaking of his own he cannot give a judgement by which he with whom he has the controversy is obliged to stand. For although he may make every effort to lay down what he has felt is just, and vows upon oath that he has done so, yet since the other can allow an equal weight to his own opinion, the equality that attends a natural state makes a decision impossible when these two conclusions are opposed. A further consideration is that, according to Aristotle, *Politics*, Bk. III, chap. vi [III. ix]: 'Most people are bad judges in their own case.' (J.) Sallust, *Catiline* [li]: 'No mortal man thinks his own wrongs unimportant; many, indeed, are wont to resent them more than is right.' (R.)

3. And yet it should not be thought that natural law allows every man, by his own judgement, to determine his right to take up arms at once and make Mars the arbiter of his disputes, before less violent means have been tried. Cicero, *On Duties*, Bk. I [xi]: 'Since there are two manners of disputing, one by debating, the other by fighting, though the former characterizes men, the latter, brutes, if the former cannot be adopted, recourse must be had to the latter.' (E.) Add Justin, Bk. VIII, chap. i, n. 4 ff. And when one flies to arms without trying friendly discussion, the remark of Ovid, *Tristia*, Bk. V, el. x [43], is in point: 'Unjustly the hard sword dispenses justice.' (W.) Therefore, first of all the parties or their agents should meet and see whether the controversy may not be settled by friendly discussion. See Grotius, Bk. II, chap. xxiii, § 7. In fact it is most often the case that even after arms have been resorted to, and the obstinacy of men's minds has been broken by the hardships² of war, a dispute is settled by conversations and

¹ [For *CAPUT XII* read *CAPUT XIII*.—Tr.]

² [For *malus* read *malis*.—Tr.]

negotiations. And in some such cases the nature of the affair and the willingness of the parties make it possible easily to end the altercation by recourse to lot. See *Idem, loc. cit.*, § 9.

But when discussion by the parties cannot lead to the end of the controversy, and they will not agree to leave to chance what they think rests upon firm reasons, the next thing is for the parties to turn to an arbitrator and bind¹ themselves by a pact to stand by his decision. Where Grotius, Bk. II, chap. xxiii, § 11, well observes that, although in a doubtful case each party is required to seek conditions whereby war may be avoided, yet he who claims something is more bound to do this than he who holds it, since favour attends the possessor even in natural law.

4. It is easily inferred from the design of appealing to an arbitrator how he should conduct himself. He is called in because every man's judgement on his own case is viewed with suspicion, on account of that boundless self-love whereby every man regularly leans toward himself and his own. *Digest*, II. i. 10. Plutarch, *How to Tell a Flatterer from a Friend* [i, p. 48 f]: 'Self-love, that grand flatterer within, willingly entertains another from without.' (G.) Therefore, the arbitrator will take care first of all that, except in so far as the merits of the case warrant, he will show no more favour for one than the other, and that he will accordingly not base right upon affection. When he has done this, there is no reason for him to notice any unjust hatred on the part of the man who has lost his suit. Although for this reason Bias used to say: 'It was more agreeable to decide between enemies than between friends; for that of friends one was sure to become an enemy of him, but that of enemies one was sure to become a friend.' (Y.) Diogenes Laertius, Bk. I [87]. Add Gellius, Bk. I, chap. iii. And it is clear for this reason that no one can properly be taken as arbitrator in a case, for whom there appears to be a greater hope for advantage or renown from
564 the victory of one party than the other, or whose single interest² is that one of them win his point no matter by what means; for such a man will be unable to maintain consistently enough his proper aloofness and impartiality. Aristotle, *Politics*, Bk. IV, chap. xii: 'The arbiter is always the one trusted, and he who is in the middle is an arbiter.' (J.) On this principle also rests the reply of Amasis, king of Egypt, who, when the Eleans were appointed to supervise the Olympic games and sent messengers to consult with him as to how they could conduct them in the most just manner, said to them, 'Let no Elean be entered in them.' Diodorus Siculus, Bk. I, chap. xcv. Here belongs the disgraceful act of the Romans, who, upon being called upon to judge in a controversy between the people of Aricia and Ardea³, awarded the field to themselves. Livy, Bk. III, chap. lxxii. Add Justin, Bk. VIII, chap. iii, n. 15.

¹ [For *adstringant* read *adstringant*.—Tr.]

³ [For *Arcea* read *Ardea*.—Tr.]

² [For *in terest* read *interest*.—Tr.]

It follows also from this that there should be no pact or promise between the arbitrator and the parties, by reason of which the former is bound to overlook the merits of the case and pronounce in favour of one of the parties. (Compare Hobbes, *De Cive*, chap. iii, § 14.) Nor should there be any other reward for his decision than the verdict: 'He judged honourably.' Pliny, *Panegyric* [lxxx. 1]. And so it was idle of Maximilian and the Venetians to refer a case to Pope Leo X, while they each bargained separately and secretly that he would not render a decision to which they did not agree. Guicciardini, *History of Italy*, Bk. XI, towards the end; Bk. XII, p. 345.

Now although a pact is entered into between the contending parties and the arbitrator on his acting as such (for just as arbitration can be used only with the consent of the parties, so no one may be made an arbitrator against his will), yet no such power attaches to such a pact as to give rise to the obligation of the arbitrator whereby he is bound to give as his decision what appears to him just. And the reason for this is not so much that the law of nature in any event enjoins an arbitrator to render such a decision (and nothing can be added to the obligation of this law by a pact), as that in this way the purpose of seeking an arbitrator is made void, and things would run on for ever. For a pact of this kind would be so worded that the parties undertake their willingness to abide by the decision of the arbitrator, if he renders a just one. And those who enter a pact whereby nothing is taken from their natural liberty are so far equal that they can each question whether the other has satisfied the pact. But if, after the decree has been awarded, it should seem unfair to either party or actually were so, a dispute would again arise over its equity, and since it could be decided neither by the present arbitrator nor the parties concerned, it would have to be referred to another arbitrator. And when¹ a similar pact had been made with him, and a question arises over his decision also, another would have to be sought, and so on *ad infinitum*.

Therefore, it is clear that the pact by which parties agree upon an arbitrator should be conceived as pure, namely, that they are willing to stand by the decision of the arbitrator; and that it is not accompanied by the condition that he deliver a just decision. For in that case when one of the litigants questioned the equity of his decision, it would have to be referred to another to take cognizance of. And if his equity were questioned another arbitrator would have to be found, and so on *ad infinitum*. See *Digest*, IV. viii. 19, 32, §§ 15, 16. And this is the reason for the statement of Quintilian, *Declamations*, cccclxxii: 'One judgement cannot be rescinded by another.' Moreover, there can clearly be no appeal from arbitrators, since there is no superior judge who can review

¹ [For *Quicum* read *Qui cum*.—Tr.]

their decision. Lucian, *Abdicatus* [11]: 'They had the choice, there, of not recognizing the courts at the outset; if they nevertheless did so, they may fairly be expected to abide by its reward.' (F.) Pliny, *Natural History*, preface [x]: 'So does every one make him whom he has chosen
 565 the chief judge of his cause.' And this holds good also in states, when parties have agreed among themselves on an arbitrator, provided the argument be over a case the manner of deciding which is of no interest to the rulers of the state. And if it be permitted anywhere to appeal from such decisions, that is due to positive law. Although sometimes in states the designation of arbitrators is accorded to extraordinary judges to whom is entrusted the examination and decision of some case closely and without the formalities of court usage. Yet nothing prevents the grant of an appeal from them to a superior.

But the statement that one has to abide by the decision of the arbitrator, whether it be just or not, must be taken with a grain of salt. For just as we cannot refuse to stand by the decision which has been made against us, even though we had entertained higher hopes for our case, so his decision will surely not be binding upon us if it is perfectly obvious that he connived with the other party, or was corrupted by presents from him, or entered into an agreement to defraud us. For whoever clearly leans to one side or the other is unfitted further to pose as an arbitrator. See *Digest*, XVII. ii. 76 ff.

It is, furthermore, clear that if several are chosen to serve as arbitrators, there should be an uneven number, lest in case of disagreement there be a tie and the matter reach no decision.

5. Grotius, *loc. cit.*, § 47, proceeds to observe that in choosing an arbitrator consideration should be given to the question whether he is taken as a judge, or as one with broader authority, who can temper his decision not so much according to strict law as to equity and humanity. For sometimes both parties appeal to justice, in which circumstance the force and merits of the case should be weighed by the arbitrator like a judge. But sometimes an arbitrator is appealed to when one party rests upon strict law, while the other demands its mitigation and remission on considerations of humanity and pity; that is, he appeals to equity. In this place *equity* does not properly signify the interpretation of laws, discussed in the preceding chapter, which should be observed even by a lower judge, but a mitigation of the law's rigour based upon the virtues of humanity, charity, mercy, and the like, which may be observed only by the supreme judge or an arbitrator appointed upon this law.

But in a matter of doubt it is presumed that an arbitrator is obligated to the rules which a judge must follow, since he is chosen because of the lack of a court and judge, and in a case of doubt we should follow the simplest course. Moreover, one is more easily injured if a

broad power is granted an arbitrator rather than a more limited one. And to urge a mitigation of strict law is the first task of those who offer themselves to the disputants as mutual friends in order to settle their difference.

The further point is obvious, that, just as they who sit upon the law between citizens regularly follow civil laws to which the litigants are subject, so he who will judge between those who do not recognize common civil laws will take the natural law as his norm; unless the parties themselves shall have ordered their transaction according to the positive laws of some state.

6. The same author, *loc. cit.*, § 48, also observes that arbitrators chosen by those vested with supreme power should pronounce on the principal point and not on possession, for decision on possession belongs to civil law, while by the law of nations the right of possession follows dominion. On that point our opinion is this: Although by the law of nature and nations it does not seem necessary that he who has been turned out of his possession should immediately be restored to it before further consideration is taken of his cause, especially when a decision of the case may follow at once, yet in many controversies the arbitrator must first learn which is the possessor, that he may know on whom falls first of all the burden of proof. For it is the plaintiff's task to state his case plainly, while the possessor need only meet his arguments, save that it is sometimes well, although not strictly required, for him to have 566 shown the title to his possession. Yet for this reason it is not enough for arbitrators only to have rendered decision on possession, because it is not usual for arbitrators to be called upon for this, which is commonly clear enough, but for bringing the principal point to an end, and in order to stop any further dispute. But natural law requires that during the inquiry no change should be made, and that, when the plaintiff does not prove his case, judgement should be handed down in favour of the possessor.

7. But arbitrators, properly so called, are not the same as mediators who voluntarily interpose between litigants and those who are preparing for or already engaged in war, and strive to move them by authority, reasons, and prayers to settling their affairs peaceably and composing their differences. See Guicciardini, *History of Italy*, Bk. IV, where it is discussed whether Hercules, Duke of Ferrara, should act as an arbitrator or mediator between the Venetians and the Florentines. Since these undertake so holy a task, it would be the height of inhumanity sternly to repulse them, even on the claim that they seem to have some special connexion with one of the parties. For it is within my power to accept what I will of their offerings, and it is recognized as the chief service of friends that, when they will not themselves join with me in the quarrel, they will endeavour to bring it to an amicable

conclusion. And it is often much to the interest of the others that there be no war between two peoples, either because some sparks from a neighbouring fire may be carried to them as well, or because it may be prejudicial to them for one or both of the parties to be destroyed. So regard for their own safety induces them to undertake in all seriousness to smother the rising flame. And Christians should all the more zealously undertake to compose the quarrels of others, because even the Koran, so stupid in general, in the chapter *On Doors*, teaches that if two Moslem nations and countries engage one another in war, the rest shall make peace between them, and compel him who committed the injury to offer satisfaction; and when this is done, bring them by fair and good means to friendship.

It is certain that several who are especially interested in having the quarrel settled can enter a pact to co-operate in bringing together the combatants, and prescribe to one another how far each of them may join in the war. In which case it is required that no one of them is bound by a special treaty to give aid to either of the combatants in case of war, for promises by a former treaty cannot be circumscribed by a later treaty made with a third party.

Nay, it appears that this further step can rightfully be taken. Two or more to whose interest it is for the war to cease, upon weighing the cases of both sides, may agree on what terms they feel peace can be most fairly secured; and then they can offer these to the warring parties with a threat that, against him who refuses peace on those terms, they are ready to join arms with him who accepts them. For by such a course a man does not thrust himself in as an arbitrator upon another against his will, or undertake the decision of a quarrel by his own authority, neither of which natural liberty allows. Nor is such an arrangement offered the parties in the manner that they must stand by it entirely. But since by natural law a man is able to join arms with him who feels that an injury is being done him, especially when such an injury will entail some damage to himself as well, by such a method he openly declares that he is desirous of equity and peace, because he himself wants others to come to fair terms, and is unwilling to go to war before the other has rejected a friendly way of composing the quarrel. Add Livy, Bk. XLIV, chap. xix, at the end; Justin, Bk. VI, chap. vi, n. 1. And this manner of mediation is the more to be commended, the more
 567 easily wars may thereby be extinguished, which would otherwise lead to destruction. Yet he who has decided to act as such a mediator should bear in mind the words of Velleius Paterculus, Bk. II, chap. 1: 'Massilia unseasonably assumed the arbitration between those great men in arms; a case in which such only ought to interpose as have power to enforce submission to their award.' (W.) Add Livy, Bk. IX, chap. xiv.

8. Common reason itself, upon observing the character of each

case, sufficiently directs the form and process for arguments held before arbitrators, so that it would be tedious to prescribe in detail how the parties should set forth their pleas, how the state of the controversy should be framed, and how the decision should finally be pronounced, after the arguments of both sides have been set forth. It need only be observed that, when the case of either party cannot be proved otherwise than by documents, and these have been lost, the arbitrator can do nothing but put one of the parties under oath with the consent of the other. I say, 'with the consent of the other', for in natural liberty no one is bound to make his case depend upon the conscience of the other party. It is likewise within the power of the parties to try the fortune by lot or a duel, which was once common enough among many people.

Now the loss of documents and proofs does not of itself extinguish a right, although in a court of law it is useless to implore a judge, when the evidence which proves a right is lacking. But in natural liberty it suffices to pursue my right, if I myself am clearly convinced of it, however much another may deny it. Add Connestagio, *De Unione Lusitaniae*, Bk. V, p. 222. This is the point of the statement by Quintilian, *Declamations*, cccxii: 'The condition of mankind is miserable, for it seems to be necessary to have a witness for everything that we do; so truth has little weight, and honesty has no standing. A thing hardly seems to be established that is known by two persons.'

9. Arbitrators have this in common with judges, that, in questions¹ of fact, they should show themselves unbiased towards the simple and unsworn assertion of the parties, that is, when they assert contradictory things to be true, they should believe neither. But when proofs (see Suetonius, *Galba*, chap. vii) and reasons and authentic documents do not lead to the ascertainment of the truth, their decision will have to be based on the testimony of witnesses. For as Isaeus, *Orations*, vii [viii. 6], says: 'Documents are more convincing than testimony.' And again (*Orations*, iii) he shows that especially in questions of inheritance documents are weightier than witnesses. Philo Judaeus, *De Decalogo* [xxvii]: 'When there is a scarcity of demonstrations, either by reasons or by letters, then those who have questions in dispute betake themselves to witnesses.' (Y.) Add *Law of the Visigoths*, Bk. II, tit. iv, chap. 3.

Witnesses should not be so disposed toward either party that it can appear likely that they prefer favour, or hatred, and desire for revenge, above conscience. Ovid, *Tristia*, Bk. III, el. x [35-6]: 'Since there is no reward for a falsehood, the witness ought to be believed.' (W.) Add *Law of the Visigoths*, Bk. II, tit. iv, chap. 12. Here belongs what De Thou, Bk. LI, tells of how it was once recognized in England that the testimony of an Englishman against a Scotchman, or of a Scotchman against an Englishman, had no value, because of the hatred existing

¹ [For *quaestiones* read *questiones*.—Tr.]

between the two peoples. Yet Camden, on the year 1585, says that this was true only of the English and Scotch along the border, so that only a Scotchman was accepted as witness against a Scotchman and only an Englishman against an Englishman, with the result that even if several Englishmen were at the spot and saw a murder with their own eyes, their evidence would be worthless, unless some Scotchman gave the same testimony.

Therefore, just as my opponent can reject my relatives, so I can rightfully reject my professed enemies. Although sometimes relatives
568 are excluded from testifying in a case because of humanity, lest they be forced to do violence to their affections or conscience. Therefore, among the Romans there was no power of the law or of a magistrate to force the testimony of a client against his patron, or of a patron against his client¹. Plutarch, *Romulus* [i, p. 25 B], and the *Law of the Visigoths*, Bk. V, tit. vii, chap. 11. In addition to this reason why among the same people slaves could not give evidence against a master, there was another, as given by Cicero, *For King Deiotarus* [xi]: 'When that which is in our houses and is our own can sally out with impunity and fight against us, slavery then gets the mastery, and the master's position is slavery.' (Y.) Lucian, *Asinus* [5]: 'For slaves know what is reputable and what is disreputable about their masters.' A similar passage is in Lysias, *On the Sacred Olive Tree*. And for this reason that slave in Plautus, *The Bacchides*, Act IV, sc. vi [791], says: 'I know I'm a slave. I don't even know what I do know.' (N.) Not foreign to this is the passage in Isocrates, *Trapeziticus* [27 f.], and one in Aristotle, *Rhetoric to Alexander*, chap. xvii. Here also belongs the history or rather tale about Avicenna in Gabrielis Sionita, *De Urbibus et Moribus Orientalium*, chap. iii. Add *Law of the Visigoths*, Bk. V, tit. iv, chap. 14, with which compare Bk. III, tit. iv, chap. 10; Bk.² VI, tit. iv, chap. 3; *Capitularies of Charles*, Bk. VII, chap. cclxxx; *Edict of Theodoric*, chaps. xlviii-xlix. But the abuse of this law, whereby some men used to purchase the slaves of others who were cognizant of their crimes, so that these slaves could not be put to torture in witness against them, was forbidden in an edict of King Theodoric, chap. ci. So also Aristotle, *Politics*, Bk. II, chap. vi [II. viii], rightly calls *ἄλογον*, or 'absurd', that law of the people of Cumae: 'If the accuser produce a certain number of witnesses from among his own kinsmen, the accused shall be held guilty.' (J.)

Finally, the ordinance of *Numbers*, xxxv. 30; *Deuteronomy*, xvii. 6; xix. 15, is most agreeable with reason, to this effect, namely, that the testimony of one person should not be enough to decide an issue, not only because a single person can more easily be deceived, or be tampered with, or lie, than can several, and because as Pliny, *Natural History*,

¹ [For *clientes* read *clientem*.—Tr.]

² [For *I* read *L*.—Tr.]

Bk. VIII, chap. xxii, says: 'There is no falsehood, if ever so barefaced, to which some cannot be found to bear testimony'¹ (B. & R.), but also because an able judge can discover the falsehoods of witnesses, if several are examined (*Historia Susannae*, line 51; *Digest*, XLVIII, xviii. 20), whereas, on the contrary, one can easily be consistent with himself. And although in this way some crimes may go unpunished in this world, and a few persons fail although their cause be just, because the thing in question was done under the eyes of but a single witness, yet this is far less inconvenient than for the other practice to be followed, and for the safety and fortunes of all to depend upon the impudence and cunning of one man, who might devise any kind of guile. For it is better that a few guilty go unpunished than that many innocent be condemned. Valerius Maximus, Bk. IV, chap. i, §§ 10-11.

Yet Selden, *De Jure Naturali et Gentium*, Bk. VII, chap. vi, notes that among the Jews the testimony of one man against a Gentile prevailed. Likewise, Grotius on *Deuteronomy*, xix. 16, observes that one witness was enough, not in establishing guilt, but in investigating a matter, and in forcing the defendant to take oath in affairs that involve money. Among the Moors at this time the testimony of two honourable men is sufficient, but when the witnesses are suspected, twelve are required, for they hold that as much faith lies in twelve men, whoever they may be, as in two. The further qualifications to be observed in witnesses are given in *Digest*, XXII. v. 2, 3, pr. §§ 1, 2, 3, 4; XXII. v. 4, 5, 9, 14, 21, 23, 24.

The Hebrews required that witnesses should be of good repute, and the right of testimony was forbidden the weak-minded, boys under thirteen years of age, thieves even after they had made restitution, those who live by gambling, publicans who require more than is just, goatherds, and all who habitually do things worthy of stripes. The testimony of one Turk who has made a pilgrimage to Mecca is equal to that of three others.² Christophe Richerius³, *De Moribus Turcarum*. To 569 which may be added Plautus, *Truculentus* [489]: 'Of more value is one eye-witness than ten hearsays.' (R.) Lucian, *De Domo* [xx]: 'Ears are less trusty than eyes.' (H.) Philo Judaeus, *De Confusione Linguarum* [xxvii]:

A law has been enacted among those nations which have the most excellent constitution, that one must not give evidence on hearsay, because by its own nature the tribunal of the sense of hearing is liable to be corrupted. (Y.) (*Idem*, *De Judice* [ii]): The eyes do indeed dwell with the very things that are done, taking hold of them as one may say, and comprehending and seizing upon them in all their parts, the light co-operating with them, by means of which all things are illuminated and clearly proved; but the ears [. . .] are less trustworthy than the eyes, inasmuch as they are not themselves present at the transactions, but are attracted by words as the interpreters of facts, which are not disposed to tell the truth. (Y.)

¹ [The original refers specifically to the Greeks.—Tr.]

² [This sentence is by oversight repeated, with, however, the correct reading at the end of *solent* for *sunt*.—Tr.]

³ [For *Richeribus* read *Richerius*.—Tr.]

Therefore, no value attaches to the testimony of those who follow another's word.

It should, finally, be added that although the oath of witnesses offers the strongest presumption of truth, yet in natural law nothing prevents a sworn witness from being accused of falsehood. And if the charge is proved, the decision based upon his false testimony comes to naught. This was allowed also by the Attic laws, which granted an action for false witness after the trial, as appears from many passages and especially Demosthenes, *Against Euergus*, 1 ff., at the beginning and *passim*. Add also Plato, *Laws*, Bk. XI, towards the end. But it would appear absurd to allow him against whom the sworn testimony was given to be able to make it void by opposing his own oath, since that would not only offer the widest opening to perjuries, but the controversy would also remain as much in the dark as before, because of the contradiction of the oaths. See *Hebrews*, vi. 16. Therefore, in keeping with its usual folly, the Koran, in the chapter *On Light*, unjustly commands that he who accuses his wife of adultery and has no witnesses to support him, should swear four times that he is telling the truth, and on the fifth time call down upon himself the curse of God if he is lying. While the woman will be clear if she also swears four times that her husband is lying, and on the fifth time calls down upon herself the wrath of God, if what her husband says is true.

10. There is no need that we add much on the execution of a judgement, since in a state of nature when another does not willingly fulfil what he owes, every man can force execution with his own strength and arms and those of his allies, and how far this may be carried will be shown more fully below where we shall treat of war. In this connexion it need only be pointed out that, in such an execution, I am not only made the owner of the thing awarded me, after I have in some way secured possession of it, but if I am unable to get hold of the thing itself, I can even seize something else of the same value (adding in at the same time the expenses incurred in the execution itself), with the effect that I become owner of it. For as Grotius, Bk. II, chap. vii, § 2, observes: 'Whenever expletive justice cannot acquire the same thing, it tries to obtain something of equal value, which, morally, is considered the same.'¹ (K.)

Yet it may further be said that by nature any possessions of a debtor who is obligated either by his contract, or by the thing itself, or because of an injury which he has done, are understood to be tacitly mortgaged for the debt, so that when he fails to pay the debt itself, they can be seized in its place. Nor is he to whom something is owed satisfied by the mere detention of the thing, since that is often more of a burden than an advantage, unless I can have the full disposal of the thing; nor is my

¹ [For *quod morali aestimationi est idem* read *quod est morali aestimatione idem*.—Tr.]

right satisfied if I receive in place of the thing, the dominion of which should have been handed to me, the mere custody of another's possession. Yet a man should make known with what intention he seizes such things, whether he detains them in order that he may the more quickly secure his debt, or whether he intends to take them in payment. Nay, 570 it sometimes appears just that, after a man has got a thing into his hands, he should give the debtor an opportunity, if he so wishes, to pay his debt directly and so get the object back.

This method of execution is proper only to natural liberty, and is foreign to the nature of the civil state. See *Digest*, XLI. ii. 5; XLVII. viii. 2, § 18; IV. ii. 13; XLVIII. vii. 7, 8.

SAMUEL PUFENDORF
ON
THE LAW OF NATURE AND NATIONS
BOOK VI

CHAPTER I

ON MATRIMONY

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| <ol style="list-style-type: none"> 1. The transition. 2. Matrimony the seedbed of mankind. 3. Whether there is any obligation to marry. 4. A wandering lust is opposed to natural law. 5. Mankind should not be propagated contrary to the laws of marriage. 6. What kind of an obligation to marry may arise from civil laws; 7. What may arise from natural law. 8. How far the civil law may rule upon marriage. 9. The irregular marriages of the Amazons. 10. The laws and rights of regular marriage. 11. The source of the power of the husband over his wife. 12. Whether that is immediately conferred by God. 13. Whether it necessarily involves the right of life and death. 14. Whether consent and not cohabitation consummates marriage. 15. It is unlawful for several to marry or lie with one woman. 16. The use of polygamy among many peoples. 17-18. Whether it is opposed to natural law. | <ol style="list-style-type: none"> 19. The most perfect form of marriage is for one woman to be joined to one man. 20. It is unlawful hastily to dissolve marriage. 21. Adultery and wilful desertion dissolve matrimony. 22. Whether intolerable habits are cause for divorce. 23. The opinions of some on the meaning of the law of God concerning divorce. 24. Especially those of Milton. 25. Physical fitness is required for marriage. 26. On error in marriage. 27. A woman married to one man cannot rightfully marry another. 28. Why marriage between blood kin is forbidden. 29. The reason for shame of one's private parts. 30. On nakedness. 31. The origin of natural shame. 32. Marriage between parents and children is wicked. 33. The opinion of the Hebrews on this. 34. On the marriage of brothers and sisters. 35. On the forbidden degrees. 36. On less common forms of marriage. |
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571 OUR next task is to investigate, first, the origin and nature of human government; and, second, what precepts of the law of nature and nations presuppose it. But since government can be understood only among several persons, and it is established on the authority of the Holy Scriptures that only one human pair was created at the beginning, to which all other mortals refer their origin, we must, accordingly, before treating of civil government, consider matrimony, which is the source of families and furnishes, as it were, the material for the establishment of governments and states. For in the same manner as the human body is made up of several members, each of which considered by itself has the form of a body, so states as well are made up of lesser societies, of which some are called simple and primary, while some are a little more complicated, and usually pass under the name of associations. Of the

societies of the first kind there are three: those of the *husband*, the *father*, and the *master*. And these are called simple, because they are not made up of other lesser societies, not because not more than two persons compose them, as is maintained by Iohannes Friderich Hornius, *De Civitate*, Bk. I, chap. i, § 2. For what prevents one father from having several children, and one master several servants, who, nevertheless, form a simple society no less than if there were but one son to one father, or one servant to one master? And that the first place in this discussion properly belongs to marriage is shown even by Plato, *Laws*, Bk. IV [p. 721 A]:

ATH. What will be our first law? Will not the legislator, observing the order of nature, begin by making regulations for birth?

CLE. Certainly.

ATH. And in all states the birth of children goes back to the connexion of marriage?

CLE. Very true.

ATH. Then, according to the true order, the laws relating to marriage should be those which are first determined in every state. (J.)

2. After mankind had become subject to death, the most wise Creator, lest either a new race should always have to be created, or the duration of so noble a species should lapse within a generation, contrived a distinction in sexes, endowed with the natural faculty of propagating themselves by joining their bodies. And that mortals should not fail to do this because of negligence or of the labours involved in the birth and rearing of children, He implanted in the sexes a mutual attraction and quick impulse for each other, as well as the deepest affection for their offspring, so that they willingly and joyfully undertake what alone can continue the family of mankind. And the result, as Bacon of Verulam, *The Advancement of Learning*, Bk. VII, chap. ii, observes, is that 'among the delights of animals the pleasure of generation is greater than that of feeding'. Seneca, *Hippolytus*, lines 466 ff.:

When he beheld the boundless greed of death,

The mighty father of the world ordained

A means by which the race might be renewed.

[. . .]

Suppose our youth should choose a mateless life,

And live in childless state: then all this world

Of teeming life which thou dost see, would live

This generation only. (M.)

3. The first point to be considered regarding marriage is whether men otherwise fitted for marriage are under any obligation to enter upon it and raise up offspring. For no less upon this than upon other things to which a man is borne by his natural appetite, such as self-preservation and the love and rearing of children, some men raise a doubt, as if they are not approved by natural law, maintaining that there was no need for nature to do so, since instinct and sense appetite

alone sufficiently incite men to it. But, granted that natural instinct tends toward such things, it does not follow that the law of nature does not for that reason command them. In fact it appears from this very consideration that nature wishes them to be observed as carefully as possible, as directly leading to the preservation of mankind, while distrust-
 572 trusting, as it were, the mere dictate of reason she has ordered so violent an instinct to come to man's aid that he can only with difficulty make headway against it. Add Oppian, *The Chase*, Bk. III, lines 107 ff.; *On Fishing*, Bk. I, lines 702 ff. For how many men would want children, who often are a cause of grief, always of cares and labours, did not a person's natural inclination, over and above his reason, draw him to desire them? See Euripides, *Medea*, lines 1090 ff.; *Hippolytus*, lines 616 ff. Especially since it entails an act of no great consequence and familiarity with women, which to a wise man would be trivial as well as tedious, were it not for nature's delights. Add Valerius Maximus, Bk. VII, chap. ii, § 1; Montaigne, *Essais*, Bk. III, chap. v, p. 137; Descartes, *Les Passions*, art. 90. We recognize that there is a great difference between natural instinct and the dictate of reason, that in any number of things they tend in different ways, and that the former, when struggling with the latter, must be controlled, and to do that gives evidence of no slight spirit. Yet although instinct alone carries no obligation of itself, it may happen that we are obligated to do something to which our instinct also inclined us. Nor is a mother free from sin against the law of nature, when she kills her child in order to avoid disgrace, and thus overcomes her instinct toward her child by another instinct, namely, that of fear of and escape from infamy, as is held by Graswinckel on Grotius, Bk. I, chap. i, § 11. For the life of the babe was guarded not only by the mother instinct but by law; and the mother should have recognized before the event that her infamy was of less consequence than the death of one whose existence was due to an act to which she herself had consented. Wherefore, if the care for her reputation meant more to her than the pleasure of copulation or the love of her own offspring, she ought to have been thinking about the matter before she took the man to herself. After the act, the child does not merit death, in order that the sin of the parent may go unobserved.

Finally, after marriage is once consummated, since fecundity does not lie within the power of human kind (compare *Genesis*, xxx. 1-2), he who becomes the parent of few children satisfies the law of nature as well as he who becomes the parent of many, while he whose wife bears him none at all has no cause to fear sin. Seneca, *Controversies*, Bk. II, cont. xiii [II. v. 7-8]:

Fruitfulness does not come at our pleasure, nor at the time fixed for it. Nature is answerable only to herself, and is not bound to human laws; sometimes she hurries and

outruns our wishes, sometimes she is slow and delays them. [. . .] Nature does not reply as upon a formula, and chance does not follow prescription. No matter if a law does set a date, nature takes no notice of it.

4. But to proceed as clearly as possible, we hold it to be fully established, first of all, that those indulgences which have no other end than obscene gratification of the senses are not agreeable with natural law. For the stronger the stimuli by which men are drawn to venery, the more does natural law take care that they may not disturb the decorous order so necessary to the peace of society, rather that they contribute to knitting more closely the minds of men. And so no grace is accorded that vile practice of sodomy, a vice once so common among the Greeks that it appeared difficult to Plato, *Laws*, Bk. VIII [p. 839 A], in his ideal state, to restrain it by laws. Phocylides [188 ff.]: 'Do not hold sexual intercourse with animals. Nor disgrace a woman in shameless postures. Nor transgress the natural forms of copulation in illicit love. Nor let a man cohabit with brutes themselves. Nor let women imitate the intercourse of men.' Pliny, Bk. X, chap. lxiii: 'In the human race, the men have devised various substitutes for the more legitimate exercise of passion, all of which outrage nature; while the females have recourse to abortion. How much more guilty than the brute beasts are we in this respect.' (B. & R.) Add Aeschines, *Against Timarchus*. As Critias used to say: 'Among males the most beautiful sight is the female, and among females that of the opposite sex.' Dio 573 Chrysostom, *Orationes, De Pulchritudine* [xxi. 3].

It may be mentioned in passing that, although sodomy is forbidden by the Turkish laws, the Turks commonly so use the boys who are captured in war, claiming that every man can dispose as he pleases of what he captures in war. Scipio Ammiratus, *Discursus*, Bk. V, chap. v. On the other hand, the Peruvians regarded that vice as so detestable that, if a man in a quarrel threw it up to another, he was disgraced for several days because such a word had passed his lips. Garcilaso de la Vega, *Comentarios Reales*, Bk. III, chap. xiii.

But since nature has contrived the regular union of the sexes not for their gratification but in order to propagate offspring, they offend against this purpose who find in it nothing other than a means to alleviate their desires. Martial, Bk. I, ep. xci [xc]: 'You have invented a prodigy worthy of the Theban riddle, that here¹, where no man is, should be adultery.' (K.) Some, indeed, believe that many peoples held it a part of natural liberty for the unmarried of both sexes to grant each other the use of their bodies, even gratis, for the mere gratification and pleasure, or for a set price. Thus Selden, Bk. V, chap. iv, shows from the Hebrew rabbis, that before the Mosaic law a maiden unmarried and still unbetrothed, was permitted to bestow herself gratis, or for a

¹ [For *Huic* read *Hic*.—Tr.]

fee, without thereby consenting to cohabitation. But that after the Mosaic law was given, the intercourse of the unmarried was at once forbidden the Hebrews, so that from then on the circumcised could no longer go in to each other except in wedlock, either for a price or from pure desire, although in certain cases they did not hold it unlawful for a circumcised youth to lie with a pagan maiden. In favour of this they cite *Deuteronomy*, xxiii. 18; *Leviticus*, xix. 29; *Genesis*, xxxviii. 14; add Grotius on *Genesis*, xx. 9. Selden records that the reason given by Maimonides for holy people being forbidden the practice of prostitution was this: That the evils of contentions and rivalries which regularly arise from such licence, when not restrained by marriage, might be avoided, and that they might enjoy that advantage of a distinction and certain knowledge of families. There is no use of our calling upon the testimony of heathen writers. See Epictetus, *Manual*, chap. xlvii; Plautus, *Curculio*, Act I, sc. i [33 ff.]:

PHAED. Why, it's a pimp that lives there.

PAL. In that case nobody stops or forbids you to buy what 's in the open market, if you've got the cash. Nobody stops any one from walking along the public highway. Provided you don't make inroads on fenced-in preserves, provided you keep away from married women, widows, virgins, young innocents, and children of respectable families, love any one you want. (N.)

The youth in Quintilian, *Declamations*, xiv [2, 3], left himself no further height of impudence, who did not hesitate to bring a charge against his mistress that she had given him a hate potion, because of which he ceased to love her. He says in part: 'Yet I had enough to keep life and soul together; I had a modicum, enough to have afforded me lawful pleasure in my mean condition. And therefore I was always content with one and the same mistress, which is a certain sign of good husbandry even in a man's pleasure.' (W.*)

But it is quite clear that, if it were a universal rule that every one could regard his powers of procreation as given only for the exercise of wantonness, and should use them to this end alone, decency and peaceful relations could no longer exist among men. This is enough to prove that such excesses are condemned by natural law; for as Richard Cumberland, *De Legibus Naturae*, chap. v, § 46, says, 'Nothing can be established in accordance with right reason to which all cannot agree'.

Yet the dictate of natural law on this point was not so obsolete even among those peoples, when a kind of public security was enjoyed by that vice, as to lead them to approve a wandering lust and to free it from every mark of baseness. 'A prostitute is vile because she is a
574 prostitute' is the pronouncement of Ulpian, and it passed as the severest punishment for them to publish their calling by showing the licence for their lewdness before the aediles. Tacitus, *Annals*, Bk. II [lxxxv]: 'Vistilia, belonging to a praetorian family, had given in her

name to the aediles, in accordance with the rule adopted by our ancestors who believed that wanton women would be sufficiently punished by the mere acknowledgement of their scheme.' (R.) But such customs were tolerated by the understanding, among the nations more inclined to venery, that the honour of matrons and virgins would be less exposed to attack. And it was the judgement of honourable men that, just as it was a special virtue to remain true to one's wife, so for loose women of the common sort to follow such a life was held a failing of youth, not so much to be defended as overlooked, as best one could, because of their unripe and vacillating age. See Cicero, *Pro Caelio* [xvi ff.]; Epictetus, *Manual*¹, chap. xlvii; add the extended treatment by Musonius in Stobaeus, *Anthology*, vi; and especially Grotius on *Matthew*, v. 27.

We may add in passing that among Mohammedans fornication with housemaids is held lawful, although the high-class Hindus are more chaste in such matters, holding even the slightest indulgence of this nature a great sin. Petrus de Valle, *Viaggi*, Pt. III. It is an interesting fact, given by Plutarch, *On Noble Traits of Women* [p. 249 DE], that among the people of Chios² there was no record of adultery or rape of a virgin for a period of seven hundred years; and yet the island was famous for women of singular beauty.

5. If one observes human nature one sees very clearly that it is not fitting for mankind to be propagated by indiscriminate intercourse unrestrained by law, even though one or both of the parties have in mind conception. Such a life the ancient inhabitants of Attica are said to have led before the time of Cecrops, cohabiting like animals without law, and if any woman conceived from such promiscuous intercourse, she offered her progeny to any one that was pleased to take it of those with whom she had cohabited. And when Cecrops had forbidden this barbarism by the introduction of laws on marriage, he was thereafter called two-formed either because he who had formerly known only his mother could now also claim a father, or because by the bond of marriage he made two unite, as it were, into one body. Athenaeus, Bk. XIII, chap. i [XIII. ii]:

But at Athens, Cecrops was the first person who married a man to one wife only, when before his time connexions had taken place at random, and men had had their wives in common. On which account it was, as some people state, that Cecrops was called διφύης (of double nature), because before his time people did not know who their fathers were, by reason of the numbers of men who might have been so. (Y.)

But who does not see how little man would differ from cattle, if there were no laws on marriage? Although even among not a few of the brutes one may see some signs of regular mating. Quintilian, *Institutes of Oratory*, Bk. IX, chap. ii [64], remarks upon Vergil, *Aeneid*,

¹ [For *Enchirid.* read *Enchirid.*—Tr.]

² [Actually 'Ceos' in Plutarch.—Tr.]

Bk. IV [550]: ‘“Might I not have lived free from the nuptial couch, without a crime, like the savage herd?” Though Dido complains of marriage, yet her passion forces us to understand that she thinks life without marriage to be a life not for human beings, but for beasts.’ (W.) Consider what quarrels men would have over beautiful women. They would be much more common than among bulls, because these are not incited to passion except when a cow is in heat and she allows the male only once a year, while man is an animal always ready for the deed of love. Furthermore, is not such a promiscuity in generation unfitted to reproduce the species? For if a woman kept herself for one man alone, that would be a kind of marriage.

A further consideration is the weakness of a woman and her need of support in pregnancy. Yet what man would offer his support unless he were sure he was the father?—a matter of uncertainty apart from marriage. The rearing of the human species is likewise a matter of 575 labour and expense, for which a woman’s resources scarcely suffice. Yet what man would undertake the care of any but his own offspring, whom it is not easy to pick out when such free licence prevails? For what Aristotle, *Politics*, Bk. II, chap. ii, recounts of some peoples of Libya (who, perhaps, are the same as Nicolaus of Damascus, *De Moribus Gentium* [Stobaeus, *Anthology*, IV. ii. 25; also in Jakoby, *Die Fragmente der Griechischen Historiker*, under *Nikolaus von Damaskos*, 103 d], calls Limyrnians), how their wives were held in common, ‘but their children were distinguished by their resemblance’¹, is an uncertain kind of proof. Although Theocritus, *Idylls*, xvii [44], makes a proof of adultery on the part of a wife the fact that ‘the children do not resemble the husband’; while Horace [*Odes*, IV. v. 23], on the other hand, says, ‘Mothers win praise because of children like unto their sires.’ (B.)

Finally, since it is impossible to conceive of families without laws on marriage, and of states without families, and so on them rests all that decorous order which should prevail in the life of man, it is clear that without marriage men would lead a life of isolation little better than that of the beasts. Horace, *Odes*, Bk. III, ode v [III. vi. 17 f.], well says: ‘Teeming with sin, our times have sullied first the marriage-bed, our offspring, and our homes; sprung from this source, disaster’s stream has overflowed the folk and fatherland.’ (B.) A further consideration is that without marriage, nearness of kinship could not be sufficiently established, and there could be no bequeathing of estates, the elimination of which would mean the loss of a great part of the advantages which either maintain or adorn the life of men. Here belongs what Justin, Bk. III, chap. iv, tells of the Spartan Partheniae who from fear of want, because they had no father to whose estate they might hope to succeed, left the land of their ancestors, although

¹ [For *forma* read *formae*.—Tr.]

Servius on *Aeneid*, Bk. III, line 551, and Lactantius, *De Falsa Religione*, chap. xx, record some variations from his account. Here too may be referred most of the arguments presented so generally against Plato's community of wives. Add Stobaeus, *Anthology*, lxxv. In Procopius, *Persian War*, Bk. I, chap. v, and Agathias, Bk. IV [xxvii], when the Persian king Cabades had by law ordered the promiscuous use of women, and made it lawful for any and every man to lie with a married woman, his subjects rose against him and drove him from the throne.

6. Since, therefore, it is clear that the propagation of the human species must be regulated by laws on marriage, if a decorous and duly organized social order is to be maintained, the next point to be examined is whether there exists for individual men who are fitted thereto in age and body, any obligation to enter upon marriage, and if so what its nature is. We find on all sides the laws of many peoples on this point.

According to Selden, Bk. V, chap. iii, the ancient Hebrews held that the divine law to 'increase and multiply' obligated all males to marry before the end of their twentieth year, unless a man were free from the keen stimulus of passions, and had devoted himself to the study of the law, or were physically unable to procreate; and that this command was laid upon all the descendants of Noah. They added that he who had lost his wife and left no child of either sex, who could continue the name (for an impotent son or sterile daughter did not pass as offspring), had not met that command; but that he whose son or daughter, though dead, had left children of either sex, was free from the command, since his grandchildren of either sex took the place of his own sons and daughters. But otherwise he who could have children was bound by it, when he had no children of either sex. Nor was the law met if a man married one too old or too young to bear, without at once taking to himself one that could. Leo of Modena, *De Ritibus Hebraicis*, Pt. IV, chap. ii, adds that while the divine law above mentioned was satisfied if a man had male or female¹ offspring, yet a man of suitable age and strength was no less required to marry, in order that he might avoid the danger of fornication. (And injunctions to much the same purpose are 576 given by Plato, *Laws*, Bk. XI [p. 930 c], where he goes on to say: 'Two children, one of either sex, shall be deemed sufficient in the eye of the law.' (J.)) But the Hebrews themselves were not entirely agreed as to whether that rule also applied to women. The most probable conclusion they could have drawn is that women were not obligated for any set period of time, since it does not lie in their power to marry whenever they wish, but that when the opportunity arose, they as well were obligated to do their part in propagating the human species. Finally, it is a saying among the same rabbis: 'Whoever disobeys the command to multiply mankind should be regarded as a murderer.' And yet there

¹ [For *faemellam* read *foemellam*.—Tr.]

was within the same people the sect of the Essenes who avoided all contact with women; on whom see Pliny, Bk. V, chap. xvii; Solinus, chap. xxxviii.

Laws and sentiments to much the same effect are found also among other nations. The *Lex Maenia*,¹ given in Nonius, under the word *Eunuchare*, ran as follows: 'Whoever destroys his country, his greater parent, is guilty of crime. And any one does this, so far as he can, if he emasculates himself, or in any way puts off children,² that is, defers procreating children.' The opinions of Musonius, Hierocles, and Antipater³ may be seen in Stobaeus, *Anthology*, lxx. Add Arrian, *Epictetus*, Bk. III, chap. vii, about the middle of the chapter. Pollux, Bk. III [48], *περὶ ἀγάμων* [*On the Celibate*], records 'suits for failure to marry and for late marriage' both at Athens and in Lacedaemon. Plutarch, *Lycurgus* [xv. 2], gives the following injunction of that lawgiver, to the effect that bachelors were forbidden to view the games of the young girls when they went naked; that by an order of the magistrate they had to march naked through the forum in the winter, singing a song against themselves to the effect that they deserved that punishment because they did not obey the laws; and that they were furthermore deprived of the honour and respect accorded old men by the youths. And the same writer in his *Laconian Apophthegms* [xiv] tells how a certain youth did not move from his seat before the famous Dercyllidas, who was, however, unmarried, saying: 'You have begotten no son who will some day give me his seat.' Phocylides [175 f.]: 'Remain not unwed, that thou perish not nameless; give something thyself to nature, and beget again even as thou wast born.' Plato, *Laws*, Bk. IV [721 B]:

A man shall marry between the ages of thirty and thirty-five, considering that after a sort the human race naturally partakes of immortality, of which all men have the greatest desire implanted in them; for there lives not a man who does not desire that he may be famous. Now, mankind is coeval with all time and immortal in this way, that they leave children behind them, with whom they are one in the unity of generation. And for a man voluntarily to deprive himself of this gift of immortality, as he deliberately does who will not have wife and children, is impiety. (J.*)

Add *Ibid.*, Bk. XI. Cicero also in his *On Ends*, Bk. III, says that in order for a man to live according to nature, he should desire to take to him a wife and wish to have children by her. Baldaeus, *De Idolatria Indorum*, Art. II, chap. iii, reports of the Benjanites that they considered it a disgrace to be without children and incapable of having any: 'Such men', they say, 'are not worthy to be the first in the morning to look upon a man.' Thus at Rome the censors Camillus and Posthumius ordered those who arrived at a childless old age to pay a fine into the treasury, which was called *uxorium* (wife-tax). Valerius Maximus,

¹ [For *Moenia* read *Maenia*.—Tr.]

² [For *Antipatri* read *Antipatri*.—Tr.]

² [The text of the original is uncertain.—Tr.]

Bk. II, chap. ix; see Festus on the word *uxorium* and the comments of Joseph Scaliger. Plutarch, *Camillus* [ii], mentions the same thing. There is a fine passage from a speech by Metellus in Gellius, Bk. I, chap. vi:

If, Romans, we could do without a wife, we should all be without that source of vexation; but since nature has so ordered it, that we can neither live with them happily enough, nor without them by any means, we must consult for our lasting security, rather than a transient gratification. (B.)

Here belongs the statement of Strabo, Bk. VII [iii. 3, p. 296], that 577 Posidonius called the Mysians who live without women Abioi (men who do not live), since he held a single¹ life without mates was but half a life. On the *Lex Papia Poppaea* see Lipsius on Tacitus, *Annals*, Bk. III and Jacob Godefroy. This law the Christian emperors abrogated, probably at the instance of the clergy. See *Code*, VIII. lvii; and Sozomen, *Ecclesiastical History*,² Bk. I, chap. ix. An interesting speech of Augustus is given by Dio Cassius, Bk. LVI. Aelian, *Varia Historia*, Bk.³ VI, chap. vi, gives a law of the Spartans that he who had furnished the state three sons should be free from watch duties, and the man with five sons should be free from all public services and expenses. Add the full treatment of Hierocles in Stobaeus, *Anthology*, lxxiii.

It follows from these considerations that it is wrong to emasculate men, at least against their will, and a law of Domitian forbidding this merits praise. See Suetonius, *Domitian*, chap. vii. Statius, *Sylvae*, Bk. IV [iii. 13]: 'He who suffers not men to be unsexed.' (S.) Add Martial, Bk. VI, ep. ii. Casaubon on⁴ Suetonius, *ibid.*, drawing from Justin Martyr, shows that after this edict a man who wanted to emasculate himself or another, regularly first asked permission of the emperor or the governor of the province. Add *Deuteronomy*, xxiii. 1; Josephus, *Antiquities*, Bk. IV, chap. viii; *Digest*, IX. ii. 27, § 28; *Novels*, cxlii, and the remarks by Denis Godefroy on *Digest*, XLVIII. viii. 4, § 2. Eusebius, *De Praeparatione Evangelica*, Bk. VI, chap. viii [10, p. 279 D]: 'In Syria and Osroene many used to castrate themselves in honour of Rhea, until King Abgarus ordered that all who mutilated themselves thus were to have their hands cut off also. From that time on no one castrated himself in Osroene.' Quintilian, *Institutes of Oratory*, Bk. V, chap. xii [19]:

But to me, who look to nature, any man, with the full appearance of virility, will be more pleasing than a eunuch; nor will divine providence ever be so unfavourable to its work as to ordain that weakness be numbered among its excellences; nor shall I think that an animal is made beautiful by the knife, which would have been a monster if it had been born in the state to which the knife has reduced it. Let a deceitful resemblance to the female sex serve the purposes of licentiousness if it will, but licentiousness will never attain such power as to render that, which it has rendered valuable for its own purposes, also honourable. (W.)

¹ [For *celibem* read *caelibem*.—Tr.]

³ [For *I* read *l.*—Tr.]

² [For *Trist.* read *Hist.*—Tr.]

⁴ [For *add. I* read *ad. l.*—Tr.]

The account of how Hermotimus revenged himself upon Panionius, by whom he had been emasculated, may be read in Herodotus, Bk. VIII [cvi]. Xenophon, *Training of Cyrus*, Bk. VII [lviii f.], shows why the kings of the Orient preferred to have eunuchs in their service. To which may be added the further reason that the kings could succeed to their estates with less envy, since they were childless. Heliodorus, *Ethiopica*, Bk. VII [VIII. 17]: 'At the Persian court the eunuchs are the eyes and the ears; they have no children and no kinsmen to warp their fidelity, but it attaches itself to him only who has entrusted himself to them.' Claudian, *Against Eutropius*, Bk. I [187-8]: 'Being a eunuch also he is moved by no natural affection and has no care for family and children.' (P.)

But since it was believed that eunuchs were particularly cruel they were not permitted by the Jews to act as judges. Grotius on *Deuteronomy*, xvi. 18. It is likewise a common saying in India that animals when gelded become docile, but that emasculated men usually become far worse, more proud and intolerable. We may note in passing another remark by Heliodorus, *ibid.*, Bk. IX [25]: 'Eunuchs have an element of jealousy in their nature; the fact that they themselves are deprived of something acts as an obstacle to prevent others¹ from enjoying it.'

Some have also observed that the number of men is greater than that of women, or at least equal, and that is the reason eunuchs were made in those countries where one man is allowed to have several wives. Others, however, think that eunuchs were first introduced by the laws of war, in that the victor, who might have killed his foe, took from his
578 captives in this way the very heart of their private interests and affections, and so could with greater security entrust them with the guardianship of his property.

7. But when one considers natural law alone, it is apparent that marriage is the foundation of social life, and that men are also obligated to enter into it, in so far as they are bound to all things which necessarily serve that end, yet as an affirmative precept, indefinite and indeterminate, and which does not lie upon a man necessarily and at all times; for affirmative precepts require the opportunity for their performance. Now the opportunity for marriage is understood to depend not alone on proper age or likelihood of offspring, but also on fitness of condition, as well as the means to support a wife and children, and that the man be fitted to play the part of the master of a household. Pliny, *Letters*, Bk. I, ep. xiv:

When I reflect upon the prevailing manners of the age, and even the laws of Rome, which rank a man according to his possessions, I feel that they certainly claim *some* regard; and, indeed, where children and many other circumstances are to be duly weighed, this is an article that well deserves to be taken into account. (B.*)

¹ [For *altis* read *aliis*.—Tr.]

Add the speech of M. Hortalus in Tacitus, *Annals*, Bk. II [xxxvii]. The laws of Iceland forbade marriage between the very poor. See Arngrimur Jonsson, *De Islandia*, chap. viii.

Sometimes also the condition of the times, and a function which we are performing, allow no consideration of marriage. See I *Corinthians*, vii. 26. Therefore, it is not only unnecessary, but stupid as well, for youths to turn their minds to wives when they can promise themselves and their family nothing more than extreme hunger, and will only fill the state with beggars, or when they have little more sense than boys. Indeed, they do well who defer marriage that they may the better as celibates cultivate the mind and prepare themselves to render outstanding services to society—things made somewhat difficult for the married by the customs of the state or the ways of womankind. Furthermore, since marriage is called for, first, in order that the human species may be preserved through offspring, and, second, that wandering lust may not defile the dignity of society, it appears that if neither ¹ of these ends is going to be impaired, no criticism should be made of the celibacy of those who see that in all probability they will serve mankind and their state better in the celibate life, the continence of which they feel they can maintain, than if they married. And so if any man is so loftily endowed that he either does not feel the shafts of love, or lightly wards them off, 'a lover of not loving', as Philostratus, *Life of Apollonius of Tyana*, Bk. VIII, chap. iii [VIII. vii], says, and if he can show himself a useful citizen of the world by serving it in some other way than leaving it his offspring, surely it should not be held that he is obligated by nature to make the charms of women an obstacle to his worthy purposes. Add Arrian, *Epictetus*, Bk. III, chap. xxii, pp. 311-12, ed. Wolf, and Cornelius Nepos, *Epaminondas*, chap. x. Especially since there are but few with such control of mind and body that they can forgo the desire for posterity and the attractions of women, and maintain an unstained chastity.

Much less should those persons fear reproach who, already given children by one marriage, refuse to bring to them a harsh stepmother or stepfather, when for their children that means some deprivation, and as for themselves, they have fulfilled the design of marriage and can easily do without another spouse. Although the law of Charondas in Diodorus Siculus, Bk. XII, chap. xii, seems excessively harsh, for he excluded from the public councils of the state those who had brought home a stepmother to their children:

For he judged that a man could never advise his country well, who was so imprudent in his own family; for men that were once well married, ought to rest satisfied with such a happiness; and such as are unfortunate in their first match, and yet against their own experience commit a second fault of the same kind, justly deserve to be noted for fools. (B. *)

¹ [For *neuter* read *neuter*.—Tr.]

Yet the children of a former marriage do not always fare badly by a second; and he who has experienced a happy marriage is desirous of a like felicity, while he who has not fared so well hopes for gentle zephyrs after the gale. There are some lines of an unknown poet in the *Anthology*, Bk. I [IX. 133]: 'He who has mated once and seeks a second couch, ventures forth, like a man once wrecked, a second time upon the grievous deep.' This Henricus Stephanus has countered with a no less pointed couplet: 'He who has mated once and seeks a second couch is not deserving of our censure: if the first wife prove bad, perhaps the second will not; while if she was good, he may have excellent hope the second time as well.' Add also Charron¹, *De la Sagesse*, Bk. I, chap. xlv, n. 2-3; Bacon, *Essays*, chap. viii.

But it may happen, on the other hand, that, in addition to the common obligation to marry, a man may be led to marriage for some special reason. Suppose a reigning house is reduced to a single member; that sole survivor will stand under a special obligation to seek the legitimate propagation of his line, both to avoid the danger of an interregnum, and because the line of Euripides, *Iphigenia among the Taurians* [57], applies especially to royal houses: 'Seeing the pillars of a house be sons.' (W.) And what we have just set forth on the obligation to marry is more agreeable with the nature of things than the loose generalization of Cumberland, *De Legibus Naturae*, chap. vi, § 9: 'Since the earth is already well stocked with human beings, a man is free to live as he pleases, single or married.'

8. We must judge from that which has been said so far, as to what power belongs² to civil laws to tighten or to loosen the necessity of marriage. Now it is incontrovertible that a civil lawgiver can by his authority require marriage of those who are fitted for it in age and in body, and who have the means to support themselves, a wife, and offspring. For to force a man to beget children to no hope but that of hunger is inhuman, and to fill a state with a crowd of beggars is improvident. On this point the laws already mentioned bear, although it appears more mild in such a matter to make use of rewards or deprivations of certain advantages than of positive penalties. Here belongs the Roman 'right of three children'; likewise the Spartan law given by Aristotle, *Politics*, Bk. II, chap. vii [II. ix]: 'The father of three sons shall be exempt from military service, and he who has four from all burdens of the state.' (J.) Thus the Persian kings every year gave rewards to those who had begotten a large number of children. Strabo, Bk. XV [p. 504].

It is no less clear that it would be not only an unjust but a foolish law, were a ruler to undertake to forbid marriages to all his citizens; or if, for example, he should allow it only to the first born, and enjoin celibacy upon all the younger children. See *Digest*, XXIII. ii. 19. For

¹ [For Charon read Charron.—Tr.]

² [For comperat read compelat.—Tr.]

it is not possible that all of them would be fitted by nature to maintain an unstained celibacy; nor would this be a method of limiting the increasing number of citizens much milder than that most cruel custom of antiquity, familiar enough to the Greeks, of exposing a new-born child, or that of causing abortion, which is recommended by Aristotle, *Politics*, Bk. VII, chap. xvi.

But if it has been discovered that some office in a state can be far better served by an unmarried than by a married person, nothing seems to prevent the civil laws from allowing only unmarried men to fill it, with the choice of leaving it if a man regards the office as of less worth to him than a wife; provided there be as great a supply of such men who are endowed with the faculty of living a chaste life, as the office requires. For it is presupposed that no excuse be thereby found for wandering lusts, and that no violence be done any man's nature (since no man¹ who does not feel himself fitted is required to undertake the office); and, finally, that it be seen to that the number of offspring be sufficient.

In the same way, for instance, an ambassador, general, or soldier may be forbidden to take his wife out of the country with him, or upon a dangerous expedition. See *Digest*, I. xvi. 4, § 2; Tacitus, *Annals*, Bk. III, chaps. xxxiii–xxxiv. Pliny [*Natural History*], Bk. VI, chap. xxii, writes of the inhabitants of Taprobane (a passage quoted by Solinus, chap. lxvi):

Their king is chosen by the people, an aged man always, distinguished for his mild and clement disposition, and without children. If after he has been elected king, he happens to become the father of children, his abdication is the consequence; this is done that there may be no danger of the sovereign power becoming hereditary. (B. & R.)

Since, likewise, the obligation to marriage is indeterminate and enjoys some latitude, the civil law will be allowed to set the time and age of the persons who would marry. So a provision of the *Lex Papia Poppaea* ran: 'Let no man sixty years of age, nor a woman of fifty, marry; nor any man under sixty a woman of fifty',² which was abrogated by Justinian, *Code*, V. iv. 27. Thus Plato, *Republic*, Bk. V [p. 460 E ff.], set the age of parenthood for women from twenty to forty, and for men from thirty to fifty-five. Add Aristotle, *Politics*, Bk. VII, chap. xvi, with the comments by Michael Piccart; Tacitus, *Germany*, chap. xx. Among some peoples a man is not allowed to marry until he has performed some deed of valour against the enemy. Thus, according to Strabo, Bk. XV [ii. 14, p. 727], no man of the Carmanians married 'until he had brought to the king the head of an enemy'. Add also Abraham Rogerius, *De Braminibus*, Pt. I, chap. xi.

Finally, although it belongs to natural liberty for a man to be able to marry whom he pleases, it will still be permissible, if it shall appear to

¹ [For *memo* read *nemo*.—*Tr.*]

² [The precise wording of this law has been a subject of much dispute.—*Tr.*]

be to the advantage of the state, for the civil power to stipulate, for instance, that a citizen shall not marry a woman of foreign extraction, or a nobleman a plebeian. Arrian, *Indica* [xii], writes that among the Indians a law forbade marriages between the castes into which the people were divided, and that, for instance, a farmer could not marry the daughter of an artisan, and *vice versa*. The same is found in Hieronymus Osorius, *De Gestis Regis Emanuel.*, Bk. II.

So also the civil law can ordain that marriages may not be consummated except through the offices of the public authority, especially between those who are of considerable consequence in the state. The force of this and similar laws can be that any marriage contrary to their ordinances may be deprived of certain effects designated by the civil law, or even be declared utterly null and void. Thus in Livy, Bk. XXXVIII, chap. xxxvi, 'The Campanians [. . .] petitioned that they might be allowed to take in marriage women who were citizens of Rome, and that any who had, heretofore, married such might retain them, and likewise that children born of such marriages, before that day, might be legitimate, and entitled to inherit.' (M.) Dionysius of Halicarnassus, Bk. VI [i], gives a decree of the senate upon the approach of a Latin war, whereby Latin women married to Romans and Roman women married to Latins, could remain at their husbands' homes, or depart to their respective countries, leaving with their husbands their male children, but taking with them their unmarried daughters. And it is added that almost all the Roman women left their husbands and returned to Rome, but the Latin women, with but two exceptions, remained in Rome holding their husbands dearer than their native land. Seneca, *On Benefits*, Bk. IV, chap. xxxv: 'Suppose that I have promised you my daughter in marriage, that then you turn out to be a foreigner, and that I have no right of intermarriage with foreigners; in this case the law by which I am forbidden to fulfil my promise, forms my defence.' (S.)

- 581 9. Our next task is to inquire through what kinds of articles a marriage pact is sealed by natural law, and what kind of right is thereby acquired by each party to it. We presuppose at the outset that by nature all individuals have equal rights, and no one enjoys authority over another, unless it has been secured by an act of himself or of the other. For although, as a general thing, the male surpasses the female in strength of body and mind, yet that superiority is of itself far from being capable of giving the former authority over the latter. Therefore, whatever right a man has over a woman, inasmuch as she is his equal, will have to be secured by her consent, or by a just war. Yet since it is the most natural thing for marriages to come about through good will, the first method is more suited to the securing of wives, the second to that of handmaids. And so those who wish to join them-

selves to women who have been captured in war and reduced to slavery, have usually laid aside the harshness of the master's authority over slaves. Add *Deuteronomy*, xxi. 10 ff.

If now we conceive mankind as constituted in natural equality and liberty, it may happen that a woman no less than a man may desire to secure offspring over whom she may acquire a right. To gain this end a man and a woman must make a pact to give each other the service of their bodies. If this pact be but a simple one, looking only to the procreation of offspring, and has no added convention on continued cohabitation, it will confer no authority of the one over the other, and neither will secure a right over the other, except to require the service of the body for the conception of offspring, which will be under the power of the mother, if the pact set forth that she is seeking offspring for herself and not for her husband.

Such a marriage, irregular and simple though it be, you may call that practised by the Amazons, if what is told of such a people be in general true. The account is questioned by Arrian, *Anabasis of Alexander*, Bk. VII [xiii]; Procopius, *Gothic War*, Bk. IV; Palaephatus, *De Fabulosis Narrationibus* [*De Incredibilibus*], Bk. I [xxxiii]. See Jornandes, *History of the Goths*, chap. viii; Justin, Bk. II, chap. iv. Although Diodorus Siculus, Bk. II, chap. xlv, relates that these women forced men to perform the services of slaves or of handmaids; something like what the same author, Bk. III, chaps. liii and lv, recounts of a certain people of Libya, which was afterwards destroyed by Hercules [lv]: 'For it was a thing intolerable to him [. . .] to suffer any nation to be governed any longer by women.' (B.) Thus in Curtius, Bk. VI, chap. v, Thalestris undertook to conceive of Alexander, and the Queen of Sheba of Solomon (if the story of some is true), not a spurious but a legitimate issue. Eduardo Lopez, *De Regno Congo*, Bk. II, chap. ix (add Francisco Alvarez, *Descriptio Aethiopiae*, chap. cxxxiii), relates that in the kingdom of Monomotapa some excellent regiments are composed of women who dwell apart in territories granted them by the king, and at a set time make use of such men as they choose, to their liking, for begetting offspring. If the offspring be girls, they keep them for training in the arts of war, but the boys are returned to their fathers. Add Isaac Vossius, *De Nilo*, chap. xix. Perhaps we should refer here what is told by Michael Glycas, *Annals*, Pt. II [p. 270 ed. Bonn]: 'Among the Agileans the women exercise authority over men, and play the whore without being subject to the jealousy of their husbands; they farm and build houses, and work at everything that men do.' Now although such mating savours somewhat of barbarism and almost beastliness, yet it is clear that there are marriages also among the most advanced peoples, in which either no authority is yielded one over the other, or the husband himself is

subject to the full civil authority of the wife. A case of this nature is when women who have crowns of their own, take to themselves husbands, without relinquishing their full authority over the state.

- 582 See the terms of marriage between Philip II and Mary, queen of England, in Thuanus, Bk. XIII, on the year 1553-4; and that of Mary, queen of Scotland, in *idem*, Bk. XX, on the year 1558, and Bk. XXXVII, at the beginning. Add also Juan Mariana, *History of Spain*, Bk. XXIV, chap. v. Diodorus Siculus, Bk. I, chap. xxvii, writes that it was a custom of the Egyptians in honour of Isis 'that they honour a queen, and allow her more power and authority than a king; and in their contracts of marriage authority is given to the wife over her husband, at which time the husbands promise to be obedient to their wives in all things'. (B.) Add also Guicciardini, *History of Italy*, Bk. VI, p. 178, where he describes the joint administration of Castile by Ferdinand and Isabella.

10. But we may take leave of these irregular marriages and turn to such as square more precisely with the condition of human nature. Now without question it agrees better with the endowment of both sexes, that the marriage pact commence with the husband, and that the husband court the wife, not the wife the husband. For although it is the practice, in some places, for the kinsmen of a maiden to make the approaches to young men, and offer them her hand, yet that is done for no other purpose than to engage the youth to fix his choice upon her as his wife.

This being established, it is surely patent that a man desires for himself legitimate offspring, not supposititious or adulterous. Therefore, the maiden should, before all else, plight her faith to the man to grant no one but him admission to her bed. Therefore, what Aloysius Cadamustus, *Navigatio*, chap. lxxv, recounts of the king of Calicut, is abhorrent to all reason and the common affection of men. He writes: 'The king has two wives, who are constantly attended by and cohabit with ten priests; and they boast of this as a great virtue of the king, giving him no other title of greater honour than that his wives accept the embraces of priests. Yet the issue of these priests never succeed to the throne, that being reserved to the nephews of the king by his sister.' A similar account is in Ludovicus Romanus, *Navigatio*, Bk. V, chap. vii. Indeed, Petrus de Valle, *Viaggi*, Pt. III, ep. vii, says that the general practice among that people is for wives to be held in common; and for that reason the fathers take little care of their children, and all inheritance follows the maternal line. Vile enough also are the practices of the Colchians as described by Busbecq, *Letters*, iii. An offensive law of Evenus III, king of Scotland, is given by Buchanan, *History of Scotland*, Bk. IV, to the effect that 'the king should be allowed to be the first to consummate the marriage of the nobles, and the nobles that of

the common sort; and that the wives of the latter were always at the beck of the nobility.' But later Malcolm III, moved by the prayers of his wife Margaret, altered this so that the husband could purchase this right to the first night by the payment of a half a mark of silver, which fee is called to this day the 'marchets of women'. *Idem*, Bk. VII; Polydorus Virgilius, *Historia Anglica*, Bk. X. Compare Suetonius, *Caligula*, chap. xl, at the end, and the comment of Boxhornius. Even to this day in the kingdom of Pegu and Aracam, it is said, the bride is deflowered by one of the wedding guests, although it is a capital offence for him to be apprehended with her a second time. Louis di Barthema, *Itinerary*, Pt. II, chap. xi; on the inhabitants of the province of Caniclu see Paul of Venice, Bk. II, chap. xxxviii.

It is furthermore obvious that nothing is more foreign to a decorous social order than a wandering and desultory life that knows no fixed abode or seat of fortune, without which civil life is scarcely imaginable. And so Xenophon, *Training of Cyrus*, Bk. VII [v. 56], rightly says of one's fireside: 'For there is no spot on earth more sacred, more sweet, or more dear than that.' (M.) Add Aristotle, *Economics*, Bk. I, chap. iii. Again, the rearing of a common offspring is most conveniently conducted by the united efforts of both parents, whose souls are bound more closely to a mutual love by the existence of such as a pledge. *Genesis*, XXIX. 32. The statement is made in Lysias, *Orations*, i [6]: 583 'After a child was born to me I put all my trust and confidence in it, because I felt this to be the firmest bond of our union.' Seneca, *Hercules Oetaeus*¹ [407]: 'Children often win a husband's love.' (M.) Besides, continued cohabitation furnishes the maximum of joy to couples that are well mated, and by it a husband can be surer of the chastity of his wife, than if he dwell apart from her, and depends only upon her given pledge. Therefore, a regular and consummated marriage, and one best suited to natural reason and the uses of civil life, includes in addition to a pact of chastity, the further condition that a wife shall always live at her husband's side, and so unite with him into the closest society of life and into the same family, for the more convenient rearing of offspring and for mutual help as well as recreation. [To which there is understood as added a mutual promise of such a manner of conduct as the nature of that society requires.]² Demosthenes, *Against Neaera* [122]: 'Wives we keep to bear us legitimate children and be our faithful housekeepers.' (K.*) Add Xenophon, *Economics*; and Columella, *On Farming*, Bk. XII, Preface. Here belongs the belief that the custom among the Chinese for women to bind their feet so closely as to be unable to walk without great pain, was to the end that they should not learn to wander about in the public ways, but to stay

¹ [For *Octavo* read *Oetaeo*.—Tr.]

² [Added, at Barbeyrac's suggestion, from the *De Officio Hominis et Civis*, II. ii. 4.—Tr.]

at home. Compare Martinius, *Historia Sinica*, Bk. III, chap. xxviii. Plutarch, *Conjugal Precepts* [xxxiv]:

Now, as the physicians say, that liquids are the only bodies which most easily intermix without any difference of propriety or respect with another; so should it be said of people joined together in matrimony, that there is a perfect mixture of bodies and estates, of friends and relations. Therefore, the Roman law prohibits any married people giving and receiving mutual presents one from another; not that they should not participate one with another, but to show that they were not to enjoy anything but what they possess in common. (G.)

Quintilian, *Declamations*, ccxlix:

It is by marriage, as you know, that the state is maintained, and nations, and children; furthermore, succession to patrimonies, different grades to inheritances, and domestic security. For otherwise how shall we go abroad, how leave the house to go into the fields and cultivate them, what security will we feel in undertaking public commissions, or leaving for military service?

Seneca, *Octavia* [189 ff.]:

The fire of youthful passions glows at first
With heat impetuous; but soon abates,
And vanishes like flickering tongues of flame.
Unhallowed love cannot for long endure;
But pure and lasting is the love inspired
By chaste and wifely faith. (M.)

The reasons are easily drawn, from what has been said, why it belongs to the husband to decide on their place of dwelling: because, namely, he received the wife into his family, not *vice versa*; and he is constituted its head and director. Although no man would in all likelihood be so harsh as not to confer with his wife as well on such a matter, especially if he is indebted to her for some part of his wealth.

Another obvious conclusion is, that, if the marriage pact is to continue unimpaired, a wife cannot go abroad or dwell apart without her husband's permission, or deny him her embraces without sufficient reason.

Upon these considerations rest that presumption that every child is held to be from its mother's husband, or why a child is in the eyes of the law what the marriage of his mother shows that it is, unless such presumption is removed by weightier arguments. See Gellius, Bk. III, chap. xvi; Pliny, *Natural History*, Bk. VII, chap. v. Although the English laws are too favourable to women, in that they force the husband, even though he has been absent several years, to acknowledge as his a child born in the meantime to his wife, provided he has for that period not left the island. Edward Chamberlayne, *The Present State of England*, Pt. I, chap. xvi. And this for the reasons that the wife gave her husband her word on this very point, which she is presumed to keep, and that the authority lies with him to guard his wife's chastity. For it is assumed that any man makes a normal use of his own right and power. Gyges says in Herodotus, Bk. I [viii]: 'Each man should look on

his own.' (M.) Here belongs the account of Plato, *Alcibiades*, chap. i [p. 121 B C]:

The wives of the Spartan kings are under the observation of the Ephori, who are public officers, and watch over them, in order to preserve the purity of the Heracleid blood. And the Persian king far surpasses them; for no one ever entertains a suspicion that a prince of Persia can have any other father. Such is the awe which invests the person of the queen, that she needs no other guard. (J.) 584

Therefore, it is not without every reason, that, in the eyes of the common sort, some disgrace is held to attach to husbands from the loose ways of their wives, because they would not use their power through their own carelessness or faintheartedness. Add Descartes, *Les Passions*, art. 169. And Domitian was right in striking the name of a Roman knight off the jury lists, because he had received back his wife whom he had divorced on a charge of adultery. Suetonius, *Domitian*, chap. iii [viii]. And by the Athenian law a man who still kept his wife after she had been taken in adultery, lost his citizenship. Demosthenes, *Against Neaera* [52]. Add *Digest*, XLVIII. v. 29 pr., 2,¹ § 6. According to Tacitus, *Annals*, Bk. II [lxxxv. 3]: 'Vestilia's husband, Titidius Labeo, was called upon to explain how it was that, though the guilt of his wife was notorious, he had failed to put in force against her the penalties of the law.' His excuse was: 'The sixty days allowed him to make up his mind had not expired.' (R.) Although there are those who base the reason for this disgrace on the fact that it appears a shameful thing for a man to lack those endowments which could deserve his wife's love, or preserve her promise. And yet those who cannot remedy that misfortune, or see unfortunate consequences following upon the punishment of the guilty wife, may find it their safest course to follow the advice of Euripides, *Hippolytus* [465 f.]:

The maxim this

Of wise men that dishonour be not seen. (W.)

Add Plutarch, *De Tranquillitate Animi*, p. 467 E F. And the remark of Charron², *De la Sagesse*, Bk. I, chap. xxxix, n. 11, cannot always hold good, namely, that to throw up to a husband the misconduct of his wife as his own disgrace, is one of the foolish ideas of the common sort; as if he who had no power to find a remedy should atone for another's sin.

That such marks of reproach, which the common sort throw up to husbands, are not new, or employed alone by Western peoples, is shown in Nicetas Acominatus, *De Imperio Andronici*, Bk. II, where he tells how the emperor had some unusually large horns of stags which he had killed, hung on the gates of the market-place as though to call attention to the number of beasts he had taken, but actually to censure the morals of the state and the looseness of the women. Yet just as she cannot

¹ [For '1. 1' read '2'.—Tr.]

² [For Charon read Charron.—Tr.]

be called an adulteress, who unwillingly and despite her struggles fails a victim to another's lust (see *Decretum*, II. xxxii. 5. 2 ff.), so it does not appear disgraceful for a man to keep such a victim as his wife. Although the action of David in 2 *Samuel*, xx. 3, is worthy of our approval.

11. A further subject for investigation is, whether, by the mere law of nature, in consequence of a principal pact of a completed marriage, there necessarily results a sovereignty, or dominion, properly so called, of the husband over the wife. In Holy Writ, indeed, the will of the wife is said to be subject to her husband, and the latter is expressly constituted her master. But since this is said to have been enjoined upon a woman by way of punishment, it can be looked at as a command only of positive law. Now in deducing the natural law on this point, it will have to be observed, first of all, that he who is obligated to obey the will of another in some kind of business, does not at once become subject to him, since the former status can arise also from a simple pact. For there are many pacts, particularly those of 'gift for work' and 'work for work', where, at the outset, the parties enjoy equal freedom of choice whether they would enter them or not. Yet after such a pact is entered upon, one of the parties must follow the will of the other in the business agreed upon, and not *vice versa*. Therefore, although in matters peculiar to marriage the wife is obligated to adapt herself to the will of the husband, yet it does not at once follow that he necessarily has power over her in other acts as well.

Furthermore, the end of marriage is not like that of states, which is
 585 the defence and security of men, for the society so formed consists of too few members for their united strength to be able to furnish mutual security. How much defence, indeed, can come from union with a woman? No, marriage has as its end the propagation of mankind. Therefore, just as states are unimaginable without sovereignty, so it appears that marriage may be sustained by a mere pact, and affection without sovereignty. And yet a family by itself does have at first glance some similarity to a state, for when a wife is received into it, it appears that she should submit to its regimen, since it would be unusual for it to have two heads, or for a person to be in it and yet not subject to its head. But the reply may be made that families, and especially those with a large establishment, may have a twofold end, one common with that of states, the other peculiar to itself. The common end is discernible in defence and security resulting from the union of several persons. And although this requires sovereignty, yet since the wife makes little contribution to that end, it can suffice for the unity of a family if she be joined to her husband by a simple pact and a degree of friendship. Thus Abraham exercised sovereignty or authority over the rest of his household, and yet he appears to have held Sarah in no other than sisterly equality. See *Genesis*, xvi. 2, 5, 6; xxi. 10-12. Yet her respect

for her husband is especially commended in Sacred Scripture, because she called him Lord. 1 *Peter*, iii. 6.

The special end of marriage, likewise, seems easily enough obtainable, even though neither of the parties should exercise over the other real sovereignty, such as includes the right of life and death, and a very rigorous restraint; but mere affection and a pact may unite the couple. Yet since the position of the husband is better, inasmuch as he enjoys the superiority of his sex, that pact partakes of the nature of an unequal league, in which the husband and wife each owe the other something, the former protection, the latter obedience. Martial, Bk. VIII, ep. xii [3-4]: 'The mistress of the house should be subordinate to her husband, for in no other way, Priscus, will the wife and husband be on an equality.' (A.) Pliny, *Panegyric* [lxiii. 4 and 7]: 'Many have been prevented from passing as great men because as husbands they have been second rate.' Yet there is nothing repugnant to natural law in a wife being subject to the actual sovereignty of the husband, for the fear of supreme authority and conjugal affection are no more mutually destructive than does the sovereignty in a prince of itself destroy the love of his citizens. And this sovereignty can not only be acquired by individual citizens through being added by a pact to the marriage contract, but it can also be sanctioned among entire nations by public law. Caesar, *Gallic War*, Bk. VI [xix], writes of the Gauls that they had over their wives, as well as over their children, the 'right of life and death'. Among the Germans husbands were allowed with their own hands to punish their wives for adultery (Tacitus, *Germany*, chap. xix); and this was to be meted out by virtue of their sovereignty, not as a means of indulging their wrath. About servants the same writer adds [xxv]: 'If they kill a slave, it is not usually to preserve strict discipline, but in a fit of fury, like an enemy, except that there is no penalty to be paid.' (H.) Gellius, Bk. X, chap. xxiii, gives us a portion of a speech by Cato:

A husband (says he)¹ when he puts away his wife, judges his own cause as a censor, and has, it seems, entire control in the matter. If she has committed any perverse or disgraceful act, she is fined; if she has drunk wine, or contaminated herself by intercourse with another man, she is condemned. (Likewise) if you shall have caught your wife in adultery, you may kill her without any legal process; but she, should you be guilty of the crime, must not presume to touch you with her finger: the law does not permit it. (B.)

Tacitus, *Annals*, Bk. XIII, chap. xxxii: 'Pomponia Graecina, having been accused of some foreign superstition, was handed over for trial to her husband. So in accordance with ancient practice he sat in judgement on his wife's status and reputation in the presence of her relatives.' (R.) Add also Euripides, *Medea*, lines 230 ff.; and on the customs of the Japanese, Bernhard Varenus, *Descriptio Japoniae*, chap. xiii. *Law of the Visigoths*, Bk. IV, tit. iv, chap. 3. Worthy of 586

¹ [For nisi read inquit.—Tr.]

mention is what Aelian, *Varia Historia*, Bk. XII, chap. xxxviii, tells about the Sacae: 'If any one wants to take a girl to wife, he starts a fight with her. If the girl wins, she carries him off as her captive and maintains authority over him; if she loses he rules over her. The struggle, however, is not for life and death, but only for victory.'

How much power belongs to the husband over his wife's money, will likewise depend upon an agreement between the two, or upon civil laws. For these engagements must be strictly lived up to, whatever agreement the two may have reached; whether the woman is to bring a dowry at marriage, or the resources of the two are to be fused into one, or the husband is to have a full or restricted power to dispose of the marriage dowry, and the like. Among the Japanese the wives bring no dowry to their husbands; the wealthier parents sometimes send a certain sum of money by their daughters to the groom on the wedding day, but he returns it with fitting ceremonies. For they are unwilling to do anything whereby the wife might have occasion for pride. They also commonly repeat the saying, that a woman her life long is without a home which she can call her own; for a daughter lives in the house of her parents, a wife in that of her husband, and a widow with her children. Bernhard Varenius, *Descriptio Japoniae*, chap. xii. We may note, in passing, a custom of the ancient Thracians, as given in Solinus, chap. xv: 'Marriageable maidens do not take husbands at the will of their parents, but the more beautiful ones prefer to be put up at auction, and through recognizing the right of valuation these marry not for character but at a price; while the less attractive ones purchase husbands with dowries.' So in Xenophon, *Anabasis*, Bk. VII, Seuthes says: 'If you have a daughter, I will purchase her in the Thracian fashion.' Add Heraclides, *De Politis* [Aristotle, frg. mdcxi. lviii]; Mela, Bk. II, chap. ii. The Assyrians likewise set up their maidens for public auction. Aelian, *Varia Historia*, Bk. IV, chap. i; Herodotus, Bk. I.

We may add the rules of Roman law on prohibiting donations between husband and wife; *Digest*, XXIV. i. 1, 2, 3 pr. When the civil laws have no ruling on such matters, or when the pair lives in natural liberty, they may make such agreement among themselves as they please on these matters.

12. To illustrate these points it is worth while to consider what is said by Johannes Frid. Hornius, *De Civitate*, Bk. I, chap. i. He at once rejects those who maintain that the sovereignty of a husband over his wife is *by nature*. This we assent to, provided it means that sovereignty belongs to a husband by nature alone, without an intervening pact and voluntary subjection on the part of the wife. That, indeed, is opposed to the natural equality of all mankind; and aptitude alone does not confer sovereignty.

He then maintains: 'No sovereignty, either public or private,

belongs to man over man, save by the most explicit appointment of God, and His most evident intervention.' Here we must observe that when the origin of sovereignty is investigated we properly inquire about the nearest, immediate, and secondary cause; and that the first and universal cause is always presupposed. And so, although there be a command of God on the introduction of some kind of order among men, the question still remains, what pacts should intervene to make men order themselves according to the command of God. For surely it is credulous to believe that when God is called the moral author of some thing, it is caused by Him in the same manner as He created the heavens and earth without the intervention of any creature. If God commanded that the tabernacle be made, it does not mean that those who undertook the task cannot be called the nearest and immediate cause of it. And so, even if God commanded that a woman obey a man, yet for such a sovereignty actually to exist, she should subject herself to him by a pact, by which very act and through it he is constituted her lord. Thus, although God said, 'Have dominion over the beasts of the field,' we must needs secure them by hunting. 587

His next argument also is worthless: 'The wife has no marriage sovereignty and so cannot confer it on her husband.' As if agreements among men cannot produce a moral quality which did not formally exist beforehand! It is not necessary for the establishment of sovereignty that it already formally lie in one person and be transferred to another (just as for physical substances to be transferable from one person to another, they must be already existent); but it arises when a man renounces that faculty of resisting another which he otherwise enjoyed by reason of natural liberty, and subjects his will to the will of the other, giving his promise to abide by the other's dictates.

Furthermore, although it is stated in Sacred Scripture that subjection was enjoined upon Eve as a penalty for having seduced her husband, yet it does not follow from that fact that her husband's sovereignty, after the fall, did not have as its second and nearest cause, the agreement between husband and wife. For inasmuch as not every necessity for obedience carries with it some infelicity (just as the most blessed state of the angels is not impaired because they must give scrupulous obedience to God), the punishment in woman's subjection lies in this, that she bears the yoke against her will and under the constant urge of a desire to rule. Therefore, these statements are not contradictory: The husband's sovereignty naturally springs from the consent of the woman; and, God made that sovereignty galling to women by way of punishment.

The following is a meaningless subtlety: 'Now whatever will and voluntary pact is found in the woman, pertains only for the contraction of the marriage, and must, therefore, be interpreted in accordance

with the assent and approval by which the woman acquiesces in the sovereignty, which will follow, of a certain husband.' This merely means that a husband's sovereignty is not produced by the consent of his wife, but is already ordained by the command of God, and consented to by the wife. Just as a traveller does not build an inn, but of his own accord enters one already built.

And yet it should be carefully noted that the sovereignty, as a moral entity, of one man over another, does not exist without a human act and is not intelligible without obedience. And no obligation to obey lies upon a woman before she has with her own consent subjected herself to a man. And although it is agreeable to the divine will that this be done, that circumstance does not, however, prevent her pact, and the attendant subjection, from being the immediate and nearest cause that produces the sovereignty of her husband.

13. Nor do we grant the same author, *loc. cit.*, that there belongs to the husband, in addition to sovereignty in things relating to the marriage and family, full 'right of life and death', and that in this right 'lies the sum of the husband's sovereignty'. Yet let this power be understood to be such as has not yet been restrained by civil sovereignty, and as does not consist of any licence excusing the cruelty of parricide, but of the lawful authority to punish without shrift capital crimes. But that 'all sovereignty, in so far as it is seated in a proper person, and is not held precariously from some man or circumscribed by a superior, implies the right of life and death', is a statement which I can scarcely accept offhand. Surely the end of marriage requires no such sovereignty. And if some one believes that certain heinous crimes should be brought before a human court, who will punish the head of a household distinct from the state, and who will punish a king in a state? But if a wife commits an intolerable crime, she may be thrust out of the family like an enemy, and put to death as if by the right of war. And we have already admitted that a sovereignty of this kind is not opposed to the nature of marriage.

14. At this point we must explain the common maxim of the lawyers, that 'consent and not cohabitation consummate marriage' (*Digest*, XXXV. i. 15); or, as it is stated by Quintilian, *Declamations*, ccxlvii: 'Copulation and intercourse that are unsanctioned by law do not make a woman a wife' (see *Decretum*, II. xxvii. 2, 5). This may
588 have two interpretations: either that they who have had associations of intimacy do not forthwith form a pair, unless they have agreed upon marriage (Vergil, *Aeneid*, Bk. IV [338-9]: 'Nor did I proffer you a formal marriage, nor did I undertake a bond like that' (B.)); or that as soon as both have given their consent the marriage contract is looked upon as consummated, even before they have known each other. My judgement on this would be, that just as it is required for the full

transference of dominion over a thing, that it be so constituted in some one's power that he may dispose of it whenever he pleases, so for it to be said that some one is actually another's wife, it appears necessary that she have come, as it were, into the hands of the man in such a way that he may treat her as a wife. But it is not at all necessary that this begin with the marriage bed. Thus Rebecca became the wife of Isaac after he had brought her into his mother's tent. *Genesis*, xxv, towards the end. So also I question whether we can call a woman an adulteress who, although betrothed to an absent lover, copulates with a third before she is taken to his home, even though marriages be consummated in the eyes of the law by proxy. On the other hand it would be absurd to try to deny that Sarah was the wife of Tobias for the first three nights (see *Tobias*, vi. 19 [18]); or that the marriage is not completed, when by our customs the priest has performed his part, until the night has brought consummation.

According to the Hebrews, as Selden, Bk. V, chap. iv, tells us, before the giving of the Mosaic law there was required for marriage both consent and consummation; and so in those days marriage was a physical union of a man and a woman, preceded by consent to the uniting of life and bed. But in the eyes of the Hebrew civil law consent alone made marriage. *Deuteronomy*, xxii. 23-4; add *Code*, V. v. 8.

We should add, in this connexion, what Grotius on *Matthew*, i. 18, notes: That among the Hebrews a wedding was not complete until a gathering had been made and the ceremony begun with solemn prayer; which the Jews formerly observed and still do, not so much as a command of the law, but as a custom of their ancestors, from whom that most worthy institution has passed on to Christians. And so, although after betrothal the young man took upon himself the care of the maiden's honour, she yet remained until the day of her marriage ἐν τῇ γυναικωνίτιδι [in the women's quarters], apart from her lover, living from then on as in another house. Compare *Genesis*, xxiv. 67; *Deuteronomy*, xxi. 13.

15. Our next step is to inquire whether there can be no marriage by natural law save between one man and one woman, or, what amounts to the same thing, whether that law allows polygamy. Now polygamy is of two kinds: the one, when several men copulate promiscuously with one woman, or when one woman marries several men; and the other when one man has several wives. To the former kind you may refer the community of wives of Plato, so much discussed; compare Plato, *Republic*, Bk. V, and the preface to that book by Marsilius Ficinus. A similar practice is ascribed to the Taprobanians by Diodorus Siculus, Bk. II, chap. lviii:

They never marry, but make use of women promiscuously, and breed up the children so begotten as common to them all, with equal care and affection to one as well as to

another. The children, while they are tender infants, are often changed by the nurses, that they cannot know even their mothers.¹ (B.*)

Add *Idem*, Bk. III, chap. xv, on the Ichthyophagi; Bk. III, chap. xxiv, on the Hylophagi; Bk. III, chap. xxxii, on the Nomads, who are also mentioned by Strabo, Bk. VII. On the vile customs of the Garamantes, see Pliny, *Natural History*, Bk. V, chap. viii, and Solinus, chap. xliii; of the Troglodytes, Agatharchides, chap. xxx, and Pomponius Mela, Bk. I, chap. viii; of the Agathyrsi, Herodotus, Bk. IV [civ], as well as of the Gindani and Nomads. Of the inhabitants of Thule, Solinus, chap. xxxv [22, 17 addit.] reports, I know not how trustworthily: 'They treat their women as a common possession, and no one is formally married.' Caesar, *Gallic War*, Bk. V [xiv], has the
 589 same to say of the ancient Britons: 'Groups of ten or twelve men have wives together in common, and particularly brothers along with brothers, and fathers with sons; but the children born of the unions are reckoned to belong to the particular house to which the maidens were first conducted.' (E.*) It is clear, in this case, that Caesar did not mean that one woman married at the same time ten or twelve husbands, as even Selden, Bk. V, chap. xi, believed, but that when ten or twelve had each taken a wife, they thereupon kept them in common and each lay with any one he pleased. The same custom is mentioned, but less definitely, by Xiphilinus, *Epitome of Dio's History*, Nero (in the speech of Buduica² [LXII. vi. 3]), and Severus. Much the same is told of the Sabaeans by Strabo, Bk. XVI [iv. 25]:

Property is the common possession of all the relationship, but the eldest is the owner. All the members of the group have one wife; the one who comes first goes in and leaves his staff at the door. [. . .] The common wife, however, spends the night with the eldest member. In consequence of these customs all are the brothers of all the rest. [. . .] An adulterer is punished with death; but in order to be an adulterer one must come of a different family.

Add what the same author writes (Bk. XI) of the Massagetae and Tapyri. Ludovicus Romanus, *Navigatio*, Bk. V, chap. viii, has this to say of some of the inhabitants of the kingdom of Calicut: 'A woman marries seven men who keep turn in their nights with her. And their women, when they have given birth, assign the child to any one of the seven they please, there being no appeal from their decision.' The same is told by Petrus de Valle, *Viaggi*, Pt. III, ep. vii. Here you may also refer the account, drawn from Aeneas Sylvius, of the Lithuanians by Johannes Boemus, *De Moribus Gentium* [*Omnium gentium mores*], Bk. III, chap. vii: 'The matrons openly have, with the permission of their husbands, their lovers, whom they call assistants of their bed; but concubinage among the men is condemned.'

¹ [So Pufendorf incorrectly for 'so that not even the mothers can recognize their own' of the original; or else, more probably, *suas* is a misprint for *suos*, which would give the correct sense, and the error belongs to the printer.—*Tr.*]
² [For *Bundoicae* read *Buduicae*.—*Tr.*]

In the same way, according to Plutarch, *Lycurgus* [xv. 6 f.] the lawgiver endeavoured to banish from the Spartan state

the empty and womanish passion of jealous possession, by making it honourable to share with other worthy men in the begetting of children, laughing to scorn those who regard such common privileges as intolerable, and resort to murder and war rather than grant them. For example, an elderly man with a young wife, if he looked with favour and esteem on some fair and noble young man, might introduce him to her, and adopt her offspring by such a noble father as his own. And again, a worthy man who admired some woman for the fine children that she bore her husband and the modesty of her behaviour as a wife, might enjoy her favours, if her husband would consent, thus planting, as it were, in a soil of beautiful fruitage, and begetting for himself noble sons, who would have the blood of noble men in their veins. For in the first place, Lycurgus did not regard sons as the peculiar property of their fathers, but rather as the common property of the state, and therefore would not have his citizens sprung from random parentage, but from the best there was. In the second place, he saw much folly and vanity in what other peoples enacted for the regulation of these matters; in the breeding of dogs and horses they insist on having the best sires which money or favour can secure, but they keep their wives under lock and key, demanding that they have children by none but themselves, even though they be foolish, infirm, or diseased; as though children of bad stock did not show their badness to those first who possessed and reared them, and children of good stock, contrariwise, their goodness. (And this was done, he concludes), with the aim of physical and political well-being. (P.)

Mention also of that law is made by Xenophon, *Constitution of the Lacedaemonians* [i. 7].

The Stoics also, according to Diogenes Laertius [VII. 131], on Zeno, used to say that among wise men wives should be in common, so that any one might lie with the first woman who met him, for in this way all men would love children like fathers with equal affection, and suspicion of adultery and jealousy would be utterly done away with. Add also Thomas Campanella, *City of the Sun*. Nor was it unusual among the Romans for a man to lend, as it were, his wife to another man that he might have children by her, and then take her back again, if he so wished. See Plutarch, *Numa* [p. 76 D]. Thus Cato lent his wife Marcia to Q. Hortensius. *Idem*, *Cato the Younger* [xxv, p. 771]; Lucan, Bk. II, line 326. A law of Solon allowed an heiress who had been claimed by an impotent kinsman, to yield herself to his kinsmen. 590
Plutarch, *Solon* [xx].

Yet it cannot be doubted that all these practices are repugnant to natural law. Compare *Matthew*, xxii. 25 ff. For the natural and orderly end of marriage is for one to secure his own particular offspring, and how could a man recognize his own in such promiscuity? Furthermore, since conception may occur but once, such intercourse serves no end but the satisfaction of lust. A further consideration is that the most endearing terms of relationship are by such actions confounded and practically done away with entirely. For the scheme of Plato, *Republic*, Bk. V [p. 461 B ff.], that the law shall designate not only the words of

relationship, such as father, mother, son, daughter, brother, sister, but also the duties owed to such relations, and that a man shall regard those who are older than himself as his parents, those who are younger, as his children, and those of his own age as his brothers, is of no value. He who has not a particular father has no father. Lactantius, *Divine Institutes*, Bk. III, chap. xx, remarks to the point:

If all are the children of all, who will be able to love children as his own, when he is either ignorant or in doubt whether they are his own? Who will bestow honour upon any one as a father, when he does not know from whom he was born? From which it comes to pass, that he not only esteems a stranger as a father, but also a father as a stranger, &c. (C.) And it was well answered the man who wondered at the fact that adultery was not heard of among the Lacedaemonians, that their marriage was adultery, in reference to their vile custom of lending their wives around.

Again, the main difference between the mating of mankind and the promiscuity of the beasts, lies in the fact that the wives plight their faith to their husbands to give their bodies to them alone. If a husband voluntarily breaks his engagement to his wife by admitting assistants and substitutes to his bed, he is unworthy the name of man and husband, and is the vilest kind of a disturber of ordered human society. And if a lawgiver felt that a fertile field should not lie idle because of the impotence of a senile husband, a far better way to prevent that loss would have been to forbid the marriage of young girls to nerveless old men.

Furthermore, as to that jealousy, due to a wife's suspected misdeed that never took place, just as it is the most foolish and miserable disease (see Oppian, *The Chase*, Bk. III, lines 237 ff.), so no sane man would say that in its form as a zealous preservation of the chastity of a wife and the reluctance to admit waylayers to one's bed, it is repugnant to honour and reason (see Seneca, *Hercules Oetaeus*,¹ line 233). And yet that community of wives could not have removed this idle jealousy, nor should it have done away with the honourable kind. Nor can I be persuaded that citizens would ever be bound in the closest ties possible, by some such scheme, whereby any man may say of any one, 'This is mine'. It is undoubtedly preferable that states be filled with stalwart men, in preference to maimed and sick, and it is a rule that the strong bring forth strong rather than weak. Yet even if the offspring would always carry on the strength of their father, that consideration would never bulk so large, that, in order to gain it, the sanctity of marriage, the foundation of all good order, should be destroyed. To apply to this institution a parallel from the breeding of horse, is a thing too vile to deserve refutation. Add the arguments adduced against Plato by Aristotle, *Politics*, Bk. II, chap. ii, and his excellent remarks in the same work, Bk. VII, chap. xvi (21) [VII. xvi. 18]: 'As to adultery,

¹ [For *Oclau*. read *Oetaeo*.—Tr.]

let it be held disgraceful for any man or woman to be unfaithful when they are married, and called husband and wife.' (J.)

16. The second kind of polygamy, and that which properly bears the name, is when several wives are united to one man, as it has been and still is practised among many peoples. The custom as it prevailed among the Hebrews is to be seen quite clearly from *Deuteronomy*, xxi. 15; xvii. 16-17, and the passage of Ambrose in *Decretum*, II. xxxii. 4, 3 and 7. Thus in 2 *Samuel*, xii. 8, God claims it as a proof of His great kindness to David, that He had given him many choice wives. And as Selden, *Marriage and Divorce among the Hebrews*, Bk. I, chap. ix, points out, the Hebrews held that every man might take as many wives as he wished, provided he was able to furnish each of them with food, clothing, and the proper conjugal affection. Yet it was to avoid the inconveniences attendant upon a number of wives, that their wise men advised no one but the king to take more than four; and he who did otherwise was held imprudent and disobedient to the institutions of their fathers. They held that a priest should have at the same time no more than one, although, if the first were divorced or dead, he was not forbidden to take a second. But they believed that by the command of *Deuteronomy*, xvii. 17, the king was forbidden to take more than eighteen. Yet if members of their race were dwelling where only monogamy was practised, they were directed to take but one. Thus, according to *Code*, I. ix. 8, polygamy was forbidden such as lived under Roman jurisdiction. Add likewise Selden, *De Jure Naturali et Gentium*, Bk. V, chap. vi. On the present Jews, Leo of Modena, *De Ritibus Hebraicis*, Pt. IV, chap. ii, observes that those living in the Orient still marry several wives, which is not permitted in Germany and is not done, while it is very rare in Italy, and only in case a man has lived with his first wife many years without issue. Here Selden, *loc. cit.*, remarks that in the first edition the words were added 'yet not without securing the permission of the pope at Rome', which are omitted in the Paris edition of 1637.

Tacitus writes of the ancient Germans [*Germany*, xviii]: 'They are almost the only barbarians who are content with a wife apiece; the very few exceptions have nothing to do with passion, but consist of those with whom polygamous marriage is eagerly sought for the sake of their high birth.' (H.) Thus according to Caesar, *Gallie War*, Bk. I [liii], Ariovistus had two wives, one of the Suebi, the other of the Norici.

Although the Greeks were as a rule monogamous, there was a vote of the Athenians which ran: '[The Athenians, on account of the scarcity of men, passed a vote,] with the view of increasing the population, that a man might marry one citizen, and might also have children by another

¹ [For '56r' read '59r'.—Tr.]

who should be legitimate.' Diogenes Laertius [II. 26], on Socrates. Therefore, Athenaeus, Bk. XIII, chap. i [27], while saying that it did not seem likely that Socrates had the two wives, Xantippe and Myrto, as some writers affirmed, both because of the law of Cecrops, and especially since the comic poets, who were always abusing him, make no mention of it, adds: 'Unless perhaps this licence was allowed by a decree at that time on account of the scarcity of men.' Gellius, Bk. XV, chap. ii, gives as one of the reasons for the *μισογυνία* [misogyny] of Euripides, that he had two wives (since it was allowed by that decree of the Athenians), and became wearied of his marriage to them. When the Spartan king Anaxandrides was unwilling to repudiate his wife who had given him no issue, he was forced by the orders of the ephors to take another who would. Herodotus, Bk. V [xxxix, xl]. It is well known that the Romans were monogamous; see *Code*, V. v. 2; IX. ix. 18. And yet Suetonius, *Julius Caesar*, chap. lii, writes that Julius Caesar wanted to have a law passed 'Making it lawful for him to marry what wives he wished and as many as he wished "for the purpose of begetting children".' (R.) So also Socrates, *Ecclesiastical History*, Bk. IV, chap. xxvi [xxx], says that the emperor Valentinian, in addition to his first wife Severa, took a second, Justina, a woman of great beauty, and passed a law, published in all the provinces, whereby every man was allowed 'to have two lawful wives'. The same account is given by Paulus Diaconus, Bk. XI, although Zonaras mentions only
 592 his two wives and is silent about the law. And since the other historians, Ammianus, Zosimus, and Orosius, as well as the Christian Fathers who dispute so often on questions of marriage, are silent on the matter, the case is taken as one of bigamy and the law as a pure fiction, by Baronius, Bk. IV, § 125, on the year 370.

Also Mahomet in his new dispensation permitted polygamy, very cunningly adapting himself to the nature of the peoples whom he was setting out to deceive. For those who dwell in warmer portions of the earth are usually very passionate, while their women, whether from natural endowment or because of their rearing, are so under the power of their husbands that their jealousies generally do not greatly disturb the peace of the household. Yet the wealthier among those peoples follow the practice of keeping each wife in a separate house, while some of them keep them in different cities in order to avoid their quarrels. Richerius, *De Moribus Turcarum*. The reason for this institution is given by Boccalini, *Ragguagli di Parnaso*, Cent. II, chap. lxxviii, namely, that it serves to dispose men to bear the harshness of slavery, inasmuch as the division of wealth among several children weakens the families, is subtle indeed, but not such as Mahomet could have envisaged, since the Turkish Empire arose so long after his death. It is said that the principal reason why so many princes of India reject the Christian faith

is because they were commanded to be content for the future with one wife. Add Abraham Rogerius, *De Braminibus*, Pt. I, chap. xiii; Alexander of Rhodes, *Divers Voyages*, Pt. II, chap. xi.

17. Whether or not this form of polygamy is repugnant to the law of nature, is a question upon which the learned are not yet in entire agreement. We for our part will set forth the arguments for both sides, leaving the decision to the reader.

Now those who maintain that polygamy is not repugnant to the law of nature speak in this way. The end of formal marriage, which is certainty as to one's offspring and mutual assistance, can be secured no less in polygamy than in monogamy. For the repeated claim of some that 'by this custom there will be no return of conjugal faith', as reason dictates, 'since otherwise the reason of the pact and exchange of faith cannot take place', is senseless, for mutual faith does not require that it be equal upon both sides. Nor does the end of formal marriage require that just as the wife shall admit to her person no one but her husband, so her husband may not bestow himself on any other women than his sole wife; for the certainty as to one's offspring which forbids a woman from being intimate with several men, has nothing to do with a man. Nor is the husband less obliged to keep faith with his wife, which is seen in the giving of aid and the performance of what is called the conjugal debt. And on this last obligation, inasmuch as among many nations men have such strength that they can satisfy several women, several wives of one man can have no cause for complaint. Indeed, if we direct our gaze upon the primary purpose of marriage, which is the generation of offspring, even among continent peoples it is not beyond the strength of one man to meet that duty for several women, especially if the women would follow the example of Zenobia, queen of the Palmyrenes, 'who knew not her own husband save to secure issue', as says Trebellius Pollio [*Thirty Tyrants*, xxx]. Therefore, the fierce hatred of women for polygamy is due to their intemperance.

But if a wife had bargained with her husband that he serve her bed alone, as Laban required of Jacob that he take no other wives after his daughters, such a pact must be kept. Add *Digest*, XLV. i. 121, § 1. When that has not been done, it is enough for the wife that she have had her share¹ of her husband's attentions. See *Genesis*, xxx. 15, 19; Herodotus, Bk. III [lxix]: 'In Persia a man's wives sleep with him in their turns.' (R.) Nor does the wife suffer an injury if her husband share his affections with his other wives, because she has no further right over the body of her husband than she acquired by the marriage pact. And in that she received a right not to his entire affections, but to her share of them, and to such a marriage she gave her free consent. And so her sole cause for complaint against her husband is when, as

¹ [For *rara* read *rata*.—Tr.]

Plautus, *Asinaria*, Act V, sc. ii [874], says: 'A man attends to the business of ploughing other people's fields and leaves his own uncultivated.' Add *Digest*, XLVIII. v. 13, § 5, and the comments thereon by Grotius in *Florum Sparsio* [XLVIII]. For women are not usually so desirous of honour that they are willing to acquiesce with complacency in the excuse which Aelius Verus in Spartianus offered his wife when she complained of his other indulgences [*Aelius Verus*, v]: 'Let me indulge my desires with others; for wife is a term of honour, not of pleasure.' Add Plautus, *The Merchant*, Act IV, last scene; *Decretum*, II. xxxii. 6. 2 ff.

They add, further, that polygamy does not reduce wives to a state of slavery, nor is it any disgrace for women to hold a position inferior to that of men; for the very weakness of their sex urges that they live under the tutelage, as it were, of their husbands. Euripides, *Suppliants* [40-1]:

Seemly it is

That women, which be wise, still act through men. (W.)

The reasons adduced with regard to jealousy, domestic discords, and hatreds of rival mothers for their offspring, do not make polygamy unlawful in the eyes of natural law, but the domestic infelicities which attend it are such as are not wanting in monogamy and second marriages, which no man would call illegal on that account. Nor are such troubles found equally everywhere, but only among those nations where the women are too forward, or where men are too subservient to their wives. But among many nations women are more accustomed to obey their husbands, whether because of their nature or their training (Benzoni, *History of the New World*, Pt. I, chap. xxxvii,) and a tactful man experiences no difficulty in preserving peace even between several wives. The reasons advanced by Denis Godefroy on *Code*, I. ix. 7, will be found to be trifling enough.

18. Those who deny that polygamy is agreeable to natural law call upon the command of the Decalogue not to commit adultery, which no one ever has said, or will say, applies only to women. If, then, it is binding upon both husband and wife, the former will be guilty of adultery whenever he has taken the marriage vow to a second wife, or received another woman to his bed, against the desires of her to whom he first pledged his faith, and gave power over his body. *Decretum*, II. xxxii. 5. 15, 16, 23. See Boecler on Grotius, Bk. II, chap. v, § 9. Hobbes, *De Cive*, chap. vi, § 16, &c.; chap. xiv, § 9, makes some reply to this, which we will discuss in another place.

Antonius Matthaeus, *De Criminibus*, III. i. 13, on *Digest*, XLVIII, denies that adultery is committed by polygamy (he had denied in the preceding section that intercourse between a married man and an

unmarried woman was adultery), since adultery is committed only with another's wife (*Digest*, XLVIII. v. 6, § 1). He further denies that every case of conjugal infidelity is adultery, for although a man who maliciously deserts his wife, and who does not fulfil his conjugal duty to her or support her, does violence to his marriage vow, yet he is not called an adulterer on that account. He goes on to say that although it is unfair for a man to demand a chastity of his wife which he himself does not observe, that does not mean that such a sin in both of them is equal. For every one knows that wives stand under a greater necessity of chastity, because of the modesty of their sex, the disgrace attending promiscuity of women, and the danger of the foisting off of children born of adultery, as well as the disgrace to the family and the whole state. Surely if it was held disgraceful for a child to be born of a citizen and a foreigner (and such offspring were formerly designated as hybrids) how much greater is the disgrace also for an entire state, if it is uncertain whether its citizens are the issue of an adulterous or a legitimate union. Thus in *Leviticus*, xviii. 20 and xx. 10, adultery is defined as approach to or violation of another's wife. Nor does it appear likely that a law on adultery which is passed for a polygamous people, can in any way apply to polygamy unless that had been expressly prohibited. The words of Sacred Scripture which calls it adultery to have desired another's wife, on which so many of the sayings of the fathers rest, and which are advanced by Gratian, *Decretum*, II. xxxii. 4. 3, 4 and 1, and II. xxxii. 6. 5 and *Decretals*, IV. xiii. 4, 10, are to be taken like those which call it homicide to hate one's brother. 594

Others take the opposite position: That the aforementioned commandment without doubt binds men as well as women, and that a husband should no more violate his wife's bed than a wife her husband's. But there is no violation of a couch in polygamy. It is, of course, obvious that he who promised his wife his entire body, breaks his word if he either goes after strange women, or takes another wife. But how will it appear that a man has broken his word who, on taking a wife, reserved to himself the privilege of taking yet another? Nor does he who promised but the partial service of his body withhold his conjugal duties by performing them for another as well.

To this the reply is made, that 'it is impossible to believe it would ever happen that a woman would consent to her own injury, unless brought to it by force or fear, or moved by weakness and lack of judgment, and from neither of these can a right arise'. But some do not recognize any injury in this, for the right belonging to one person over another's body was secured by the latter's consent and a pact. Therefore, if as much is performed as was promised by the pact, there is no reason to complain of injury. Nor does it follow, that, if a man is to secure a right over a woman as his wife, it can be secured by the nature of a just

marriage only in its entirety, and therefore, *vice versa*, a right should be acquired by a woman only over an entire man. Nor is the natural inequality of men infringed upon by this pact, for that equality by no means requires that the mutual performances among men be equal. Were this so, it would be repugnant to natural law that after some antecedent deed of men, even of aliens, some should, by mere fortune of birth, be born to sovereignty and others to obedience. And in marriage itself no sensible person would extend the equality of men so far, that he would maintain that the family sovereignty should be borne by husband and wife in turn. So in the bringing into the world of offspring what an easy part is played by the man, what anguish, what cares are drained, as it were, by the mother to the very dregs! Women would make themselves a laughing-stock in states, if they would want to be admitted to a share in the government; and yet no one would be so bold as to say they are excluded from this to their injury by men's tyranny. Thus if any people were of such a mind as to wish to be governed by a more autocratic sovereignty, which its bolder foes call no better than slavery, it would act foolishly and against that ruling prudence, which is the most benignant sister of natural law, if it would wish to give it more rein than is fitting. Therefore, it would be no less foolish to pity the condition of the women of Asia than that of plowmen and artisans, because they had a harder lot than those of gentle birth. The reason why a husband may not in decency admit friends to his bed is a very different thing.

Therefore, there is no reason for a wife fearing for her conscience if she agrees to a polygamous marriage, when it is the custom of the
 595 land; especially since it would be morally impossible for a custom once established in the public mind to be overthrown by women alone, even were it the most vicious imaginable. For they are both lacking in strength and excluded from a voice in the state, while there would not fail among them some who would want to cling to the side of peace. *Isaiah*, iv. 1. And although the example of the heathen and the Mohammedans (who may take four wives and as many concubines in addition as they can support) may be disregarded, since they obviously go counter to many principles of natural law, yet those act frankly who admit that the objection drawn from the polygamy of the fathers under the old covenant is unanswerable. Finally, they observe, on the saying of the Apostle in *1 Corinthians*, vii. 4, that there is no discussion there of the primary but of a secondary and indirect end and use of marriage, *διὰ τὰς πορνείας* [to avoid fornication], and since that end is needed as much by women as men, humanity and equity join in providing not only for the man but also for the woman; and it follows therefrom that a man cannot deny his body to his wife. But it does not follow from this that a man cannot bestow himself upon any other woman than his wife.

19. However all this may be, it is surely patent that it is best and most decorous, as well as most conducive to domestic peace, for one man to live content with one woman, and so this kind of marriage should undoubtedly be regarded as the most perfect, whose laws are to be observed most sacredly no less by the husband than the wife. Euripides, *Andromacha* [464 ff.]:

Never rival brides blessed marriage-estate,
Neither sons not born of one mother:
They were strife to the home, they were anguish of hate.
For the couch of the husband suffice one mate:
Be it shared of none other. (W.)

Isocrates, *Nicocles* [40]:

More than that, I considered that men were guilty of great wickedness, who, after taking a wife, and entering upon a life-long association, are not content with the arrangement they have made, but by their own indulgences pain those whom they expect never to cause them any pain, and while in other associations of life they behave fairly, do wrong in their dealings towards their wives, whom it was their greater duty to protect in proportion as they are nearer and dearer to them and of greater value than other people. (F.) Plautus, *The Merchant* [824-5]: 'Now a wife, a good wife, is content with just her husband; why should a husband be less content with just his wife?' (N.) To this subject can also be applied the following remarks of Plutarch, *Conjugal Precepts* [xliv]:

It is reported that the scent of sweet perfumes will make a cat grow mad. Now, supposing those strong perfumes which are used by many men should prove offensive to their wives, would it not be a great piece of unnatural unkindness to discompose a woman with continual fits rather than deny himself a pleasure so trivial? But when it is not their husbands' perfuming themselves, but their lascivious wandering after lewd and extravagant women, that disturbs and disorders their wives, it is a great piece of injustice, for the tickling pleasure of a few minutes, to afflict and disquiet a virtuous woman. [. . .] Much rather ought a man to be pure from the pollutions of harlotry, when he approaches his chaste and lawful wife. (G.)

Clytemnestra speaks as follows in Euripides, *Electra* [1035 ff.]:

Women be frail: sooth, I deny it not.
But when, this granted, 'tis the husband errs,
Slighting his own true bride, fain the wife
Would copy him, and find another love. (W.)

But it is also the case that of several wives one is loved above the others. *Genesis*, xxix; *Deuteronomy*, xxi. 15; *Esther*, ii. 17; *Song of Solomon*, vi. 7-8. Therefore, even when there is a number of wives, nature, as if of its own accord, inclines towards singleness. On this point bears the statement of Sallust, *Jugurtha* [lxxx]:

But such a tie (of son-in-law) is not considered very binding among the Numidians and Moors, since each of them has as many wives as his means permit—some ten, others more, and kings a still greater number. Thus their affection is distributed among a large number; 596¹ none of the wives is regarded as a consort, but all are equally misprised. (R.)

¹ [For '396' read '596'.—Tr.]

Ammianus Marcellinus, Bk. XXIII, chap. xii [76], writes to the same effect of the Parthians: 'Natural affection is lost among them because of the numerous objects of their license.' (Y.) Procopius, *War of the Vandals*, Bk. II [xi. 13]: 'And as for children, that will be your concern, who are not permitted to marry more than one wife, but with us, who have, it may be, fifty wives living with each of us, offspring of children can never fail.' (D.) Claudian, *War with Gildo* [441-3]: 'Though each has many wives, ties of family bind them not, nor have they any love for their children whose very number causes affection to fail.' (P.)

The following reasons for the reception of monogamy by Christians are adduced by Grotius, *On the Truth of the Christian Religion*, Bk. II, n. 13: That the wife, bestowing her mind and affection entirely upon her husband, may be met with an equal return; that the domestic regimen proceeds more properly under one head; and that different mothers may not cause discord among their children. To these may be added the political consideration, of considerable weight against polygamy among the more advanced nations, now that mankind has so multiplied, that with the signal increase of children noble families must be reduced to slender means and the poorer sort to beggary, while a state must be filled with too great a multitude of impoverished rabble, which will surely overwhelm society by its very mass, if it cannot conveniently be drawn off, for the doing of which there is not always an opportunity. For it is a most horrible manner in which the superabundance of men caused by polygamy is decreased in the kingdom of Angola—by selling them to toil in America. Nay, they say that even among the Turks polygamy is not practised so much as formerly, and is kept far within the limit of their law, the cause for which being apparently not so much the increase among them of sodomy, as the disadvantage attendant upon polygamy.

20. Another question no less vigorously discussed is, whether by natural law marriage is an association that can be dissolved, and whether, therefore, the same law allows divorces. Here again we shall set forth what is usually stressed on both sides, leaving the decision to those who know how to weigh the force of arguments.

As is presupposed at the outset, every pact implies that one party cannot depart from it but with the consent of the other, or if the other has violated it. Therefore, it will be repugnant to natural law if one of the married pair leaves the other against his will, when the latter has violated no part of the marriage pact; and this merely to better his position, or because it suits his fancy. Nor should *Digest*, XVII. ii. 14, be called upon in this connexion; for beside the consideration that either party thus deserted does without doubt suffer a damage, a partnership which was entered into for the sake of profit is far more

easily dissolved than that most intimate union between husband and wife. For in marriage each of the parties has secured a right over the body of the other, which cannot be taken away against either's will. Moreover, although marriages may be dissolved by mutual consent without any very serious cause, that is both unbecoming and menacing, since both families and the general propriety of states cannot avoid being seriously injured by the licence of such divorces. See Valerius Maximus, Bk. II, chap. ix, § 2. This principle may be extended to betrothals, which should not be broken off at the mere dissent of the parties, even though they be in their beginning, unless there be very good reason, or the conditions are wanting on the existence of which the validity of the pact was made to depend. Add Gellius, Bk. IV, chap. iv. Dionysius of Halicarnassus, Bk. II [xxv], highly commends an institution of Romulus in which he commanded that the bond of a marriage consummated by the offering of bread (*confarreatio*) should hold for ever: 'This law obliged both the married women, as having no other refuge, to conform themselves, entirely, to the temper of their husbands, and the husbands to retain their wives as necessary and inseparable companions.' (S.) And you may well number among the principal causes for the corruption of the morals of the Romans, the fact that divorces were so freely granted for unimportant causes, or none at all. Seneca, *On Benefits*, Bk. III, chap. vi [16]:

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Is any woman ashamed of being divorced, now that some noble ladies reckon the years of their lives, not by the number of the consuls, but by that of their husbands, now that they leave their homes in order to marry others, and marry only in order to be divorced? (S.)

Thus it is worthy of the barbarity of the Saracens which is seen in other things as well, that, as we are informed by Ammianus Marcellinus, Bk. XIX, chap. iii [XIX. iv]:

Their wives are hired, on special covenant, for a fixed time; and that there may be some appearance of marriage in the business, the intended wife, under the name of a dowry, offers a spear and a tent to her husband, with a right to quit him after a fixed day, if she should choose to do so. (Y.)

Similar marriages are often entered into by the Dutch in Japan, to be broken when they depart. Bernhard Varenus, *Japonia*, chap. xiii. This is the custom also in other regions of India. Ad. Olearius, *Itinerarium Persicum*, Bk. V, chap. xxii, writes that such marriages are common also among the Persians, as also does Petrus de Valle, *Viaggi*, Pt. II, ep. xvii. Surely there is no decency in that which is castigated by Juvenal, *Satires*, VI [142 ff.]:

'Why does Sartorius burn with love for Bibula?' If you shake out the truth, it is the face he loves, not the woman. Let three wrinkles make their appearance; let her skin become dry and flabby; let her teeth turn black and her eyes lose their lustre: then will his freedman give her the order, 'Pack up your traps and be off! You've become a nuisance;

you are forever blowing your nose; be off, and quick about it! There's another wife coming who will not snuffle.' (R.)

For 'when a woman grows old her children cement the marriage tie and a mother's dignity compensates for the lost charms of a wife'. Claudian, *Against Eutropius*, Bk. I [72-3]. Add Martial, Bk. X, ep. xli. Equally disgraceful is a law of Charondas, in Diodorus Siculus, Bk. XII, chap. xviii, whereby men and women are allowed to marry again after divorce, provided a younger mate is not taken than the one left.

Surely it is a great affront to dismiss a wife—an affront such as no honourable woman deserves save for very serious cause. And this should be extended to all repudiations. When Radigis, in Procopius, *Gothic War*, Bk. IV [xx. 22], broke off his betrothal to the maiden Brittia without showing any cause on her part, she 'unable to endure the disgrace, violently sought to make him pay for the insult. For the barbarians in that quarter of the world set so great store by chastity, that when marriage has once been mentioned, although not accomplished, a woman is regarded as having played the wanton'. In Tacitus, *Annals*, Bk. II [lxxxvi], in filling the office [of Vestal Virgin] 'the daughter of Pollio was preferred, for no other reason than that her mother had never had but one husband; whereas Agrippa had impaired the honour of his house by a divorce'. (R.) Publilius¹ Syrus [223, 340]: 'Repeated marriage merits condemnation. [. . .] The woman who marries many men is unattractive to many.'

21. We must inquire, further, whether what is common to all other pacts also holds true of marriage, namely, that when the primary articles, at least, of the pact have been violated by one of the parties the other secures thereby the power to withdraw from the marriage. It appears that this can safely be answered in the affirmative in the case of the principal articles. For the bond is entered into for the procreation of offspring, which end requires the mutual service of their bodies. Therefore, by mere natural law one of the two will be freed from the marriage bond when the other is guilty of malicious desertion, as well as of obstinate and voluntary refusal to perform the due rights of marriage. Under the latter head, according to Selden, *Marriage and Divorce among the Hebrews*, Bk. III, chaps. vi and vii, the Jews placed the 'action of conjugal dues'. Lactantius, *Divine Institutes*, Bk. V, chap. xxiii: 'The true reason why God willed that all other female animals should resist the advances of the males when they were pregnant, but that woman alone among them all should accept them, was that lust should not impel men, when their women repelled them, to look elsewhere, and in so doing² lose the glory of chastity.' Add *Decretum*,

¹ [For *Publius* read *Publilius*.—Tr.]

² [For *sacto* read *facto*.—Tr.]

II. xxxiii. 5. 1 ff. To this can be added Plutarch, *Amatorius* [xxiii, p. 769 A]:

Solon was a lawgiver the most experienced in conjugal affairs, who decreed that a husband should lie with his wife thrice a month at least—not for pleasure's sake—but that, as cities renew their treaties one with another at intervals, so the alliance of matrimony might be renewed by this enjoyment, after the jars which may have arisen in the meantime. (G.*)

And *Idem*, *Solon* [xx]:

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Conformable to this, also, is the requirement [...] that the husband of an heiress shall approach her thrice a month without fail. For even though they have no children, still, this is a mark of esteem and affection which a man should pay to a chaste wife; it removes many of the annoyances which develop in all such cases, and prevents their being altogether estranged by their differences. (P.)

Add Michel Montaigne, *Essais*, Bk. III, chap. v, pp. 102–3. Thus it is told in Diogenes Laertius [VIII. 21], in the life of Pythagoras, that when the philosopher descended into the lower world he witnessed the punishment 'of those who refused to consort with their wives'. Aristotle, *Economics*, Bk. I, chap. iv: 'A husband does wrong to seek sexual intercourse away from home.'

In the next place marriage is contracted so that a person may obtain, not adulterous nor supposititious offspring, but his own. Josephus, *Antiquities*, Bk. III, chap. x: 'Moses absolutely prohibited adultery, feeling the happiest state was for men to rest secure about their own marriage bed, and that it was best for states as well as private homes that the children who were born should be legitimate.' (W.) Nay, above and beyond the procreation of offspring, honourable men wish to keep their wives to themselves alone, and judge it improper, even though their ship be not loaded, to have it receive passengers. Surely we do not rate the praise of urbanity so highly as to fear the stricture of Ovid, *Amores*, Bk. III, chap. iv [37–8]: 'He is too countrified who is hurt when his wife plays false, and is but slightly acquainted with the manners of the city [Rome].' (S.) Martial, Bk. VI, ep. xc: 'Gellia has but one gallant; this is a great disgrace, but, what is greater, she is the wife of two husbands.' (A.) Add Abr. Rogerius, *De Braminibus*, Pat. I, chap. xiii.

It will, therefore, be just cause for divorce, if a wife grants another the service of her body, provided, of course, it be voluntary; for no one may rightly charge those women with adultery who are ravished against their will. See Valerius Maximus, Bk. VI, chap. i, § 2, *inter externa*; Livy, Bk. XXXVIII, chap. xxiv; Xenophon, *Hiero*, p. 578; *Digest*, XLVIII. v. 13, § 7; XLVIII. v. 39 pr., Aelian, *Varia Historia*, Bk. XII, chap. xlvii. For although it appear a graver offence to assault a woman's virtue by violence than by blandishments and persuasiveness, yet rape involves a greater injury for the wife, persuasion for the

husband. *Digest*, XI. iii. 1, § 3.: 'To persuade is something more than to compel and to constrain.' (M.*)¹

It appears, then, that the reason why adultery and malicious desertion are recorded as a sufficient cause for divorce, is not due to a special positive law of God, as though those were the two exceptions added to the absolute stability of marriage, but to the fact that the common nature of pacts is such that when one party does not abide by the agreements, the other is no longer bound by them. So much so that not only is the injured party no longer required to cohabit with such a perfidious consort, but he or she may marry again. Whatever the canon law urges to the contrary is nonsense. Nor is it a difficult task for those priests to find some other way around their own laws, if they wish to curry favour with some one, by declaring that the marriage was null at the outset, for which conclusion the same law can find many excuses.

But although marriage is chiefly entered into for the sake of securing children, yet it does not seem that mere sterility or lack of fecundity on the part of either, when otherwise fitted for the marriage state, is sufficient for divorce, since it does not lie within the powers of man to ensure fecundity. And yet Sp. Carvilius Ruga, the first man in Rome to divorce his wife, in the 523rd year of the city [231 B.C.], is said to have been moved to do so by the oath which every married man had to take before the censors, 'that he had a wife to secure children by her.' See Gellius, Bk. IV, chap. iii; Valerius Maximus, Bk. II, chap. i. We are informed in Herodotus, Bk. V, that although the Spartan king Anaxandrides was unwilling at the command of the ephors to divorce his wife, who had given him no issue, he nevertheless heeded their advice and took a second who could.

599 22. Now the main point of controversy concerns the following consideration: Since a wife regularly agrees to a continuous cohabitation with her husband, with all her strength to come to his aid with assistance and pleasant companionship, and places herself under his guidance in the home, her husband in return for all this owes his wife defence, honourable treatment, and the like. Homer, *Iliad*, Bk. IX² [341 f.]: 'Whatsoever man is good and sound of mind loveth his own and cherisheth her.' (L. L. & M.). Does then an aggravated violation of this duty to the husband give sufficient ground for divorce?

Not a few have no hesitation in answering this question in the affirmative, so far as the mere law of nature is concerned. For since a father has the right to cut off a disobedient son, who is surely in nature's law more closely joined to him than his wife, why may not a wife of unbearable disposition, who will not brook correction, be cast out of the home like a rebellious member of the family? Especially

¹ [The text of the *Digest* at this point is very uncertain.—Tr.]

² [For 'x' read 't'.—Tr.]

since nothing is more true than the remark of Fulgentius, *Mythologicon*, Bk. I [xxvii]: 'The more closely a wife is bound to her husband by the law, the more certainly is she either pleasing by the charm of her association or poisonous by her vixen disposition: for she is either a constant haven or a perpetual torment.' Semonides¹ [*Iamb.* 6]: 'A man wins no better spoil than a good wife, none more baneful than a bad one.' Euripides, *Orestes* [602 ff.]:

Happy the life of men whose marriages
Are blest; but they for whom they ill betide
At home, abroad, are they unfortunate. (W.)

On the other hand, if a husband treats his wife with unreasonable severity and fails to accord her the respect and regard due her sex, so as to show himself not so much a helpmate as a vexatious enemy, it seems but fair that she be able to look to her own interests by way of a divorce. Add a law of Theodosius in Justinian's *Code*, V. xvii. 8.

But now, however, a scruple arises as to whether it is permissible definitely to sever the conjugal bond because of intolerable habits and severe treatment, or whether the other offices of marriage, such as the propagation of offspring, may not be continued even though constant and pleasing cohabitation have been discontinued; for the former pact that concerns the bearing of issue seems essential, and the second only additional. In such a case it is patent that the same persons can enter into several pacts, on the condition that, although one of them be violated, the rest may still be held to. Indeed, a pact of several heads may be entered into, and the agreement added that although one of them may be broken, the parties shall continue to the fulfilment of the rest.

Now if the marriage was contracted in this form, it is apparently possible for the performance of the dues which pertain to the bringing forth of issue to be continued, even when the wife has by her vexatious manners rendered herself no longer suited to constant cohabitation. But since it is not likely that she with whom association is intolerable can fit herself for this debt, or that a man will not turn from a body which houses so crabbed a guest, since a man will scarcely want issue of one whom he hates, it is the regular custom for husband and wife to make an agreement, by one and the same pact, regarding the two heads of the mutual service of body and association in family life, which are so inextricably bound together that the breaking off of the one appears to involve the severing of the other. Therefore, it is repugnant to natural law for husband and wife to separate from the associations of table and bed, because of intolerable manners and incompatible temper, and yet to maintain the bond of marriage which

¹ [For *Simonides* read *Semonides*.—Tr.]

prohibits them from changing their position for the better. Unless it happen that such a separation be enjoined for a time, as a method of punishment, for the purpose of breaking down stubbornness and exploring more thoroughly whether there be any hope of effecting a change of ways. For it is absurd to say¹ that the bond of a pact still
 600 holds when no part of the debt which flows from that pact can or should be performed. And although we should concede that that party on whose shoulders rests the blame for separation, is perhaps justly punished by this method, yet the innocent is injured, being forced to pay for another's sin and compelled to a life of celibacy, perhaps highly inconvenient or intolerable.

Down to this point the state of husband and wife appears to be equal by the law of nature. Therefore, Plutarch, in his life of Romulus [xxii], calls his law *σφοδρός*, or 'harsh', which forbids a woman to leave her husband, but permits the husband to repudiate her, 'for using poisons, for substituting keys (although Xylander prefers to read 'children'), and for adultery.'² (P.) Euripides, *Andromacha* [672 ff.]:

'Yet husband's cause'—say'st thou—'and wife's alike
 Are strong, if she be wronged of him, or he
 Find her committing folly in his halls.'
 Yea, but in his hands is o'ermastering strength,
 But upon friends and parents leans her cause. (W.)

By a law of Solon, among the Athenians the husband could renounce the wife and the wife the husband, although different terms were used for such separations; for if the husband renounced the wife it was called *ἀποπομπή* [dismissal], if the wife left the husband *ἀπόλειψις* [withdrawal]. That is, the bride was brought to the house of her husband and so she could not 'dismiss her husband' and cast him out of the house, although she could 'withdraw from' him and retire elsewhere [*Lexicon Seguerianum*, p. 421, in *Corpus Juris Attici*, iv. 1369].

Yet it should be observed that no matter what the reason be for the granting of divorces in any state, it should be done only after that reason has been passed upon by a judge, and that a matter of such consequence should not be left to the mere conscience of the parties concerned. For the reason advanced to the contrary by Bodin, *On the Republic*, Bk. I, chap. iii, that, were this done, the standing of one or the other of the parties would be prejudiced, does not appear sufficiently valid. Add also Plato, *Laws*, Bk. XI, p. 974; Charron, *De la Sagesse*, Bk. I, chap. xlvii, n. 12; Selden, *De Jure Naturali et Gentium*, Bk. V, chap. vii.

23. But regarding the divine law, whether of the first dispensation or that of Christ, there is greater difficulty. Undoubtedly the Jews

¹ [For *dicere* read *dicere*.—Tr.]

² [The text used by Pufendorf reads: 'for poisoning his children or counterfeiting his keys.'—Tr.]

believed that by God's law in *Deuteronomy*, xxiv, divorces were not only permitted, but also commanded, in case the wife was displeasing to her husband. Nay, the conclusion is possible from Philo Judaeus, *On Special Laws* [III. vi], that a man should divorce his wife for sterility:

As many men, therefore, as marry virgins in ignorance of how they will turn out as regards their prolificness, when after a long time they perceive [...] that they are barren, and do not then put them away, are still worthy of pardon, being influenced by habit and familiarity, which are motives of great weight, and being also unable to break through the powers of those ancient charms which by long habituation are stamped upon their souls. But those who marry women who have been previously tested by other men and ascertained to be barren, do merely covet the carnal enjoyment like so many boars or goats, and deserve to be inscribed among the lists of impious men as enemies of God—for God [...] takes all imaginable care for the generation of mankind. (Y.*)

Nor should we question whether divorce was commonly practised by that people, although in their sacred and profane history over a period of more than 700 years no instances of it, or at least very few, are recorded; for only such acts as are sure to contain something unusual and peculiar are commonly noted in annals, not those which agree with the common customs. Nay, in *Isaiah*, l. 1, and *Jeremiah*, iii. 1, 6, when the prophets tax the people for their sins¹ they employ similes drawn from divorce, as though from an act quite familiar² to the people. And so Josephus, *Antiquities*, Bk. XV, chap. ix, notes as unusual and opposed to common law the fact that Salome sent a bill of repudiation to her husband Costobarus, governor of Idumea and Gaza, since the custom of the Jews did not permit a wife to leave her husband, unless she had been put away by him, except when a man had claimed that on the marriage night he had not found his wife to be a virgin, and the charge was false. In that case she could exercise her choice of leaving or staying with her husband, and if she wished to stay with her husband, he had to keep her. Philo Judaeus, *On Special Laws* [iii. 80]. Josephus, Bk. XVIII, chap. vii, gives the same story about Herodias, the daughter of Aristobulus, whom John the Baptist reprov'd. *Matthew*, xiv; *Mark*, vi. 601

But most theologians, on the authority of *Matthew*, v. 32; xix. 8; *Mark*, x. 4, maintain that our Saviour entirely withdrew such licence of divorce. Here Grotius, Bk. II, chap. v, § 9, adds that it was always God's will from the creation that marriage be for ever binding, but that men were not obligated to that under the old dispensation; and that under the new dispensation Christ sanctioned by his express law, what had before been most agreeable and pleasing to God. Yet Selden, *Marriage and Divorce among the Hebrews*, Bk. III, chap. xxii, explains the saying of Christ in this way. At that time there were two sects of the Jews, the followers of Shammai and those of Hillel, the first of whom held that a husband could not leave his wife except upon the

¹ [For *peccatis* read *peccatis*.—Tr.]

² [For *in in* read *in*.—Tr.]

discovery in her of some baseness, while the latter held that she could lawfully be dismissed for anything which was not to his fancy. Now Christ acted as an arbitrator between the two sects, and decided for the disciples of Shammai, that is, for those who held it illegal to break up in such rash fashion a union established by God himself, unless some vile reason, such as was in the genius of the Hebrew language usually designated *πορνεία* [fornication], demanded it. See Valerius Maximus, Bk. IX, chap. ii. He goes on to say that not even among the early Christians was divorce except for adultery absolutely unlawful (as is shown by *Code*, V. xvii. 8, a law passed by a most Christian emperor), until the popes in their superstition and iniquity declared it a tie to be severed only by death.

Buxtorfius, *De Sponsalibus et Divortiiis*, shows, in opposition to most of the Jews, that the words of Moses in *Deuteronomy*, xxiv. 1-4, contain only the one command, that a man who had once dismissed his wife should not take her again to his bed. That the custom of dismissing wives was in that passage neither approved by Moses, nor clearly disapproved, but left, as it were, open; and when our Saviour says that it was allowed them for the hardness of their hearts, he does not mean that the Mosaic permission approved, but only tolerated and connived at it, thereby merely freeing it from any punishment in a court of law. Add especially the full discussion by Grotius on *Matthew*, v. 31-2.

24. John Milton in a special work, *On [the Doctrine and Discipline of] Divorce*, perhaps because irritated by his own domestic infelicity, goes to great pains to prove that even by the principles of the Christian faith intolerable habits and disparity, coupled with incompatibility of disposition between husband and wife, are a sufficient cause for divorce, nay, that they who find themselves so ill-mated are under every obligation to separate. It will not be tedious to review the principal reasons which he adduces.

At the outset he lays down this presupposition:

[. . .] God, in the first ordaining of marriage, taught us to what end he did it, in words expressly implying the apt and cheerful conversation of man with woman, to comfort and refresh him against the evil of solitary life, not mentioning the purpose of generation till afterwards, as being but a secondary end in dignity [. . .].¹

This hypothesis appears to us to be false. For they are not distinct ends when God desires to create a helpmeet for Adam and join her to him, and then commands them to increase and multiply, but by the later words are described the first fruits arising from the helpmeet lent him by favour of God's benediction. And surely if a happy association had been the primary purpose of God, what need would there have been of different sexes? For if you should remove the procreation of offspring and the pleasure with which nature endows it in order to

¹ [Milton's own words. Vol. II (Bowles and Dearborn, Boston, 1826), p. 86.—Tr.]

promote the union of the two sexes, men would rather gather by themselves and could find of their own number a more practical helpmeet. Therefore, boys before they experience the desires of love, and old men who are past it, are more drawn to association with their own sex than with women. And Milton dreams about some undefined delights of association, and creates for himself an ideal of a wife highly suited to the genius of a wise and literary man, who can make herself a companion of his studies or refresh him, when wearied, with merry jests, and cheer him, when oppressed with cares and sadness, by her polished conversation. Yet just as no wise man would deny that the pleasure of the mind in its infinite forms is preferable to the momentary tickling of the senses, so since there are so few who are blest with that sublimer wisdom, you will find few marriages of wise men which might not be dissolved on this score. Nay, if there is any man so highly endowed that he holds the procreation of offspring as of little or no worth, and feels none of the urges which can be allayed only in the company of women, my advice to him would be that he by no means take to himself a wife. For as a rule the wisdom of such men holds no charms for women, while it is not at all strange that they in their turn are little loved by such nerveless and morose men.

Finally, no matter how such men may excuse their feeling that the association of women rather than men was instituted as a solace for life, they can advance no other reason than because nature has endowed men and women with a singular leaning toward each other, resulting from their difference in sex. It may, therefore, be better to keep our philosophy on lower levels, and, taking into account the common genius of women, hold that a woman does her share for her husband when she devotes her energies to bringing forth and rearing children, and to undertaking her share of the labour of the house, even though she may otherwise offer little aid in matters of philosophy. Surely there is much in what Juvenal¹, *Satires*, VI [448 ff.], says:

Let not the wife of your bosom possess a special style of her own; let her not hurl at you in whirling speech the crooked enthymeme! Let her not know all history; let there be some things in her reading which she does not understand. I hate a woman who is for ever consulting and poring over the 'Grammar' of Palaemon, who observes all the rules and laws of language. [. . .] Let husbands at least be permitted to make slips in grammar. (R.)

On the Brahmans Strabo, Bk. XV [i], says: 'With their wives the Brahmans do not philosophize, lest they tell to the uninitiated their secret lore, if they be evil; or else, if they be good, lest they abandon them. For he who despises pleasure and pain, and so likewise life and death, is unwilling to be subject to another.' Euripides, *Hippolytus* [640-1]:

¹ [For *Juvenalis* read *Juvenalis*.—Tr.]

In mine house
Ne'er dwell one wiser than is woman's due. (W.)

Of Milton's arguments in general it is to be observed that they prove nothing at all, if, indeed, it be clearly established that Christ wished no cause to suffice for divorce save adultery. For in that case the common saying will obtain, 'It is, indeed, hard, but it is the law.' So also human laws, which in their general application are for the good of the state, are not at once abrogated if they cause some hardship for one man or another, for that must be regarded as an inevitable misfortune. And so what Milton accomplishes is no more than this, that if the decision of the Saviour may bear another interpretation it would appear more agreeable to the compassion of the teaching of the Gospel, to follow a meaning more lenient than the one commonly accepted.

His arguments sum up to something like this: Disparity of dispositions, stubbornness of mind such as makes association with some certain man impossible, and cannot be corrected, and whatever else
603 interferes with the primary good of marriage, namely, helpfulness and diversion, constitute a far more weighty cause for divorce than a natural defect, or ill-health, or any repulsive feature of the body, because of which the Jews, on the basis of *Deuteronomy*, xxiv, allowed divorce. Furthermore, no partnership binds members together contrary to the primary purpose of its formation, or the intention and expectation of each or one of the members. But now God wished to join to man not a domestic tormentor, but a helpmate who would minister to him not alone in giving him children, but in rearing them, and would cling to him through life; and this end an intolerable harshness of nature and manners destroys. It seems absurd, that, although the canon law has without scruple declared impotence to be a sufficient cause to dissolve marriage, it should take no account of manners, especially since the former can be immediately discovered, while the latter are usually entirely concealed and covered for a time, until the victim has fallen into the meshes which cannot be broken. It is contrary to the law of charity, it is inhuman, in any way to bind a man to miseries which can be ended only by death, and for which a perfectly easy remedy could be found, were it not for that severe positive law; since it appears that God Himself in promulgating His laws accommodated Himself to human frailty. Among other reasons for marriage the Sacred Scriptures recommend it for the avoiding of the temptations arising from an incontinent life. But he who finds nothing in marriage in which his mind can acquiesce, whose whole life is a thing of loathing because of his wife, is vexed with far more serious temptations than if he had remained a bachelor. For he is ever ill at ease and because his wife yields him no pleasure, his passions yearn to break out elsewhere. Among the reasons for the law on divorce Maimonides adds this as well: That peace and

quiet may the more easily be preserved in individual households. In the same way Bodin, *On the Republic*, Bk. I, chap. iii, says that no law can be more holy than that of God on divorces, whether to check the pride of women, or to control the wrath of men. But since this reason applies as well to Christians as formerly to Jews, it does not appear likely¹ that God wished to lay a heavier yoke on the former than the latter.

(Thus Bernhard Varenius, *Descriptio Japoniae*, chap. xii, says that divorces are extremely common among the Japanese, although the nobles keep the unloved wife in their houses and provide for her needs. The result is that the women make every effort to understand the manners of their husbands, so that with this knowledge they may do what is gratifying and pleasing to them, and omit nothing which might avail to win back to them their husband's attentions. Nay, not only do they make no complaints to those who have turned away from them, but even affect grief, so that by the charm of their association and the promptness of their services, they may win back the love of their husbands.)

The Sacred Scriptures command us to remove all hindrances to piety, among which the chief in all likelihood is the moroseness of a partner who can in no way be corrected or escaped. Yet it is repugnant to nature to join dispositions that cannot be adapted to each other in an irrevocable bond. The Christian emperors judge that a plot undertaken against one's life is a ground for divorce. And yet how many have had their life shortened by such ceaseless jarrings! Finally, marriage is a society or partnership between individuals. Yet when human societies are bound together by a moral tie, it is more a union of minds than of bodies. For were this not true, nothing remains to them but a joining of bodies in no way superior to that of the beasts, since among many of the animals something like kindness is discernible between mates². When, therefore, the mind does not find that fitting and due union which it seeks in marriage, a pair so badly matched 604 passes its life more in a prison than in a human society. And since vows that are strengthened by an oath can be broken, when they are not germane to the case in hand, or are prejudicial to a third party, why cannot also the marriage agreement? It is idle to reply that unfortunate marriages are given by God to develop men's patience, for diseases and other calamities are sent of heaven, and yet men are not forbidden to resist them with the means at their disposal.

He then discusses at length the permission of divorce among the Jews. For if, he says, it be in its own nature adultery for either party, upon being separated, to marry again, it follows that Moses authorized adultery as though by a holy law. Yet to hold this of that law which has God as its author is both absurd and impious.

¹ [For *verosimile* read *verisimile*.—Tr.]

² [For *comparcs* read *compares*.—Tr.]

He also denounces those who think that the Jews lay under a divine dispensation. He observes that a dispensation may be so denominated either properly or improperly. The latter is a special and exceptional law, such as *Numbers*, ix. 6 ff., whereby a man is for a just and fair cause exempt from the requirements of a general law. Another such is the law on marrying the wife of a brother who died without issue. A dispensation properly so called applies only in special and unusual cases, and such as are, for that reason, rarely set forth in law, but are left to the charity and prudence of judges; for instance, the permission for David, when hungry, to eat of the shewbread. And so this last dispensation is nothing other than an interpretation of the law on the principles of equity.

Here it is patent that Milton confuses dispensation with equity, which are two very different things. And yet if any man would endeavour to maintain that divorce among the Jews was by way of dispensation, he must first have shown that there was at that time a general law to the effect that marriages could not be dissolved on the ground of manners, which law must have been either of nature or a positive one of God. For regarding the words, 'and the two shall be one flesh', some hold that there is meant the very closest form of society or union, which it would be neither fitting nor advantageous to mankind to have rashly dissolved. Yet it does not follow from this that the union in question cannot be dissolved for causes which subvert the nature and end of marriage. Thus God joins husband and wife, and yet it does not follow that it is not left to man's own choice whom he may wish to marry, or that no pact need intervene between the pair. The proper conclusion to be drawn is: God joins husband and wife by an intervening pact; therefore, He does not wish them to part unless that pact has been violated.

Milton then inquires into the opinion of those who say that divorces are only permitted by divine law but not approved. He feels that such a view is lacking in reverence for God, since it is a witness to a ruler's weakness for him to permit to his subjects what he himself does not approve. And how does it come that so many Christian nations for all these centuries have been able to accommodate themselves to this law, and the Jews alone, for their *σκληροκαρδία* [hardness of heart], could not?

On the words 'In the beginning it was not so', some descant as follows: In the state of innocence the manners of mankind were more agreeable and yielding, so that there could arise no opportunity for such great disagreements. Therefore, it witnesses to human imperfection that men and women had to have recourse to the remedy of divorce.

Finally, the same author censures the view of those who assert that

divorce was permitted the Jews because they had become accustomed to it in Egypt. For when the remembrance of their bondage in Egypt was still fresh in their minds, would have been the most opportune time to cure them of it. And the very reason why such specific laws were passed on the avoidance of idolatry, was because they had witnessed the daily practice of it by the Egyptians.

But such matters as these we leave without decision.

25. Of those who will properly enter upon marriage, natural law requires both physical aptitude and moral ability or suitableness. By the former we understand such a constitution of body as fits a person to attain the primary end of marriage, which is the procreation of offspring. Zosimus, Bk. V[xxviii]: 'To give an immature maiden to the marriage-bed is nothing other than a breach of nature's law.' And so it is vain for those to aspire to marriage who labour under a permanent and incurable impotence, such as eunuchs and the like. For it is without doubt repugnant to natural law that eunuchs, as not experienced in all the pleasures of venery, used to marry in Egypt, as is recounted by Grotius on *Deuteronomy*, xxiii. 2, on the basis of *Genesis*, xxxix. 1. In which connexion the question might be raised, as to whether it can properly be called marriage when a decrepit old man marries an elderly woman past the age of child-bearing. Indeed we are told by Plutarch, *Apophthegms* [p. 175 F], that when Dionysius was asked by his ancient mother to secure a husband for her he replied, 'I can break the laws of the state, but not those of nature'. Here may be applied the statement of Quintilian, *Declamations*, cccvi: 'There is a certain immodesty even about marriage.' Many also hold to another saying of the same author, *Declamations*, ii [14]: An old man that marries again is a pitiful kind of creature, for it is with but frigid powers that we conceive a very violent passion for a wife's love. Compare Valerius Maximus, Bk. VII, chap. vii, § 4. Yet in most states such matches are countenanced, because at least one of the ends of marriage, mutual assistance, can be secured. See *Code*, V. iv. 27. You may not inaptly denominate them honorary marriages, in the sense in which some men are called 'honorary', who are given the title of an office without the actual performance. In Suetonius, *Nero*, chap. xxxv, such barren matings are called the 'insignia of wifehood', in the sense in which men used to speak of the insignia of triumphs. Here you may refer the cohabitation of Abishag with David, in 1 *Kings*, i, although it appears that Solomon held it a true marriage, having Adonijah slain, when he asked to marry her, on the ground that a marriage with the king's widow was a threat of civil war, and because it was forbidden in that nation to marry the widows of the king. Grotius on 1 *Kings*, ii. 17.

26. It is also presupposed in marriage, from the nature of pacts in general, that in the agreement to it there should be present a

sufficient use of reason, and no taint of error as touching its substance, and of unjust compulsion by fear. On the last consideration it was a special point in the civil laws of the Hebrews, that, if a maiden had been led to betrothal by force or fear, the arrangements were void, but not if the youth made such a claim, since there was not an equal presumption that force or fear were used upon him, while he was able to repudiate her if he did not like the new state. Selden, *Marriage and Divorce among the Hebrews*, Bk. II, chap. iv. Thus, if there is an error in the object of the consent, or in the person, or in some quality which concerns either the marriage itself, or what by way of condition the consent was based upon, especially when there intervenes some practice of fraud by the other party, it is patent that the marriage contract is void. Therefore, if a bride posed as a virgin and was upon marriage found to be otherwise, their sacred law not only legalized a divorce but also made her liable to punishment in addition. Although the ancient heathen nations paid little attention to virginity, as may be seen from the customs of the Baleares in Diodorus Siculus, Bk. V, chap. xviii; of the Armenians and Lydians in Strabo, Bk. XI, and in Herodotus of the Babylonians (Book I), of the Thracians (V), of the Adyrmachidae and Nasamones (IV). The sordid tale of Aristippus is in Diogenes Laertius, Bk. II [74]. Add the comments of Boethornius on Suetonius, *Caligula*, chap. xl, at the end; Justin, Bk. XVIII, chap. v, § 4; Paul of Venice, Bk. II, chap. xxxvii, on the customs of the inhabitants of Tebeth, and chap. xxxix, on those of Caraia. A similar depravity among the Phoenicians was abolished by Constantine the Great; Sozomen, *Ecclesiastical History*, Bk. I, chap. viii; Bk. V, chap. ix.

- 606 Thus, if a man has added an express clause to a marriage pact that such a person will be his wife if she be of noble birth, if she bring a certain dowry, he will surely¹ not be obligated to consummate the marriage until that condition appear. Yet if a man fail to inquire about the existence of that condition and consummate the marriage, he will appear to have tacitly renounced that condition; and so if what was hoped for does not later appear, it will by no means furnish cause sufficient for divorce. For the agreement did not run, 'I will divorce you, if you do not bring me a certain dowry', but, 'I will not marry you, if you do not bring me a certain dowry', which is something quite different. Therefore, if a man's first interest in a marriage concerns his bride's fortune, he plays the fool if he goes through with the ceremony before he has made sure of it. Especially since many of those who arrange matches fit the character given them by Libanius, *Progymnasmata* [*Chriae*, i. 10]: 'He who comes with a long and beautiful speech already made up, clearing away what actually exists and introducing what was not already there, readily reconciles nations.'

¹ [For *utiquē* read *utique*.—Tr.]

Much less will it be possible either to break off a betrothal or to refuse to consummate it, when it has been properly engaged, if a man has not agreed upon a definite dowry, but snatched at only a tacit hope of fortune without investigating it. So the ephors were justified in fining the man who promised to marry the daughter of Lysander while he was still alive, but refused to do so when it was discovered that her father had died in poverty. Aelian, *Varia Historia*, Bk. VI, chap. iv.

These principles hold good only in natural law, for civil laws can provide that such conditions may not hinder consummation of marriage, since they have no direct bearing upon it.

27. The moral ability to marry is lacking in those women who are already married to another man. For the right of the husband over such a woman lasts so long as he has not renounced it. Therefore, marriage with a woman already married and not yet formally released from her husband is not only unlawful but useless, both because the power of entering a new marriage is wanting in a woman already bound to another man, and because all cohabitation with such is continued adultery. So also where polygamy is forbidden, a man marries in sin when he is already bound to a wife. By the Hebrew law it was also unlawful for a man to marry a second time her whom he had once divorced. *Deuteronomy*, xxiv. 4. It was without question thought that divorces would not be so frequently sought out of hand and on slight occasion, if there was no hope of getting back, when the first burst of passion had spent itself, her who had once been dismissed from the home. Grotius in commenting on this passage adds this reason: 'Because it has the appearance of lending to another one's own wife, and all kinds of pandering¹ might be hidden under such a veil.' Yet some feel that by *Jeremiah*, iii. 12, it was allowable to take her back before she had in the meantime married another.

The Koran allows one to take back his wife, even when she has been dismissed three times, provided in the meantime another has married and then cast her off. But that this is an unworthy practice may be inferred from the reply of Amurath to Tamerlane: 'If he does not come as he threatens, may he take back his wife after he has thrice dismissed her.' Laonicus Chalcocondylas², Bk. III. Another law of the Koran is that he who will dismiss his wife must set for her a certain time during which she shall not marry another, as though he would consider for so long whether he wishes to receive her back.

There is also a Hebrew law worth noticing, as given by Josephus, *Antiquities*, Bk. IV, chap. viii: 'If a man be not to marry a virgin, let him not take to wife a woman whom he has persuaded to leave another man, nor let him embitter the life of her former husband.' (W.) And reason sides with the Christian canons which forbid a man marrying

¹ [For *leocinia* read *lenocinia*.—Tr.]

² [For *Chalcondilam* read *Chalcocondylam*.—Tr.]

607 another man's wife with whom he has committed adultery. *Decretum*, II. xxxi. 1, 2 ff. Especially since the words of Euripides, *Electra* [921 ff.], usually hold true:

Let whoso draggeth down his neighbour's wife
To folly, and then must take her for his own,
Know himself dupe, who deemeth that to him
She shall be true, who to her lord was false. (W.)

28. It is also held that marriage between individuals joined by certain degrees of relationship or kinship (see *Digest*, XXXVIII. x. 4, §§ 3, 4, 5) is unholy, so that not only at the outset is such a marriage forbidden, but for all its duration it labours under a perpetual taint. Now although it is found that this view is commonly held by all peoples whose moral code is at all advanced, yet it is not so easy to assign for it a firm reason, and such as may proceed, like other precepts, from the social nature of man. Some in discussing this simply fall back upon an abhorrence of men's affections, as though all men not corrupted by ill rearing or vicious habits, instinctively feel something repugnant in such mating, which is a sure witness that natural law forbids it. And yet such abhorrence in the feelings is not to be found equally among all peoples, not even among those who are inclined to culture, and to those who assert this it can be said not improperly in reply, that such abhorrence may come not so much from some innate principle as from custom and training which often pass for nature's dictates. Nor is it altogether safe, in eliciting the law of nature, to consult the mere judgement of the senses and passions, since the opposite conclusion can be reached, that all things to which the senses and passions are strongly attracted are enjoined by the law of nature, while most of them are in fact clearly opposed to that law.

Plutarch, *Roman Questions*, cviii, after wondering why the Romans did not marry their near relatives, with some diffidence, after his manner, suggests the following reasons:

Do they wish to increase by marriage the size of their families and the number of their relatives by giving wives to and taking them from other families? Or are they afraid of the quarrels which take place in marriage between near kin, and fearful lest these should destroy even the natural rights? (Because, for example, hatreds are so common between mothers-in-law and daughters-in-law, and so a man should not marry one who already on natural grounds owes his mother respect, that is, his sister.) Or do they consider that the weakness of women puts them in need of many protectors, and so did not wish to let near kinsfolk marry, so that if the husbands ill-treat their wives, their relations may protect them? (R.)

The latter reason seems to be drawn from Euripides, *Andromacha*¹, lines 674 [675-6]:

In <the husband's> hands is o'er-mastering strength,
But upon friends and parents leans <the wife's> cause. (W.*)

¹ [For *Andromachi* read *Andromache*.—Tr.]

The former reason, that, namely, of contracting friendships more widely by alliances, also receives the approbation of Augustine, *On the City of God*, Bk. XV, chap. xvi, which is cited by Gratian, *Decretum*, II. xxxv. 1, with whom in turn Richard Cumberland, *De Legibus Naturae*, chap. vii, § 9, agrees. Yet not to mention the fact that what is less advantageous is not for that reason unlawful, what is useful is not always obtained by this rule, since it is quite possible that a greater advantage would come from the very opposite course; for instance, should the nearest relatives marry among themselves, their wealth would be prevented from passing to another family. Hence the law of God in *Numbers*, xxxvi, enjoined women who held immovable property, to take husbands only from their nearest of kin, so that the lands would not pass from one tribe to another, although they could marry any 608 Hebrew they pleased, provided they renounced their inheritance. But the women of the tribe of Levi were not constrained by this law, since they were unable to hold land. See Grotius on *Matthew*, i. 16.

Among the inhabitants of Peru under the rule of the Incas, a law forbade men to take wives within their own city and family; yet the young couple were presented by their fellow citizens with a house, and with it furnishings by their nearest relatives. Garcilaso de la Vega, *Comentarios Reales*, Bk. IV, chap. viii. By the law of Athens girls who were *ἐπίκλητοι* [the sole heirs of their parents] were commanded to marry among their nearest kin, that the ancestral estate might be kept in the family. And since such girls were often the objects of quarrels among their suitors, quarrels which had to be settled in court, they used to be called *ἐπίδικοι* [objects of suits]. Yet there was another law of Athens which served as a kind of compensation for the first, that if such an heiress be left with little means, her nearest relative had either to marry her or to furnish her with a suitable dowry. A similar law of Charondas is in Diodorus Siculus, Bk. XII, chap. xviii.

29. We must in this connexion consider first of all why, in view of the fact that it is a worthy task in itself to propagate so noble a being as man, among more advanced peoples such great modesty surrounds both the generative organs and the act itself, that only those can overcome it whose shame has been lost in a life of immorality. Worthy of record in this connexion is a story of the maidens of Miletus in Plutarch, *On Noble Traits of Women* [p. 249 c]; and Polyænus, *Strategemata*, Bk. VIII [lxiii]. When for some unknown reason they were seized with a frenzy to hang themselves, and could in no way be prevented from doing so, a law was finally passed ordering that all the bodies of those who had encompassed their death in this way should be borne to burial naked through the market-place. So fear of a disgraceful burial recalled them to sanity, when death could not.

Indeed, when nakedness or open indulgence has been practised

among any nations, such customs have been condemned by the rest as a blot of base barbarism. Mela, Bk. I, chap. xix, reports of the Mossynians that 'they lie with each other promiscuously and openly'; and the same people are thus described by Apollonius Rhodius, *Argonautic Expedition*, Bk. II [1017 ff.]:

And strange are their customs and laws. Whatever it is right to do openly before the people or in the market-place, all this they do in their homes, but whatever acts we perform at home, these they perform out of doors in the midst of the streets, without blame. And among them is no reverence for the marriage-bed, but, like swine that feed in herds, no whit abashed in others' presence, on the earth they lie with the women. (S.)

The same account is given by Diodorus Siculus, Bk. XIV, chap. xxxi; and of the Massagetæ¹ by Xenophon, *Anabasis*, Bk. V, and Herodotus, Bk. I, towards the end, while the latter, in Book IV, treats of the Nasamones.

Now the reason for this modesty is not so clear; for these members are not signalized by any outstanding deformity or striking unattractiveness, while they serve a most noble function, the propagation of mankind. For this latter reason they were held in sacred veneration by the Egyptians, and by the Athenians in the celebration of their mysteries. See Diodorus Siculus, Bk. I, chap. lxxxviii. Nay, the act of generation in itself conforms to nature, is necessary, and fitted to continue a being of such dignity. Why, then, should a man be any more ashamed of exercising it in the presence of others than of eating and drinking, since the human species can no more be preserved without the former act than individuals without the latter? Nor is much gained by the explanation of Plutarch, *Banquet of the Seven Wise Men* [xv, p. 158 F]:

For the body there is certainly no pleasure more harmless and commendable and fitting than that which springs from a plentiful table—which is granted by all men; for, placing this in the middle, men converse with one another and share in the provision. As to the pleasures of the bed, men use these in the dark, reputing the use thereof no less shameful and beastly than the total disuse of the pleasures of the table. (G.)

609 Although in Xiphilinus, *Epitome of Dio's History, Severus* [LXXVI. xvi], the wife of the Scotch chieftain Argetocoxus, when taxed by Julia Augusta because the women of her nation mingled so boldly with the men, replied to her very wittily: 'We fulfil the necessities of nature in a much better way than you Roman women. We have dealings openly with the best of men, whereas you let yourselves be debauched in secret by the vilest.' (F.) Montaigne, *Essais*, Bk. II, chap. xii, p. 398; Charron, *De la Sagesse*, Bk. I, chap. xxii.

Nor do those who take refuge in the statement of Holy Writ, to the effect that this shame arose immediately after the fall, contribute anything to the matter. For the question still remains why modesty fastened only upon these parts, since a man's hand and tongue are as

¹ [For *Massa getis* read *Massagetis*.—Tr.]

instant in service upon our disorderly and base desires. Nay, since man's first disobedience came of eating, that evil reputation should apparently have first fallen upon the mouth and the act of eating.

30. The author of *De Principiis Justi et Decori* [Velthuysen], pp. 59 ff., in theorizing upon nakedness and its accompanying shame, begins by saying, 'Not everything which causes shame is sinful and is forbidden by the dictates of natural law'. He then proves this by some examples; for instance, of poverty, mean attire, an innocent mistake, deformity, and the like, at which we blush although there is actually no moral baseness in them. The reason why we avoid them is because they bespeak some shortcoming and infirmity which every one wishes to hold at arm's length from himself. Now although nakedness and the uncovering of the private parts are not sinful in themselves, yet a man may not reveal them in the sight of others, unless in such an act there be nothing repugnant to natural honour. Yet this is sometimes the case, for a man may well be ashamed when he has such imperfections, or some the disclosure of which could cause his neighbour to despise him or justly and deservedly to esteem him the less, because they do not agree with the dignity of the position which he assumes. Thus it is no disgrace in itself for a man who has never had any education to be ignorant of something, but for him who has long devoted himself to studies and made no advance, ignorance is a cause for shame. Thus plain manners do not ill become a countryman but clownishness among gentler folk is surely unbecoming. The man who uncovers those parts of his body which the custom of his people would have covered, sins against natural honour in so doing. As Herodotus, Bk. I [viii], says: 'Together with her tunic a woman puts off also her modesty.' Yet a person in another country, where men regularly go about naked, as among the Caribbeans, may uncover them without sin or the imputation of wantonness. In some parts of Abyssinia the women of the lower classes go about entirely naked, and yet the men are no more moved at such a sight than if they saw but their hands or feet. Franc. Alvarez, *Descriptio Aethiopiae*, chap. xxxii; add Jean Lery, *Historia Americae* [Itinerary], chap. viii; Rochefort, *Descriptio Antillarum*, Pt. II, chap. ix. In fact, if I am not mistaken, among some Indians, to go about with a loin cloth met with the same penalty as that for adultery.

It is considered imprudent among comparative strangers or men of influence to fail to ask their permission to do what¹ is freely enough done among our acquaintances. And you may not with good breeding do among honourable men, or in a gathering, what you need not be ashamed of when by yourself, unless Claudius finally issued the edict which he considered so long, as given in Suetonius, *Claudius*, chap. xxxii. Add Diogenes Laertius, Bk. VI, in the life of Metrocles.² Thus

¹ [For *quæ* read *quae*.—Tr.]

² [For *Metrolis* read *Metroclis*.—Tr.]

610 a teacher of anatomy lays out before the eyes what it would be disgraceful even to name, save by reason of his profession; and the same should be said about the disclosure of one's genitals. For although that nation must have cast off all modesty in their manners which does not hold the display of them disgraceful—since civilized nations are careful even in death *εὐσχήμως πεσεῖν*, 'to fall decorously' (Euripides, *Hecuba*, line 568)—nor was it without heinous sin that their ancestors arrived at such immodesty, yet after this custom has taken such firm root that in the eyes of all the nation such a mode of living was freed from all censure, the whole people can appear in such fashion without stain of sin, inasmuch as they recognize in it no more the shortcoming or weakness at which a man should blush, than do we in looking upon the faces of women in public, for which, however, women are severely criticized by other peoples. Plato, in Diogenes Laertius, Bk. III [86], in speaking of an *ἀγγραφος* [unwritten] law which obtains by use, gives as an illustration 'not to come naked into the market-place'. But even among peoples where nakedness is forbidden, such members may sometimes be uncovered without sin, when, for instance, they must be treated by a physician, or necessity does not allow time or provision for covering, or when infants are wrapped in swaddling clothes; for in such cases there ceases to be any censure of shamelessness, since the members are shown without wantonness and display. Therefore, since among some barbarian peoples the nakedness of the genitals is not censured as an infirmity or flaw, the display of them involves no crime of immodesty, nor does any man among them fall under contempt for that reason, as is regularly the case with us. Thus among the Pygmies, 'where a whole regiment is no more than a foot high',¹ their stature is no cause for shame, although others make sport of it. Nay, among the Casares, when the women have been given some present, they entirely uncover themselves as a sign of their civility. Herbert, *Itinerarium Persicum et Indicum* [*Travels*], p. 21.

The same author, p. 240, makes a similar statement: That the uncovering of the genitals is not base in itself, but only according to the circumstances, which depend upon the lust of those nearby, or their position, or one's own esteem, for which every man should look out for himself. But because of the variation in the external signs, by which we show respect and honour to one nearby, many things may with one people imply disgrace for one nearby, or for oneself, which do not have that character under different circumstances. And so in *John*, xxi. 7, on the approach of the Master Peter makes haste to put on his cloak, although he had not been ashamed to go about his fishing naked with his companions; for the dignity of Christ to whom Peter owed respect, required that in his converse with his Master he

¹ [From Juvenal, *Satires*, xiii. 173.—Tr.]

conduct himself with modesty and dignity, which in the eyes of people who go clothed was not possible were one naked. Therefore, at Rome, 'Sons grown to manhood, never bathed with their parents, nor sons-in-law with their father-in-law.' Cicero, *On Duties*, Bk. I, chap. xxxv; Valerius Maximus, Bk. II, chap. i, § 7. So in Livy, Bk. III, chap. xxvi, the ambassadors 'command L. Quintius to don his toga and hear the orders of the senate'. We are not ashamed to go about our house in old clothes, which, however, it is indecorous for one to wear to a wedding or formal gathering. *Matthew*, xxii. 12. So also some things are done in secret the performance of which in public would be most disgraceful; nay, it is not improper for others to know why we are retiring. Finally, many things may be done without censure by men which would be considered brazen for maidens.

He concludes from 2 *Corinthians*, xi. 17 and 19, that after a request for pardon, and upon its being granted by another, something may properly be said or done which would have been improper without it, 611 such a thing being improper not in itself but only from the circumstances, upon the removal of which it can no longer be censured under that head. For the other person remits, as it were, the respect which was otherwise due to him. Yet in this connexion he rightly adds the proviso, that it be the universal custom of the nation for men to grant each other this liberty, for were this not the case, individuals may not avoid the censure of immodesty, when they grant each other such freedom from respect. Thus if debauchees agree to go about naked in their own company, they do not escape censure among a people whose custom is to go about clothed.

He ends with the conclusion that our first parents before their sin were as regards shame like children; but when they had sinned, a sense of shame came over their minds, as a result of which they recognized that it was indecent for them to go about naked, just as we conclude as we grow up. And his conclusion from all of this is that the law of nature fixes no degrees about the act of marriage, but that it is only agreeable to natural honour that it be restrained within some degrees. Compare also Montaigne, *Essais*, Bk. I, chap. xxxv; Charron, *De la Sagesse*, Bk. I, chap. vi.

31. Although there plainly appears to be much good sense in all this, yet we feel that we can best assign two reasons for that modesty about the genitals and the act of procreation. Firstly, because man is a proud animal, desirous of renown and seemliness and averse to all that makes against them. Now it is by these and neighbouring parts that nature casts forth the refuse of our food and drink which are loathsome to man, not because of their qualities alone, but also because they seem to offer reproach to his condition, since the daintiest food is changed within his body into such filthy matter. Therefore, the proud

nature of man is always solicitous that such indications of his weakness go entirely concealed. This is the force of 1 *Corinthians*, xii. 23-4. Cicero, *On Duties*, Bk. I [xxxv]:

Nature seems to have paid a great regard to the form of our bodies, by exposing to the sight all that part of our figure that has a beautiful appearance, while she has covered and concealed those parts which were given for the necessity of nature, and which would have been offensive and disagreeable to the sight. This careful contrivance of nature has been imitated by the modesty of mankind. (E.)

These remarks seem to be derived from Xenophon, *Memorabilia*, I [iv. 6]. Add Ambrose, *On Duties*, Bk. I, chap. xviii.

Herodotus, Bk. II [xxxv], tells of the Egyptians that they relieve themselves at home, but eat in the streets, giving as the reason: 'What is unseemly but necessary ought to be done in secret, but what has nothing unseemly about it, should be done openly.' (R.) Although I may add, in passing, that the same people were laughed at for working their clay with their hands and their bread with their feet. Thus in Sadi, *A Persian Rosegarden*, chap. viii, there is given as the reason for rings being worn on the left hand, although it is less honourable than the right, that 'the highest distinction for the right hand is its own dexterity'. For the same reason, it is said, the inhabitants of Borneo always cleaned themselves with the left hand, because, as they maintain, the right is for their mouth. Here belongs what Aloysius Cadamustus, *Navigatio*, chap. x, recounts of the Azenagians, inhabitants of the kingdom of Senegal: 'They are as much ashamed of their mouth as of their privates, and keep it covered as a thing of shame, because, as they say, it sends forth an odour like a fetid sink; nor do they uncover it except to eat and drink.' The same account is given also by Leo of Africa, Bk. I, who, however, calls the tribe Zenagates.

612 In the second place, because, after our passions were corrupted by the fall, our depraved lusts yearn to break forth in great violence through those parts, and, because all becoming order in human society hinges upon the condition that the propagation of offspring be guarded by sacred laws, nature, studious to preserve its dignity and at the same time to guard against occasions of unlawful or untimely venery, devised that modesty whereby those parts would be carefully covered, in order that they might not, by their continued exposure to the eyes, arouse the lust that waits for any call, and in order that unlawful venery might be the less indulged in, inasmuch as the delicate feelings of that modesty would restrict even lawful venery to places of secrecy out of human sight. Therefore, after the harmony of our first parent's affection had become depraved, and they had observed that their disordered lusts built a passageway, as it were, for themselves by those parts, they were overcome by a worthy shame at discovering in themselves so great an imperfection, for which they set about to devise

some sort of cure by way of coverings. And I should judge that the original reason why that shame of nakedness disappeared among many nations was poverty, when men were driven into barren regions and could find no material for other garments, when what they had wore out, and, in fact, felt no need for any in the pleasant climate. And so their modesty passed away with their clothing, although some of them kept a little of it by covering their loins with a small cloth, from which it was but an easy passage to entire nakedness.

Furthermore, that modesty is greatly increased before those persons for whom we owe some natural reverence, or in whose presence we should conduct ourselves with dignity, such as our parents, and children in particular. And so the man who is not restrained by it so as to hesitate before that familiar joining of bodies, may be held to have a brazen character and such as would not stop at any other villainy as well; who, indeed, in the words of Euripides, *Medea*, line 471, suffers from that which is:

[. . .] Of all plagues infecting men, the worst,
Even shamelessness. (W.)

Huarte, *Scrutinium Ingeniorum*, chap. i, at the beginning, advances another reason for that modesty, which we have not now the time to put to the test.

32. This modesty appears to be not the least reason why the law of nature itself is held to forbid marriage between kindred in the direct ascending and descending lines, especially since there never was, and probably never can be, a case when such would have to be allowed in order to preserve the human race. For the daughters of Lot, in *Genesis*, xix. 31, were too eager with their solicitude, although Grotius in commenting on that passage, feels that they thought that lawful which they knew to be the common practice of the neighbouring Arabs, as was also the custom of the Persians as well. And in this sense is to be taken also the reason advanced by Grotius, Bk. II, chap. v, § 12: 'The son, being by the law of marriage superior, cannot show toward his mother, as his wife, the reverence which nature demands, nor the daughter to her father, since she, although inferior by the law of marriage, is prevented from showing reverence, because of that familiar relation necessitated by her marriage to him. Yet were that modesty of which we have spoken, removed, it would not be so absurd for a mother to be joined to a son of legal age, since it is agreeable for a husband to show his mother reverence, because of her virtue, wisdom, or nobility. Tacitus, *Agricola* [vi], observes of his wife's parents: 'Their life was singularly harmonious, thanks to mutual affection and alternate self-sacrifice.' (H.) Much more could a daughter-wife show her father-husband filial reverence along with conjugal obedience, did

not modesty prevent her. The objection of Socrates in Xenophon, *Memorabilia of Socrates*, Bk. IV, is barren enough, as though there were nothing else in the marriages of parents and children deserving of censure, than their disparity of age, which would mean either sterility or ill-formed offspring. And as though there were not any number of marriages in which the ages range from that of complete puberty to as many years as parents can be separated from their children.

613¹ But we must in this connexion praise the chaste rules of the Roman laws, whereby, because of nothing else than the reverence due to the name of father, they declared void all marriages between a father and his adopted daughter, even after the rights due to adoption had been given up by her emancipation. See *Digest*, XXIII. ii. 55. And when a certain woman refused to acknowledge her son, and the arguments on each side were indecisive, Claudius acquitted himself better than was his wont in forcing her to confess, by commanding her to marry the youth. Suetonius, *Claudius*, chap. xv.

Some have also tried to show how the unseemliness of such marriages would lead to the confusion of the different words of relationship. Thus Myrrha argues with herself in Ovid, *Metamorphoses*, Bk. X [346 ff.]: 'Think how many ties, how many names you are confusing! Will you be the rival of your mother, the mistress of your father? Will you be called the sister of your son, the mother of your brother?' (M.) Oedipus is thus described in Seneca, *Phoenician² Women* [134 ff.]:

He was his grandsire's son-in-law, and yet
His father's rival; brother of his sons,
And father of his brothers; at one birth
The granddame bore unto her husband sons,
And grandsons to herself. (M.)

In the *Agamemnon* [34-6], of the same author, Thyestes says:

Then were the laws of nature backward turned:
I mingled sire with grandsire, sons with grandsons;
Yea, monstrous! husband and father did I join. (M.)

An old epitaph runs as follows:

Here I lie, Hersilus, and by me rests Marulla, my sister, mother, and wife. Do you think I lie, and do you frown, and treat this as a riddle of the Sphinx? Nay, but it is truer than the Pythian tripod. My father begat me by her who was his daughter, and then we wedded. And so she was sister, wife, and the one who gave me birth.³

Philo Judaeus, *On Special Laws* [III. iii], in the midst of an invective against the Persians, who allowed marriage with one's mother, adds:

And yet what can be a more flagitious act of impiety than to defile the bed of one's father after he is dead, which it would be right rather to preserve untouched, as sacred;

¹ [For '913' read '613'.—Tr.]

² [For *Phaenissis* read *Phoenissis*.—Tr.]

³ [From Del Rio's commentary on Seneca's *Thebaid* [*Phoenician Women*], 134, but it is almost certainly a forgery. Hersilus is not an old Latin name.—Tr.]

and to feel no respect [. . .] for one's mother, and for the same man to be both the son and the husband of the same woman, and again for the same woman to be both the mother and wife of the same man, and for the children of the two to be the brothers of their father and the grandsons of their mother, and for that same woman to be both the mother and grandmother of those whom she has brought forth, and for the man to be at the same time both the father and the uterine brother of those whom he has begotten? (Y.)

No less detestable is what they tell of the inhabitants of the island of Ceylon, that a father always deflowers his daughter at the time of her marriage, giving the preposterous reason that it is but fair that he pluck the first fruits of a tree of his own planting. The same vile excuse was offered by Shah Jehan for his incest, in Bernier, *De Rebus in Regno Mogolis*.

33. The Hebrews on this question took refuge not so much in natural reason as in the *original* prohibition of God. For they said that from the beginning of the world six kinds of conjunction were forbidden by God: With one's mother, step-mother, another's wife, a sister by one's mother, another man, and a beast. And they concluded from *Genesis*, ii. 24: 'Therefore shall a man leave the bed¹ of his father' (that is, he shall abstain from his father's wife, or his step-mother) 'and shall cleave unto his wife' (not another's wife, and not a male), 'and the two shall be one flesh' (therefore, one must abstain from a beast, since a man cannot unite with such into one flesh). Selden, Bk. V, chaps. i and ii. Yet it is a strange thing which the same author recounts (chap. xviii), to the effect that they believed that when a Gentile became a proselyte of righteousness, every relationship, by which he was before bound to other Gentiles by blood or marriage, vanished. Nay, they said that as soon as those who were before blood kinsmen, such as mother, son, or daughter, were admitted to Judaism, the right of relationship at once expired between them, so that henceforward they were as aliens to each other. For they felt that by reception into the Jewish faith a man was entirely regenerated and, as it were, made a new-born babe. The same thing appears to be hinted at by Tacitus, *Histories*, Bk. V. v: 'The first thing instilled into their proselytes is to despise the gods, to abjure their country, to set at naught parents, children, brothers.' (O.) Therefore a proselyte had no longer a mother, step-mother, and sister, so that no one of these was forbidden to him 614 on the basis of natural kinship; and this was due to the force of their regeneration, by which the proselyte was constituted a new man, as it were, all those rights having been extinguished which depended upon his former birth as a Gentile. All this, they held, proceeded from the divine law. Although in the traditions of their wise men a proselyte was forbidden to marry his mother, or daughter, or sister when likewise proselytes. And if any man while yet a Gentile had married his mother,

¹ [The text differs markedly from that of the Authorized Version.—Tr.]

step-mother, or sister, he was forced to dismiss her upon becoming a proselyte. By a similar consideration a slave, when received into Judaism in his servile condition, was held to have no relationship or right of blood. And so it was not considered unlawful for him to take as a concubine his mother, daughter, or sister, although such practices were forbidden no less to free-born Gentiles than to Jews. The reason for this was that a slave was considered a nobody before the law, and so their marriages stood or were dissolved at the mere will of their masters. Yet by the Roman laws the kinship of slaves in the matter of marriage was as strictly observed as that of free-born. See *Digest*, XXXVIII. viii. 2, § 1; XXIII. ii. 8, 14, §§ 2, 3; L. xvii. 32. Selden, Bk. V, chap. xvi.

We should also note, in passing, what is said of the Chinese, namely, that they refrain from marrying those women who have the same name as themselves, although there be no blood relationship between them. But if they have different names they give little heed to how closely the bride and groom are related in blood, so that girls do not hesitate to marry their mother's brothers. See Martinius, *Historia Sinica*, Bk. I.

34. We must next examine other degrees of relationship in a transverse line, as well as relatives by marriage. And we may observe that brothers and sisters are most closely bound to one another, and between them there is observable such a degree of modesty that those who are more sensitively inclined will not willingly meet where the caresses of lovers may happen to be witnessed or even discussed. Nay, even brothers usually avoid any light discussion with each other of the things of sex. The reason for this, according to Plato, *Laws*, Bk. VIII [p. 838 c], is as follows:

Because every one from his earliest days has heard men saying the same thing about them always and everywhere, whether in comedy or in the graver language of tragedy. When the poet introduces on the stage a Thyestes or an Oedipus, or a Macareus having secret intercourse with his sister, he, when he is found out, is ready to kill himself as the penalty of his sin. (J.*)

And Simplicius on Epictetus, chap. xlvii, says:

Since now law and custom forbid the union¹ of sister and brother, such desires are restrained as though by the command of nature and therefore something unchangeable—save when men are driven by untempered² frenzy and the dire avengers of past crimes.

Compare Charron, *De la Sagesse*, Bk. II, chap. viii, n. 6.

Yet what chiefly prevents us from asserting that marriage between these is of itself contrary to the law of nature, is the fact that, as the Sacred Scriptures describe the beginnings of the human race, there must have been marriage between the children of our first parents, i.e., between brothers and sisters. For it is not likely that God appointed such a case where violence had necessarily to be offered to the law of nature, com-

¹ [For *consuetudine* read *consuetudinem*.—Tr.]

² [For *intemperie* read *intemperiae*.—Tr.]

manding that the human species be propagated, and yet furnishing no other means for such propagation than marriages of that kind; especially since He was under no necessity of creating but one pair of mortals. Nor do I see why some look upon this reason with such arrogant scorn, especially since the grounds which they adduce for the opposite view, are of no greater worth. They say, 'God wished the entire human race to take its origin from one stem and thus be closely related.' Yet just as their statement really serves our argument, so the relationship would 615 have been near enough had several pairs had the same creator and nature, for the children of the unions between them would have kept the strain much the same. Nor is there any point to their further contention, that, had there been several first pairs, 'the world would have been created in war and destroyed at its very birth'; for, as it was, the first son born killed his brother. Therefore, it must appear that the prohibition of such marriages came from positive law. Add Richard Cumberland, *De Legibus Naturae*, chap. viii, § 9; Selden, *De Jure Naturali et Gentium*, Bk. V, chap. viii.

Yet some ground for such a prohibition can apparently be found in the facts, first, that there is modesty between brother and sisters, and, second, that this daily and unobserved companionship could easily furnish the occasion for debauchery and adulteries, if such amours could be made permanent by marriage. See Ovid, *Metamorphoses*, Bk. IX, lines 458, 535, 558 ff.

In this connexion it is worth while to record from Selden, Bk. V, chap. i, the position of the ancient Hebrews, who reckoned among the six kinds of cohabitation, originally forbidden by God, that with a sister by one's own mother. But they added that this precept exerted its force only after the human race had multiplied, and there were enough other women besides one's sisters. There is an old belief among the peoples of the Orient, that all the children of Adam except Seth were twins; and although it was necessary for brothers to marry their sisters, they carefully refrained from marrying a twin sister, but took one born at another time, avoiding twin sisters. The Hebrews believed, furthermore, that a brother was more closely related to a sister by his own mother than by the father alone. See *Deuteronomy*, xiii. 6, where brothers of the same mother are apparently more closely joined. And so they held that this first command applied only to the former sisters, and not to the latter, because there was a closer bond between those of the same womb than between those of the same father. And so in their view only a sister by the father could properly be married to a 'descendant of Noah', that is, a Gentile who is under only the law of nature and nations. This was the reason, why, before the law of Moses, Abraham married Sarah, his sister by his father. And lest one might think the word 'sister' in that place meant

any kinswoman at all, Abraham says plainly, 'She is indeed my sister, the daughter of my father, but not the daughter of my mother.' *Genesis*, xx. 12; add Grotius on this passage. Although that such a union was unusual among neighbouring peoples is proved by the fact that Abraham believed he would not be considered Sarah's husband, if he announced that she was his sister; unless we should rather say that the word 'sister' was taken in its common sense as one by both parents.

Some trouble is caused, in this connexion, by 2 *Samuel*, xiii. 13, where Tamar says to Amnon, her brother by her father, as he was intent upon violating her, 'Speak to the king about marrying me, for he will not withhold me from thee.' For it is not likely that she did not know of the divine law which expressly forbade the marriage of brother and sister by the same father. And it would have been vain for her to wish to avoid her brother's violence in this way, if they could not be wed without violating the law of God, although the opposite view is expressed by Josephus, *Antiquities*, Bk. VII, chap. vii. Here the Hebrews offer the following solution: Maccah, the mother of Tamar and Absalom, was captured by David in a war against the king of Geshur, and while not yet a proselyte she bore Tamar, and after conversion bore Absalom. Therefore, because they believed, that, when a person passed from heathendom to Judaism, all his former relationships were extinguished, and that offspring from a Gentile mother followed the mother and not the father, and was considered a Gentile, and since Tamar afterward became a proselyte, all her relationship that she had formerly had as a Gentile with Amnon, by reason of their common father, was lost. And so she actually believed that, since her conversion had destroyed all former relationship, she could properly marry
616 Amnon and not sin against the divine law.

Turning to the customs of other nations, we find that in Ovid, *Metamorphoses*, Bk. IX [457, 458, 537-558], Biblis complains that the laws of men forbade marriages which the gods themselves contracted. [497-9]: 'But the gods have loved their sisters: so Saturn married Ops, blood-kin of his; Oceanus, Tethys;¹ the ruler of Olympus, Juno.' (M.) In Homer, *Odyssey*, Bk. X [7], the daughters of Aeolus are said to be married to his sons. Theocritus, *Idylls*, xvii [130-1], speaks thus of the wife of the king Ptolemy: '[. . .] She loveth with her whole heart brother and husband in one. So too in heaven was the holy wedlock accomplished.' (E.) Artemisia was the sister and wife of Mausolus. Lucian, *Dialogue between Diogenes and Mausolus*. Arrian, *Anabasis of Alexander*, Bk. I [xxiii], tells us that Hidrieus married his sister Ada 'by the law of the Carians'. Among the ancient Peruvians only the Incas were allowed to marry their sisters, but others were forbidden that practice. Garcilaso de la Vega, *Comentarios Reales*, Bk. IV, chap. ix. On

¹ [For Thetyn read Tethyn.—Tr.]

the other hand the Romans held such marriages in great disrepute. When Plutarch, *Roman Questions* [vi, p. 265 c], explains¹ why women saluted their kinsmen with a kiss, he adds:

Is it because marriage between blood relations was not allowed, so that their mutual affection went the length of a kiss and no farther, this alone being retained as a token of relationship and kin? Men did not anciently marry their kinswomen, just as to this day they do not marry their sisters or aunts; cousin-marriage was permitted at a recent date. (R.)

The reason for this last practice may be seen further below in the same connexion.

By a law of Solon the Athenians could marry their sisters germane or consanguine, but not uterine. Therefore, Plutarch, in his life of Themistocles [xxxii], writes that his son Archeptolis married his sister Mnasiptolema 'since he was born of another mother'. Demosthenes, *Against Eubulides* [20]: 'My grandfather married his sister, but not by the same mother.' It is related in Cornelius Nepos, [*Preface*, iv] and [*Cimon*, i. 2 and 4], that Cimon married his germane sister, 'which the manners of the Athenians allowed'. See the note of Boecler on that statement. Yet a passage in Andocides, *Against Alcibiades*, Or. [iv. 33], appears to controvert this: 'Recall how brave and fore-sighted were our ancestors, in ostracizing Cimon for over-stepping the laws, when he cohabited with his own sister.' This is supported by Athenaeus, Bk. XIII, chap. xxi. But Plutarch, *Cimon* [p. 480 E], leaves this point in doubt, when he says that some censured Cimon for making sport of his sister, while others said the marriage was lawful, because, due to her poverty, she could not find another husband.

In Sparta, however, according to Philo Judaeus, *On Special Laws* [III. xxii], by a custom opposed to that of the Athenians a man could marry his uterine sister but not one by his father. It appears also from Plato, *Laws*, Bk. V, that he legalized marriages between brothers and sisters, since he forbids them only in the ascending and descending line. We have the authority of Diodorus Siculus, Bk. I, chap. xxvii, that among the Egyptians marriage with sisters was formally sanctioned, because it had turned out so well in the case of Isis. Achilles Tatius, Bk. I, attributes the same custom to the Phoenicians.

Yet other people disapproved of such marriages. Phocylides [182]: 'Mount not the abominable couch of a sister.' Ocellus Lucanus, *De Natura Universi*, chap. iv [12]: 'Lie not with mother, or sister, nor in an open spot.' Although it may be inferred from Euripides, *Andromacha*, lines 173 f., that over Greece in general marriages with sisters were extremely unusual, since Hermione censures Andromacha with the following words:

Suchlike is the whole barbaric race:—

Father with daughter, son with mother weds,

Sister with brother. [. . .] No whit hereof doth law forbid. (W.)

¹ [For *ratismem* read *rationem*.—Tr.]

617 That the custom at any rate completely vanished among the later Greeks is to be gathered from Sextus Empiricus¹, *Pyrrhoneiae*, Bk. I, chap. xiv [152]: 'Among the Egyptians men marry their own sisters, which is forbidden us by law.' *Idem*, Bk. III, chap. xxiv [205]: 'It is a crime among us for a man to marry his own mother or sister.' Add Selden, *De Jure Naturali et Gentium*, Bk. V, chap. xi. On the marriage of the Persians with their mothers and sisters see Sextus Empiricus, *loc. cit.*, as also Strabo, Bk. XV [iii. 20, p. 735]; Diogenes Laertius, *Preface*; Curtius, Bk. VIII, chap. ii; Lucian, *De Sacrificiis* [xiii. 5]. Although the opinion of the better men on such practices may be gathered from the reply of the royal judges to Cambyzes, in Herodotus, Bk. III. Add what is written, although I know not how trustworthy the account is, by Leonhard Rauchwolf, *Itinerarium Orientale*, Bk. II, chap. xv, on the Thrusci, a people of the Lebanon Mountains.

We should observe, in this connexion, that, in forbidding marriage between brothers and sisters, the ancient Jews were not concerned whether the sister was of an adulterous or of a lawful union. And so the offspring of a mother-in-law and of an adulterer was considered a sister in the prohibition of marriage. Add *Digest*, XXIII. ii. 54. Although they also held that incest was committed only by marriage, not by violence or adultery. Therefore, it was not incest if a man lay with a mother and then with her daughter, since it would be incest only if a man married first the mother and then her daughter. So also a man could marry a woman whom his father, brother, or uncle had already lain with, although he could not without incest marry his mother-in-law nor his uncle's widow, nor his brother's wife, save in the special case when his brother had died without issue. Compare *Digest*, XXV. vii. 1, § 3; XXXVIII. x. 4, § 8. So also in their opinion a man could marry Seia even though he had already violated her mother, sister, grandmother, aunt, daughter, or niece. And although their teachers regarded such a marriage as unlawful, yet when once contracted it held, though the man was scourged. The conclusion, then, is that they felt that kinship was established not by the mere contact of bodies but by marriage. Selden, *loc. cit.*

Nicetas Acominatus relates that when Andronicus Comnenus desired the marriage of Alexius to Irene, both of whom were incestuously born of Theodora, and inquired of his judges concerning it, some of them 'maintained that they were not related because, being born of an unlawful union, the law of kinship had nothing to do with them, and they were to be held as entirely alien to each other'. Although the writer calls the judges 'avaricious men, who were accustomed to put sacred matters up to auction and to sell their votes for banquets with the rich'.

¹ [For *Emperici* read *Empirici*.—Tr.]

35. Regarding the other degrees forbidden in *Leviticus*, xviii, it would be more difficult to find a reason why they should stand in the way of marriage by virtue of natural law also, although such unions are held in disrepute by many heathen nations as well. The statement of the Apostle, in *1 Corinthians*, v. 1, on a step-mother, agrees with that of Phocylides [179 f.]: 'Touch not thy step-mother, thy father's second couch, but honour as a mother her who follows in a mother's footsteps.' Well known is the story in Plutarch, *Demetrius* [xxxviii], of Stratonice, whom her husband Seleucus gave to his son Antiochus when he was wildly infatuated with her, saying, as it is reported: 'If his wife were reluctant to take this extraordinary step, to call upon his friends to teach and persuade her to regard as just and honourable whatever 618 seemed good to the king and conducive to the general welfare.' (P.) Appian, *Syrian Wars* [lix], also calls that love of Antiochus an 'unholy passion'. Add Seneca, *Controversies*, Bk. VI, declam. vii; Valerius Maximus, Bk. V, chap. vii, § 1, ext. Thus Cicero, *For Cluentius* [vi], expresses his deep disgust at the marriage of a young man with his mother-in-law: 'Oh, the incredible wickedness of the woman, and, with the exception of this one single instance, unheard of since the world began!' (Y.) Andocides, *Orations*, i [124]: 'That vilest of men lay with a mother and her daughter.' Add *Digest*, XII. vii. 5, § 1; XXIII. ii. 12, §§ 1, 2, 3; XXIII. ii. 15, 39. Although it is the custom among the Tartars for a son to marry his step-mother upon the death of his father. Haythonus, *De Tartaris*, chap. xlviii; Paul of Venice, Bk. I, chap. xv.

The ancient Hebrews, according to Grotius, *loc. cit.*, gave two main reasons for forbidding marriages in these degrees, one drawn from natural shame, which does not allow the authors of offspring, that is, parents, to have intercourse with their own offspring, either in themselves or through persons closely related to them in blood and marriage connexion. Now, although this reason is strong enough in the ascending and descending degrees, yet since that modesty entirely vanishes in collateral relations, especially those beyond the second degree, it can have no force for the formation of any natural law. Yet reason approves those civil laws which have extended the prohibition of degrees more widely, placed like a hedge, as it were, about those degrees which are held forbidden by natural as well as divine law.

Their second reason is, that the daily and unobserved contact of such persons would give opportunity for lewdness and adultery, if such amours could be made permanent by marriage. This argument can likewise give rise to positive law, but does not suffice for natural law. The Hebrews seem to make good enough use of it to explain why *Leviticus*, xviii, forbids the marriage of an aunt, but not of a brother's daughter, although both appear to be distant in the same degree. For they say that young men regularly visit the homes of their grandparents,

or even live there along with their aunts, yet they have no such frequent entrance into the homes of their brothers, and enjoy no such¹ right there. The same degree was unlawful by the customs of the Romans, as appears by the example of Claudius when desirous of marrying Agrippina. Tacitus, *Annals*, Bk. XII. Yet there are many who assert that in this passage not persons but degrees are forbidden, though there is, perhaps, no want of something that might be said in opposition to their reasons.

But those who feel that every and all degrees listed in this passage of Leviticus are repugnant to natural law, emphasize the words of the twenty-seventh verse.² For they say, since every transgression presupposes a law, it must be that those heathen, in contracting such marriages, violated either some natural or divine positive law that was binding upon all nations. It would be hard to make out a clear case for the latter. To this Selden, Bk. V, chap. xi, replies that those words should be taken only of those sins which could have fallen also upon the heathen. And he finds an argument in the fact that it is prohibited there for a man to marry two sisters—a thing, however, which was done by Jacob, a most righteous man. Although it can be said with some reason that the rivalry between those same sisters was one of the reasons for that law. So also Amram, the father of Moses, married his aunt Jochabed, a degree expressly forbidden in that same chapter.

Some interesting facts on the degrees of consanguinity are given by Abr. Rogerius, *De Braminibus*, Pt. I, chap. xii. In the chapter *On Wives* in the Koran marriage is forbidden with the following persons: mother, step-mother, daughter, sister, aunt, niece, nurse, foster-sister, mother-in-law, step-daughter, daughter-in-law, two sisters, the daughter of a woman whom a man has known in a sexual relation,
 619 another man's wife, unless captured in war. Add Selden, *De Jure Naturali et Gentium*, Bk. VI, chap. xi, towards the end.

It may be noted, in passing, that many men hold the force of kinship to be broken upon the death of the person on whom it was based, and of those who sprang of it. Euripides, *Medea* [76]:

The old ties in the race lag far behind
 The new. (W.)

Isocrates, *Aegineticus* [8]: 'He thought so much of my father's friendship, that when my aunt died without issue, again he married a relative, this time my father's cousin, so as not to lose relationship with us.' Cicero, *For Quinctius* [vi]: 'A relationship, which while his children lived, could not possibly be annulled.' (Y.) *Idem*, *Philippics*, XI. [iv. 10], on Dolabella, his former son-in-law: 'And this man, O ye

¹ [For *tandundem* read *tantumdem*.—Tr.]

² [For all these abominations have the men of the lands done, that were before you, and the land is defiled.—Tr.]

immortal gods, was once my relation.' (Y.) Florus, Bk. IV, chap. ii: 'At the death of Julia, Caesar's daughter, who had been married to Pompey, and had kept them friends through the bond of matrimony, rivalry immediately broke forth between these men.' Philo Judaeus, *On the Embassy to Gaius* [x]: 'Intermarriages are the bonds which unite families between which there is no kindred, [. . .] but when that bond is dissolved, then the union is dissolved likewise.' (Y.) On the other hand Paul of Venice, Bk. I, chap. lviii, records of the Tartars that parents unite in marriage dead unmarried sons with unmarried daughters, and believe that by such a posthumous contract as close a relationship is established between their surviving parents and relatives as would have been possible had the wedding been celebrated in their lifetime.

36. Something may well be added, in conclusion, on the subject of secondary wives, an institution which is found among many peoples; I mean such as offer actual conjugal faith to their husband and are joined in the closest relationship with him, and yet either because of inequality of station and birth, or for other reasons, never attain the dignity of a full mother of a household, nor secure for their issue as much right as usually belongs to the children of a household. Selden, *De Jure Naturali et Gentium*, Bk. V, chap. vii, may be consulted, who makes it clear that the distinction between these and lawful wives is due only to positive law or pacts between individuals. For distinctions of position have been established by positive law, and the parties to a marriage pact may add to it at their pleasure whatever does not change its nature. It is clear that such a distinction is introduced in order to preserve illustrious families, or in favour of former children (in Julius Capitolinus [xix. 29 f.], the emperor Marcus, 'after the death of Faustina [. . .] took a concubine, the daughter of a steward of his wife's rather than put a stepmother over so many children' (M.*)), or, finally, the better to avoid the expense which the manner of states would otherwise have required for a lawful wife. For it tends to preserve illustrious families if the daughters of the same be taken into houses of equal station; and for this end civil laws have in certain places ordained, that, if a man joins himself to a woman of inferior position, such a marriage need not have all the effects which otherwise attend a legal marriage in that state. They are likewise weakened by a division of the estate, to avoid which it is helpful to take secondary wives, lest, if smaller portions be assigned the children of the lawful mother of a family, they would have just cause for complaint. And, on the third reason, he is surely a fool who marries a wife whose expenses must reduce him to beggary.

From all this it is patent, that an injury is done such secondary wives, if they are given the vile name of concubines. For these last are

properly such as live a life of shame with a man, without promising him conjugal faith, and differ from prostitutes only in degree. Nor are they removed from that class, even if they agree to give themselves for a time to but one man (see Aelian, *Varia Historia*, Bk. X, chap. xviii); for in conjugal faith there is something far more sacred and comprehensive than the mere preservation of one's body for a single
 620 man, in return for money alone or mutual lust. Although sometimes the term concubine would appear to carry no opprobrium with it. See *Digest*, XXXII. xlix, § 4; and in *Code*, V. xxvii. 3, a certain form of concubinage is called 'unequal marriage'; see also the remarks thereon of Godefroy.

On the Turkish rulers Busbecq, *Letters*, i, reports that after Bajazet none of them ever even took a lawful wife. 'For when he and his wife came into the power of Tamerlane after his defeat, nothing seemed so disgraceful to him as the affronts and dishonour to which his wife was subjected before his eyes. The following rulers, bearing this in mind, refrained from taking wives, and begat sons only of wives of servile condition, who, they thought, could suffer less injury than lawful ones.¹ Nor, in fact, do the Turks pay less honour to sons of concubines or mistresses than to those of lawful wives, nor are such accorded less right to their father's property.' Although Abbas, king of Persia, conceived another plan of preventing such an insult, for when he had taken along his harem on a campaign, he left them in the care of his eunuchs, with the command to behead them in case he was defeated in the battle. Petrus de Valle, *Viaggi*, Pt. II, ep. v.

When the Chinese have no hope of issue from a lawful wife they take concubines, since they hold it the greatest misfortune to be without children to accord them at their death the honour of mourning and burial. Martinius, *Historia Sinica*, Bk. VI, chap. i, p. 201.

We should observe, in conclusion, that just as civil laws regularly clothe other contracts as well with certain formalities and rites, upon the absence of which they are held invalid in a court of law, so also in some states such features are understood to be joined to marriage, with the result that, if they are lacking, the marriage is regarded as unlawful, or at any rate is lacking in some of the effects in a court of law. See *Constitutions of Sicily*, Bk. III, tit. xx. Now although these formalities are unknown to natural law, nevertheless, since that law enjoins the observance of civil laws in the case of those who are subject to them, it is vain for those who lack the power to pass or abrogate civil laws, to claim² that the law of nature is indifferent to such cases.

¹ [For *uxors* read *uxores*.—Tr.]

² [For *ellegant* read *allegant*.—Tr.]

CHAPTER II

ON PATERNAL POWER

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| <ol style="list-style-type: none">1. The common view of the origin of paternal power.2. According to Hobbes the original power over children lies with the mother,3. Which is then derived from her upon others.4. Upon what reasons the sovereignty of the father is based¹.5. How far it belongs to the father rather than the mother.6. How much power over his offspring belongs to a father as such; | <ol style="list-style-type: none">7. And, indeed, in their infancy and childhood.8. How far during this period children are capable of sovereignty.9. Whether a father can sell his son.10. On the obligations of emancipated children.11. What power over adult children belongs to fathers outside states;12. What within states.13. How this power is lost.14. Whether children must have the consent of their parents for contracting marriage. |
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FROM marriage come offspring, and over them is established paternal power, a most ancient as well as sacred form of sovereignty, whereby children are required to respect the commands of their parents and acknowledge their superiority over them. On its origin Grotius, Bk. II, chap. v, § 1, and most writers, say that it springs from generation, 621 in which men are in a way like God, in that they bring into being one who before was not. But that, since each parent shares equally in that generation, each originally secures a right over the offspring, although if they dispute over the sovereignty and both cannot be satisfied, that of the father is to be preferred, not only because he is superior by reason of his sex, but also because he exercises sovereignty over the mother.

2. Hobbes, *De Cive*, chap. ix, has undertaken to investigate the origin of this sovereignty as follows. Although, he says, it is a logical conclusion that because a man is the father of a son he is also his master, yet it is not so manifest as at once to show clearly the necessity for it, as is true in other conclusions, one of the terms of which is included in the definition of the other, but must be based upon other considerations. Furthermore, since supreme sovereignty, so long as it is expected to have a regular form, is indivisible, so that no man can at the same time serve two masters, of whom neither is subordinate to the other, and yet two persons concur in generation, apparently sovereignty cannot be acquired by generation alone. Therefore, paternal power must be deduced from a natural state in the following manner: Since in that state everything is permissible over any person, in so far as a man feels that it makes for his own preservation, the conqueror becomes the

¹ [For *nitasur* read *nitatur*.—Tr.]

² [For '92r' read '62r'.—Tr.]

master of the conquered. It follows from this, that, by the law of nature, the sovereignty over an infant belongs at the outset to the one who was the first to have it in his power. It is clear, then, that an infant by reason of its birth is first in the power of its mother, and of no one else; and if she has decided to rear it (as, of course, she is required to do), she is understood¹ to do so to the end that it may not grow up to be her enemy, that is, that it render obedience to her. (For by his hypothesis all who are not related to each other as sovereign and subject, or do not acknowledge a common master, are mutual enemies.) For it is not to be presumed that any person gave another his life that he might later, so soon as he acquires strength by age and his right, become his enemy. Therefore, on this score, every woman who brings forth in a state of nature, becomes at the same time both a mother and a sovereign mistress. The excellence of sex is not sufficient to give the father, rather than the mother, right over the offspring, for the inequality of strength between man and woman is not so great that the former can secure sovereignty over the latter without a struggle, and so he has need also of war to bring her under his authority. It is a further consideration, that the part of woman in the generation of children as compared with that of man, if not more noble, is at least more laborious and irksome, since she has carried the child for so long a time within her body and nourished it with her own strength.²

Quintilian, *Declamations*, cccxxxviii:

It is one thing to be made a parent by a brief and transitory act of pleasure, and to be endeared to one's children only by this external satisfaction; and a very different thing to love what you have yourself given birth to, that which reminds you of those ten months, and recalls so many dangers and anxieties.

Medea speaks as follows in Ennius: 'I would rather face battle thrice than be a mother once.' [Frag. 222 Ribbeck.] The thought is taken from that famous line of Euripides, *Medea* [250-1]:

Thrice would I under shield
Stand, rather than bear childbirth peril once. (W.)

They say of the women of Paria in America, that they suffer no labour in parturition, and feel no weakness, but return immediately after delivery to their accustomed tasks. The same is told of the women of Chile, and that women of Spain, after a long residence there, become equally hardened. Although Orestes, in the play of that name by Euripides [552 ff.], may, when it serves his purpose, appear to give his vote for the father:

My sire begat me, thy child gave me birth—
The field that from another gat the seed;
Without the father might no offspring be.

¹ [For *intelligetur* read *intellegitur*, or else translate 'she will be understood'.—Tr.]

² [This reason belongs to Pufendorf, not Hobbes.—Tr.]

I reasoned then—better defend my source
Of life, than her that did but foster me. (W.)

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Furthermore, since in a mere state of nature, where no commonwealths or families are recognized, to which each person might have been subject, it cannot be known to what father a child belongs save on the declaration of its mother, and so it belongs to whomsoever the mother wishes, and is hers first of all. Hence it is a rule of Roman law that a child born out of wedlock follows the womb, that is, the mother. There was also a law among the Lycians, that, 'If a woman who is a citizen marry a slave, the children are accounted to be of gentle birth; but if a man who is a citizen, though he were the first man among them, have a slave for wife or concubine, the children are without civil rights.' (M.) Among the same people children took their name from that of their mother and not from that of their father. Herodotus, Bk. I [clxxiii].

3. According to Hobbes this power passes from the mother to others in different ways. I. If the mother has renounced or thrown away her right by exposing her child. In that case he who has found and reared him will have the sovereignty which the mother had, for that life which the mother gave him when she carried him, she took back, so far as she was able, by exposing him. Therefore, the obligation as well which a child owes his mother, and which sprang from her gift of life, is removed by her having exposed him, while the child owes everything to the one who saved and nourished him, as a foster-child calling him his mother, and as a servant his master. Here may be applied the words of Admetus in Euripides, *Alcestis* [666 ff.]:

For thee dead am I. If I see the light—
Another saviour found—I call me son
To her, and loving fosterer of her old age. (W.)

Libanius, *Orations*, xiii [xx. 43]: 'The man who has saved another from a river's swirl, may well be called his father.' Now although we may concede that such a child should be willing to show some regard for his mother, and upon her repentance to assume again their natural relationship, yet that may not be done without the consent and withdrawal of his foster-father, to whom he must return the cost of his rearing and all other expenses incurred upon him. And this appears to be the only case whereby sovereignty over a man is secured by seizure.

II. If a mother is captured in war, the issue born to her after her capture belongs also to her capturer, because whoever has dominion over a person, has it also over all her possessions, and so over her son. Although it should be observed, that, in this case, a different kind of power is acquired by the capturer over the child than that which the mother had.

III. If a mother is the citizen of some state, he who has the highest sovereignty in that state will also have dominion over her issue, although it should be noted in this case also, that the power held by the state is different from that which belongs to the parents; and that the power of the mother is not immediately extinguished by the civil sovereignty, but in some states is circumscribed within definite limits, and in others left practically unimpaired.

IV. If a woman give herself to a man in union, on the condition that the sovereignty shall be with him, the children born of both are under the father, because of his sovereignty over the mother. But if the woman have the sovereignty, and beget children by him who is subject to her, they are under the mother, for otherwise the woman cannot have children and keep her sovereignty unimpaired. And, in general, if the society of the man and woman be such a union wherein one is subject to the sovereignty of the other, the children are under the one that is free. Yet if a man and woman agree to cohabitation in a state of nature, in such a way that one is not under the sovereignty of the other, their children are under the mother, unless they have agreed otherwise.

623 For the mother may by pacts dispose of her right as she pleases. This, they say, was done by the Amazons, who reached the agreement that, of their issue by their neighbours, they would return the males and keep the females. But in states, if there is a contract for cohabitation between a man and a woman, the children are under the father, because in all states, at least in those formed by the male heads of families, the domestic sovereignty belongs to the man. If such a contract is drawn up in accordance with civil laws and in due form, it is called marriage. But if they only contract a concubinage, or a cohabitation without due form, the children will be under either the father or the mother, according as the civil laws have determined.

4. For our part, as in other similar points, we presuppose a universal cause, even the most Good and Great God. Yet we think it no less proper to inquire into secondary and immediate causes. For when some say: 'All sovereignty which belongs to man over man is communicated to him by God through some divine commission, and man has no power but that which is delegated him,' such a statement seems to us disrespectful to God, however much those who so glibly repeat such thoughts maintain a pose of exalted piety. For whoever exercises a delegated authority has it along with him who delegated it, except that the latter possesses it as his own, and the former as another's. And yet he has a very low idea of God's majesty who thinks that the same kind of sovereignty as lies in God belongs also to men. See *Matthew*, x. 28.

So much being premised, we feel that it should, in the first place, be fixed beyond doubt, that the act of generation gives rise to an occasion of acquiring some right over offspring, which not only has

power against others, who are not parents (that as he who is master of a thing is also master of its fruits, so he has the nearest degree to acquire mastery over a child, who is master of the body from which it was born), but has force against the child itself. I say 'occasion', for in our opinion generation alone is not sufficient for a claim to sovereignty over human issue. For although our offspring may be of our substance, yet because it passes into a person that is like us, and is our equal, so far as the rights naturally belonging to men are concerned, there is need of some other claim to render it unequal to us, that is, subject to our sovereignty. Especially since such issue follows upon an act which we usually perform with an eye to our own pleasure¹, and which we cannot impute to our children, as being of such worth that they are obligated to be subject to us, whether they will or not. Lactantius, *Divine Institutes*, Bk. V, chap. xviii: 'He who begets a son has it not in his power to effect that he shall be conceived, or born, or live; from which it is evident that he is not (so much) the father, but only (as) the instrument of generation.' (C.*)

Therefore, the right of parents over children is based upon a two-fold claim: First, because the very law of nature, by reason of its command that man be sociable, has laid upon parents the care of children, and, to provide against its neglect, has at the same time implanted in them the most tender affection for their offspring. For unless you provide that parents rear their offspring, it is impossible to conceive of a social life. But that care cannot properly be exercised unless parents have power to direct the actions of their children to their good, which is not yet recognized by the children because of their immature judgment. See *Ecclesiasticus*, viii. 25; xxx. 1 ff. And so for this very reason nature enjoins upon parents that they exercise sufficient sovereignty over their children to attain that end. For whoever obligates a man to an end is understood to have conferred upon him at the same time the power to avail himself of the means without which it cannot be obtained. Furthermore, this power of parents, resulting from the command to care for one's children, necessarily lays upon children the 624 obligation to submit themselves to the direction of their parents, since this direction without the former obligation is to no purpose.

In the second place, the sovereignty of parents appears to rest upon the presumed consent of the children themselves, and so on a tacit pact. For as a parent by his acknowledgement of a child declares that he will fulfil the obligation enjoined by nature, and will give it proper rearing, so far as he is able, so, on his part, the infant, although unable, because his reason is not yet developed, expressly to promise the services which correspond on his side to the obligation of his parents, contracts an obligation towards his parents by reason of their care for him, no less

¹ [For *delectionis* read *delectationis*.—Tr.]

than if his consent had been expressly stated. Add *Digest*, III. v. 2. And this obligation exerts its force so soon as he is able to understand what is done for him by his parents. For it is presumed that had he had the use of his reason at the time when he was acknowledged by them, and had recognized that he could not preserve his life without their care and the sovereignty imposed upon him, he would gladly have consented to it, and would have agreed on his part to a rearing so advantageous to him. This consent, being reasonably presumed, has the same force as if it had been expressed. Compare Seneca, *To Marcia, On Consolation*, chap. xviii. Just as he whose business is conducted by another in his absence and without his knowledge, is understood to have contracted an obligation, as if from a tacit contract, to repay the other what was paid for his advantage. From this it is patent, that the sovereignty of a parent over a child is actually established when he accepts and rears¹ it, and undertakes to mould it, as well as he can, into a useful² member of human society.

Nor is there any force in the view of some, that the obligation between parents and children can in no way be derived from consent and a tacit pact, 'because, under whatever title consent comes, it cannot properly be found save in actions that were free before the consent; and yet it is not free to the father or to the son to decline respectively the right of education and any debt consequent upon it.' For it is not contradictory that a thing should arise from a precept of natural law, and also from tacit consent. Surely a man is not free not to obey God, and yet God has willed to require obedience from the faithful by a covenant. So also a citizen owes military service to his state, and yet, when he enlists, his consent and oath are required. And so why may it not be said that the tacit consent of a child is understood, when a parent actually undertakes its rearing, the effect of which is that he has no cause to complain that the paternal sovereignty is laid upon him without his consent and to no purpose?

5. When the further question is raised, as to which parent has the greater right over the offspring, the matter may be cleared up by drawing a distinction at the outset. For they either live within or without a state; and there is, or there is not a pact between them. If the parents live without a state, in natural liberty, the offspring belongs to the mother, in case they joined themselves without any lasting pact. For in that state the father cannot be known but on the evidence of the mother, at least with such certainty as matters of fact usually require, it being permissible in such a state for the mother to accept the services of other men as well. Compare *Institutes*, II. i, §§ 31, 32, and *Digest*, XLI. i. 7, § 13. For this reason the Roman laws assign children of uncertain parentage to the mother, although the custom of the ancient

¹ [For *nutrique* read *nutritique*.—Tr.]

² [For *incommodum* read *in commodum*.—Tr.]

Egyptians, as given by Diodorus Siculus, Bk. I, chap. lxxx, was just the opposite:

None of the sons are ever reputed bastards, though they be begotten of a bond-maid, for they conceive that only the father begets the child, and that the mother contributes nothing but place and nourishment. And they call trees that bear fruit males, and those that bear none, females; contrary to what the Grecians name them. (B.*)

A similar opinion occurs in the Pythagorean Theages, *De Virtutibus* [Mullach, Vol. II, p. 22]: 'The father generates the spirit; the mother does in bringing forth but supply the material body.'

But when there has passed between a man and a woman a pact 625 which disposes of the issue, it will fully decide the question as to the one to whom belongs the sovereignty over the issue, for it is contrary to rule that two should together hold the supreme authority over the same person. Now this pact either merely looks to the acquiring of offspring, or also involves sovereignty over the woman, and so includes a lawful marriage, where the sovereignty over the offspring unquestionably lies with the father.

But although it is the rule, in pacts of the former kind, that they have their rise in the man, and he seeks issue for himself and not for the woman, and so has bargained for that parental sovereignty for himself, yet it can happen, contrary to this rule, that a woman may choose a man, and not the opposite. This was once done by the Amazons, and is needful at the present time in the case of women who hold the supreme sovereignty in a state and marry without impairing it, whose husbands are not, properly speaking, so much kings as husbands of queens. Nor are such pacts repugnant to the law of nature, by reason of the fact that one of the parents apparently frees himself of that care of the children which nature enjoined upon both without distinction; for nature does not specifically require that they both, of themselves and personally, look after the rearing of their offspring, but her law is met if they agree to turn that over to one of them, just as a mother is not required to suckle her children, but may turn them over to a nurse. (Although the opposite position is taken by Plutarch, *The Education of Children* [v], and Favorinus, in Gellius, Bk. XII, chap. i. Add Ferdinando Pinto, *Itinerarium*, chap. liv, where he describes how the Javanese make it a point of their religion for the mothers to nurse their own children. In the Koran it is especially commanded that women do this for their offspring two full years.) And in the same way fathers are allowed to hold that the mind and manners of their children may be shaped by capable instructors.

But where males establish states, just as they are regularly the heads of the families, so the private sovereignty over children lies with the fathers, and hence the orders of the mothers have of themselves only the force of advice, and usually have full authority to obligate the

children only as they borrow the power from the father. For just as it is advantageous for wives to be admitted to a share in the administration of the household, so the sovereignty of the father does not exclude the mother's care over the children. Although civil laws may dispose of this in their own way. Thus Petrus de Valle, *Viaggi*, Pt. I, ep. xvii, writes that among the Babylonians the supreme power over the sons lies with the father, but that over the daughters with the mother.

But if, upon the death of the father, the government of the family lies with the mother, it is also right that she receive the power of the father over the children. Compare *Genesis*, xxi. 21 with xxiv. 4. And when her second husband succeeds to the care of rearing his step-children, he will be accorded the respect owed their natural father. Yet it is recorded of the Chinese, that, if a woman upon the death of her husband marry again, she leaves her children, taking with her but a single garment, because among that people the children will not tolerate a step-father, much less obey him. Neuhoof, *Legatio*, p. 281.

6. It is our next task to inquire into the amount of the power of parents over their children. Here we must distinguish (1) between heads of households established without the bounds of states, and those who have already subjected themselves to states; and (2) between the power held by a father as such, and as the head of a separate family.

Now since the power which belongs to a father as such is necessary to his fulfilling towards his children the obligation which is enjoined by nature, it is understood to be as great as serves to obtain that end. Furthermore, the duty of a parent as such lies chiefly in this: That he rear his children properly, that is, provide for and govern them until they are able to look out for themselves and to temper their actions to
 626 their wills, and see to it that they become useful members of human society. For generation is not a part but only the occasion of the duty of a father. And parents should undertake this duty all the more zealously, as there is the more truth in what is said by Plutarch, *The Education of Children* [vii, p. 4 c]: 'The fount and root of excellence is to receive a proper education.' Especially since the observation of Plato, *Republic*, Bk. VI [p. 491 E], is nearly always true:

And may we not say that the most gifted minds, when they are ill-educated, become the worst? Do not great crimes and the spirit of pure evil spring out of a fulness of nature ruined by education rather than from an inferiority, whereas weak natures are scarcely capable of any very great good or very great evil? (J.)

The same writer also in his *Laws*, Bk. VII [p. 808 D], calls a child 'the most unmanageable of all animals'. (J.) Libanius, *Declamations*, xx [ix. 6]: 'Education is a great service for the soul.' Horace, *Odes*, Bk. IV, ode iv [33 f.]: 'Yet training increases inborn worth, and righteous ways make strong the heart; whenever righteousness has failed, faults mar even what nature had made noble.' (B.) An anonymous poet [Menander,

Monostichoi, 96 and 557]¹: 'One must learn how to read and write, and when he has learned, have some sense; for learning is nothing without sense.' Add Stobaeus, *Anthology*, lxxxi.

It is patent from all this, that the power of the father does on no account extend so far that he can destroy the child while yet unborn. (See *Digest*, XLVII. xi. 4; XLVIII. viii. 8; XLVIII. xix. 38, § 5; except in case both the mother and the child would otherwise perish. See Ant. Matthaeus, *De Criminibus*, V. i. 5, on *Digest*, XLVII²; Grotius, *Florum Sparsio*, on *Digest*, XLVIII. xix. 39.) Nor may he expose it upon birth, or kill it, especially if it is somewhat advanced in years. For although it may be said that a child traces its origin to the substance of its parents, yet upon conception it attains a like condition with them, at least to the extent that it is capable of suffering injury from a person. Pliny, *Letters*, Bk. IX, ep. xii: 'In exerting the authority of a father, remember always that you are a man, and the parent of a man.' (B.) See Philo Judaeus, *On Special Laws*; Lactantius, *Divine Institutes*, Bk. VI, chap. xx; Diodorus Siculus, Bk. I, chap. lxxvii. Add Grotius on *Exodus*, xxi-xxii; *Law of the Visigoths*, Bk. VI, tit. iii, chap. 7; Selden, *De Jure Naturali et Gentium*, Bk. IV, chap. i. It is a most absurd custom of the natives of Formosa to regard it as disgraceful for a woman to conceive before the age of thirty-five or thirty-six; and if she becomes pregnant before that age they kill the foetus by buffets, blows, and pressure, which are attended with excruciating pains.

And so we must condemn the view of Aristotle, *Politics*, Bk. VII, chap. xvi [21]:

As to the exposure and rearing of children, let there be a law that no deformed child shall live, but where there are too many (for in our state population has a limit) [...] let abortion be procured before sense and life have begun; what may or may not be lawfully done in these cases depends on the question of life and sensation. (J.)

Not much more humane is the institution of Lycurgus in Plutarch, *Lycurgus* [xvi]:

Offspring was not reared at the will of the father, but was taken and carried by him to a place called Lesche, where the elders of the tribes officially examined the infant, and if it was well-built and sturdy, they ordered the father to rear it. [...] But if it was ill-born and deformed, they sent it to the so-called Apothetae, a chasm-like place at the foot of Mount Taygetus, in the conviction that the life of that which nature had not well equipped at the very beginning for health and strength, was of no advantage either to itself or the state. (P.)

Compare, *Digest*, XXV. iii. 4. I know not whether any credit is to be given to what Diodorus³ Siculus, Bk. I, chap. lviii [II. lviii], recounts of the way in which the Taprobanians discover the future quality of their children. Indeed, this monstrous custom of exposing children was

¹ [The first line is ascribed also to the much earlier poet, Philonides, by Stobaeus, *Anthology*, III. xxxv. 6 a.—Tr.]

² [This reference we have not succeeded in verifying.—Tr.]

³ [For Diodorus read Diodorus.—Tr.]

so common among the ancients, that Strabo, Bk. XVII [ii. 5, p. 824], calls it a 'peculiar' practice that the Egyptians 'reared all their children'. Add Diodorus Siculus, Bk. I, chap. lxxx. Dionysius of Halicarnassus, 627 Bk. I [xvi], has the same to say of the Aborigines, that they 'would not put any of their children to death, looking on this as the greatest of crimes' (S.). And Tacitus, *Histories*, Bk. V [v], writes that among the Jews: 'It is forbidden to put any of their brethren to death.' (O.) Yet Curtius, Bk. IX, chap. i [25], tells us that the Spartan custom was practised in India in the kingdom of Sophes: 'The children are not reared and educated according to the decision of the parents, but of officers appointed to examine the conformation of infants; who, if they observe any to be monsters or defective in their limbs, cause them to be killed.' (A.) The same is recounted of the Catheans by Strabo, Bk. XV [i. 30, p. 699]. Poor parents among the Chinese freely kill their offspring, especially the girls. And because of their belief in metempsychosis, which is held by almost all the heathen nations of the Orient, they feel that they are doing their children a good turn, since in this way they open a way to them for birth into a better condition.

But it does not appear that this power, as such, should be extended to a right of life and death, to be exercised upon the occasion of wrongdoing, but only to moderate reproof, since it concerns that tender age in which there are but few cases of incurable misdeeds that deserve the punishment of death. And so it was the custom among the Romans for boys who had not yet come of age to be lashed with a whip of eel-skins, 'and for that reason they were not fined.' Pliny, *Natural History*, Bk. IX, chap. xxiii. And if a man has a son who, because of incorrigible self-will and perversity, stubbornly scorns the care expended on him for his own good, it is a better course to drive him away and order him to live at a distance. And so it appears that the severest punishment a father as such can inflict upon his son is to disown and disinherit him.

7. It is of such parental power, in the strict sense, that we must understand the passage of Grotius, Bk. II, chap. v, § 2, where he distinguishes between three periods in the life of children: The first, of imperfect judgement, and when there is no *proairesis* [free choice]; the second, of perfected judgement, yet when the son still remains a part of the father's household and does not conduct his own¹ affairs; the third, when he leaves the family, whether he has established one of his own, or has entered into another's. Still I cannot discover the reason why Ziegler, in commenting on this passage, cannot accept it. For although the Sacred Scriptures, in enjoining upon children obedience to their parents, make no such distinctions (*Ephesians*, vi. 1; *Colossians*, iii. 20), neither does it forbid treating a little boy in one way and a grown youth

¹ [For *tuas* read *suas*.—Tr.]

in another; just as it does not require that a son, when grown, should never leave his father's house within the lifetime of his parents. During the first period, therefore, as Grotius holds, all the actions of children lie under the direction of their parents, since it is right that whoever cannot direct himself should be directed by another, and no one can naturally be found,¹ to whom that control better belongs than one's parents.

8. The question is raised, in this connexion, whether a child at this period is by natural law capable of a dominion which will prevail against his father. Here, it seems, we must distinguish between property which is secured by one's own industry, and that which is made over to one by the liberality of others, as by wills or gifts. At that age how little, indeed, can a boy acquire by his own labour! Surely it will not be more than his parent spends or has spent on his education; and so the father may properly claim this in return for his troubles and expense. For although he was required by natural law to support his offspring, he was not forbidden to receive any profit which he could get from rearing it, any more than parents are forbidden to take pleasure in their children, which is often so great that they are glad to purchase it at any price. See Seneca, *To Marcia, On Consolation*, chap. xii [2]. Therefore, it would be effrontery in a son of that age to try to demand 628 compensation for the work he does for his father. Sophocles, *Oedipus at Colonus* [508-9]:

In a parent's cause
Toil, if there be toil, is of no account. (S.)

Among the inhabitants of Peru children were obliged to work for their parents until they were fifteen years old. Garcilaso de la Vega, *Comentarios Reales*, Bk. IV, chap. xix.

But when a child receives something by the generosity of others, such a transfer appears at first invalid, because it requires acceptance, which cannot be given without deliberate consent, and therefore without the use of reason. But because it would indeed be a hardship for those who, because of their tender age, stand in special need of aid from others, to be shut off from some way of receiving such aid, it is entirely fair for another to receive it in their name, and also to administer it until they are able to manage their own affairs; and for such a trust no one is more fit than the father. From this it appears that it is by no means in accordance with nature for a father to secure dominion over goods which are transferred to a son in this way; although equity does not prevent the father from enjoying their usufruct, and supporting his son by this means, until the latter can take over their administration. And so it appears that the Roman laws were on firm ground when they divide the private property of sons of a family

¹ [For aut emineniri read autem inveniri.—Tr.]

into what he receives of his parents, from others, and for his military service.

9. Another question, in this connexion, is whether the paternal sovereignty and duty can be taken from the father and transferred to another. Here we should bear in mind, that, although it was a personal act, such as cannot pass from one man to another, which conferred the paternal duty and sovereignty (Libanius, *Declamations*, xx [ix. 43]: 'The fact that you are born of me cannot be undone by law'), yet this does not prevent that function from being delegated and turned over to another, upon the urge of necessity or the advantage of the child. Although it is well to bear in mind the admonition of Plutarch, *The Education of Children* [xiii, p. 9 D]:

Those parents, moreover, are to be blamed, who, when they have committed their sons to the care of pedagogues or schoolmasters, never see or hear them perform their tasks; wherein they fail much of their duty. For they ought, ever and anon, after the intermission of some days, to make trial of their children's proficiency; and not intrust their hopes of them to the discretion of a hiring. For even that sort of men will take more care of the children, when they know that they are regularly to be called to account. (G.)

Furthermore, it is not repugnant to the law of nature to turn over one's child to a worthy man to be educated, provided some advantage will accrue therefrom to the child. Add Gellius, Bk. V, chap. xix. Euripides, *Ion* [1535-6]:

[...] As friend to friend should give
His own son, that his house might have an heir. (W.)

But in no case does it appear that nature allows a father to use his son as a pledge, or sell him, unless there is no other way to support him. For if that be the case, it is better that he be sold into some easy slavery, from which there is some hope of his securing release, than that he starve to death. Here belongs a law of the Thebans in Aelian, *Varia Historia*, Bk. II, chap. vii:

No Theban is allowed to expose an infant or cast it away into some solitary spot, upon pain of death. However, if the father suffers from extreme poverty, whether the child be male or female, the law bids him to take the child immediately at birth, and in its swaddling clothes, to the magistrate. The latter takes it and sells it for a modest price to some person who enters upon a pact and an agreement to care for the child in good faith, and, when it is grown up to treat it as a slave, recovering by its subsequent services the cost of upbringing.

This law may be defended on the ground that nature is held to give a right to whatever is absolutely necessary for its commands. So the emperor Constantine, in *Code*, IV. xliii. 2, allows a father, because of
629 extreme want and poverty, to sell his own son or daughter, that they, the children, and not the parents, may not starve; on condition, however, that, if any man gives their purchaser the purchase price, they can regain their liberty again. When the *Edict of Theodoric*, chaps. xciv-xcv, and the *Law of the Visigoths*, Bk. V, tit. iv, chap. 12, forbid the

selling of children in order to secure food, that must apparently be understood of food for the use of the parents. A law of Romulus in Dionysius of Halicarnassus, Bk. II [xxvii], appears to have given parents greater latitude than was just, who

even gave leave to the father to make an advantage of selling his son, so far as three times, giving by this means a greater power to the father over his son, than to the master over his slave. For a slave who has once been sold, and afterwards obtains his liberty, is his own master ever after¹, but a son, when sold by his father, if he should become free, returned to his father's power. And if he was a second time sold, and a second time freed, he was still as at first his father's slave; but after the third sale he was discharged from his father. (S.)

This law was slightly weakened by Numa, when he excepted from it those sons who were married, provided they had married at the command or with the consent of their father. Plutarch, *Numa* [p. 71 E]. Nor did the Decemvirs dare entirely to abolish it, although it gradually passed into disuse and was finally rescinded. *Code*, IV. xliii. 1. Yet a part of the old custom was still retained, when, in the emancipation of sons, they were, as a formality, sold three times, a usage which was finally abolished by Justinian in *Code*, VIII. xlvii. 11.

From Plutarch, *Solon* [p. 85], it also appears that in Athens, at least before the time of Solon, a child could be sold to pay his father's debts. Compare *Matthew*, xviii. 25; 2 *Kings*, iv. 1; Philostratus, *Life of Apollonius of Tyana*, Bk. VIII [vii. 12]: 'With the Phrygians it is a fashion even to sell their children, and once they are enslaved, they never think any more about them.' (C.) Add Plutarch, *Lucullus* [xx, p. 504 C D]. According to Sigismund, Baron of Herberstein, among the inhabitants of Muscovy a father could sell his child four times, but after the fourth sale had no further right over him. Add Ad. Olearius, *Itinerarium Persicum*, Bk. III, chap. vi. The Chinese have the custom of selling children whom they think they cannot support, although on the condition that any one of them can claim his liberty upon paying the price for which he was sold.

10.² That we may know what power belongs to the father over his child in the second period, we must observe that fathers also hold a degree of sovereignty, in so far as they are heads of their families, which sovereignty is one thing among those who live outside of states, and another among those who united within states. For just as distinct families have somewhat of the form of states, so their heads bear some analogy to royal sovereignty. What prevents us from calling them states, with Hobbes, is the fact that the end of families and states is different, and therefore many parts of royal sovereignty do not fall upon families. Indeed, Hobbes himself in his *Leviathan*, chap. xx, acknowledges that a family is properly not a state, unless it be so powerful, either because

¹ [For *in posterum* read *in posterum*.—Tr.]

² [This appears as § 11 in the 1688 edition, but the context seems to indicate that the order herein followed was intended by Pufendorf.—Tr.]

of its number, or other opportunities, that it cannot be subdued without war. Yet there is place in them for the right of life and death, to be exercised in the case of crimes, somewhat as the legislative power, as
 633 well as for the right of arms and of concluding treaties. This sovereignty of the father over adult children is based upon a tacit pact, whereby the father extends his commands to things which look beyond the rearing of his child, and the latter renders him obedience. The laws of equity and gratitude suggest this, since a child should yield his strength first of all to him through whom he is what he is, until he is freed from that sovereignty by the consent of the father himself.

II.¹ But after separation into states, some rights were taken away from the heads of families,² while others were restricted. Yet nearly everywhere as much as is needed for the rearing of children was left, although Plato in his state seriously restricted the power of fathers as such. Nor was much left them by the ancient Persians, if there is any historic truth in what is reported by Xenophon, *Training of Cyrus*, Bk. I. Elsewhere little was taken from the power of the fathers of a family.

Thus at Rome the fathers had the right of life and death over their children, which they exercised practically like a court, calling their kinsmen and friends into council, and imposing punishment upon their opinion. See Valerius Maximus, Bk. V, chap. viii, §§ 2, 3, 5; Seneca, *On Clemency*, Bk. I, chap. xv. In Livy, Bk. I, chap. 1, Turnus says: 'There was no question more quickly settled than one betwixt father and son, for these few words were enough to end it: "Unless you obey your father, it will be the worse for you."'³ (F.) Bodin, *On the Republic*, Bk. I, chap. iv, calls Justinian to account for claiming (*Institutes*, I. ix, § 2) that others did not have this right, since he shows that the Persians as well as the ancient Gauls, according to Caesar, *Gallic War*, Bk. VI [xix], had the right of life and death over their children. And some vestiges of this custom still remained among the people of Bordeaux down to A.D. 1301, in whose laws it was set forth that fathers had the right of life and death over their children, and husbands over their wives. And had a man killed his wife in a fit of rage or pain, he had only to declare his repentance, with a solemn oath, to be cleared of all punishment. Bodin goes on to show that the abrogation of that power was the cause of many evils to the Romans. This conclusion is concurred in by François Connan, *Commentaria Juris Civilis*, Bk. II, chap. xiii, while the institution receives the praise of Dionysius of Halicarnassus, Bk. II [xxvi-xxvii].

On the other hand, some strongly defend the view of Justinian, claiming that nowhere did fathers have such strict power over their children as at Rome, where, indeed, it had no limit or restraint. And

¹ [Appears as § 12 in the 1688 edition.—Tr.]

² [For *patribusfamilias* read *patribusfamilias*.—Tr.]

Dionysius of Halicarnassus seems to lend colour to this point, in the passage cited above. Others say that the emperor had in mind the fact that the paternal power among the Romans had certain attributes which were not found elsewhere; for instance, it was lost if a man suffered the least deprivation of civil rights, or exile, which punishments, however, do not elsewhere include the forfeiture of his right by the law of nations. And they allege, further, that since legal marriage belongs to civil law, so will the paternal power, which is a result of it, this being the view of Maestertius, *De Justitia Romanorum Legum*, chap. xxvii. Perhaps the simplest thing is to say that in the Roman state no one who was not a Roman citizen was allowed to exercise the right of life and death over his children.

But those who left this right to fathers when living in states had as their reasons to increase notably in this way the reverence of children for their fathers, and at the same time to leave the latter control over the misdeeds of those who were living under their eyes, while the tenderness of the fatherly affection would not abuse that power to a point of cruelty, in those tender years when there is greater need of clemency than of harshness. Thus in Diodorus Siculus, Bk. IV, chap. xlv [IV. xlv], Phineus observes: 'No father would willingly so punish his own sons, unless the greatness of their faults had overcome all natural affection.' (B.) Sopater¹ says of the law permitting a father to put his children to death: 'The law ordained this, since it knew how upright a judge a father would make.' Add Aelian, *Varia Historia*, Bk. I, chap. xxxiv. 634

On the other hand, those who have taken away that power may be moved by the reason that they have witnessed its abuse by some fathers, for often the most tender regard, when strained beyond measure, will be transported into a violent passion.² Libanius, *Declamations*, xxxiii [xxxix. 36]: 'Believe not that nature is a sufficient bond. For the most part it serves well enough. But whensoever the plagues of the spirit become violent, it is broken, and a father becomes something other than a father, under the stress of a disordered mind.' Furthermore, it seemed superfluous, since capital offences can easily be punished by the magistrates; while it is hard to strain the paternal affection to such a point as to compel a father to pass capital judgement upon his own, even though guilty. See Aelian, *Various History*, Bk. I, chap. xxxiv; Valerius Maximus, Bk. V, chap. ix, § 4. Add Charron, *De la Sagesse*, Bk. I, chap. xlvii. Libanius, *Declamations*, xxxv [xl. 75]: 'To do anything in the case of one's children is the same as to suffer it.' What is commonly opposed to this from *Digest*, XLVIII. ix. 5, to the effect

¹ [Probably the rhetor, in Walz, *Rhetores Græci*, vols. IV, V, and VIII. But the reference seems to have been taken by Pufendorf from Grotius II. v. 28, the editors of which work have not been able to verify the citation any more than have we.—Tr.]

² [For *in truculentas* read *truculentus*.—Tr.]

that the paternal power 'lies in affection, not in rigour', has no bearing on the matter. For Hadrian had banished a father to an island for killing his son while out hunting, because he had been guilty of adultery with his step-mother. And it is right to punish him for killing a guilty person like a robber, or by stealth, when he could have called his friends to council and sentenced him to death after the manner of a domestic tribunal. Although we should possibly say that the words here used savour of an interpolation by Tribonian.

By the Hebrew law it was a part of the paternal power to be able to declare void the vows of the son and the daughter of the family. The reason for this was not alone that an imprudent age, moved by a false kind of piety, might ruin itself by rash vows, but also, either that the paternal estate might be burdened by such vows, or that the services which the parents owe might be interfered with. And so that power flows not from positive law alone, but also from natural reason, since no one, who is subject to another, can effectually dispose of those things in which he is subject to the power of another. Grotius in his comments on the law in *Deuteronomy*, xxi. 18 ff., calls it severe, yet it was capable of a strict interpretation, since it was not extended to a daughter, while a son who was not yet capable of guile, and one who was of age and was established apart from his father, were excluded. Moreover, writers disagree on the extent of gluttony and drunkenness which had to be shown for the law to be effective. They also felt it was necessary for the father and mother to be alive, because when a son has lost his father or mother, he often has some property with which the damage can be met. To-day, among the Japanese, parents possess the most severe right of life and death over their children.

From this it appears that the following statement of Grotius, Bk. II, chap. v, § 3, must be understood of paternal power as it is found in most Christian states, where the paternal sovereignty is chiefly concerned with the matters which affect the education of children. He says:

In the second period, when judgement has now matured with age, no other actions are subject to the rule of parents except those which in some way are important for the position of the family in relation to the father or the mother. It is in fact fair that the part should conform to the interest of the whole. In other actions, then, children in that period have *ἐξουσία*, that is, a moral faculty of action¹; but nevertheless in those acts they are bound to desire always to please their parents. If, however, they have not done so, that reason does not make void what they may do. (K.)

Thus it is just that if children wish to be sustained by their father's goods, and later to succeed to them, they should obey the will of their
 635 father, in so far as it implies nothing absurd or incongruous, while if they refuse to follow it without sufficient reasons, they will have no

¹ [For *agindí* read *agendi*.—Tr.]

ground to complain when their parents refuse to take any further interest in their rearing, and disinherit them. Yet at this point civil laws have wisely provided against parents possibly following a reckless obstinacy rather than reason, and inhumanly cutting off their children from inheriting their estate. Thus Plato, *Laws*, Bk. XI [p. 973 E], does not allow a father to disinherit a son without the consent of his kinsmen. Add Seneca, *Controversies*, i and ix; Quintilian, *Declamations*, ix.

And in general, just as it has fallen within the province of states to accommodate the other rights of private citizens to the public advantage and repute, so civil law-makers usually provide that parents are not to abuse their authority over children to the harm of the latter, or the detriment of the state. Thus a father is obligated, so far as he is able, to train his sons to become useful members of civil society. This was the end of a law of Solon, whereby a son need not support his father, if he had not taught him a trade. Plutarch¹, *Solon* [xxii, p. 90]. But since there are different callings and ways of living in states, it is right that sons should follow the authority of their fathers in their choice of them, provided it leads to nothing absurd or base; especially when the expense of undertaking them is met by their parents. Yet it would be foolish and unjust to compel children against their will to a kind of life that their nature abhors, and a scoundrelly undertaking to force them to a life of shame, such as that of prostitutes, or to one so unsuited to human nature as is celibacy without the gift of continence, and monastic life.

12.² In the third period, when a child leaves his father's household and is freed from the paternal power, he is in all things *αὐτεξούσιος* [free] and possessed of his own right, though always remaining under a debt of filial duty and reverence, the reason for which is perpetual since it rises from the past services of his parents. On this there is a weighty observation of Plato, *Laws*, Bk. IV [p. 717 B C]:

To parents we have to pay the greatest and oldest of all debts, considering that all which a man has belongs to those who gave him birth and brought him up, and that he must do all that he can to minister to them: first, in his property; secondly, in his person; and thirdly, in his soul; paying the debts due to them for the care and travail which they bestowed upon him of old, in the days of his infancy, and which he is now to pay back to them when they are old and in the extremity of their need. And all his life he ought never to utter an unbecoming word to them. [...] And we ought to yield to our parents when they are angry, and let them satisfy their feelings in word and deed, considering that, when a father thinks that he has been wronged by his son, he may be expected to be very angry. (J.)

(Compare *Digest*, XLVIII. ii. 11, § 1.) Then he gives some final admonitions on erecting a fitting monument to the dead and on cherishing their memory. See *ibid.*, Bk. XI, p. 975 [XI, p. 932]. Arrian, *Epictetus*, Bk. II, chap. x:

¹ [For *Plutarh* read *Plutarch*.—*Tr.*] ² [Appears as § 10 in the 1688 edition, see § 10 *supra*.—*Tr.*]

Next remember that you are a son [. . .] whose part is to count all that is his as his father's, to obey him in all things, never to speak ill of him to any, nor to say or do anything
 630 to harm him, to give way to him and yield him place in all things, working with him so far as your powers allow. (M.)

Oppian, *On Fishing*, Bk. V [89]: 'Sons impart a second vigour to a father in his old age.'

Among the Chinese, when a man's parents die, he is at once required to drop whatever office he had in the state, provided it be not military, return to his home and mourn them three years, by reason of the fact that the first three years of his rearing meant so much trouble to his parents. Neuhoof, *Legatio*. Many forms of their mourning are given by Martinius, *Historia Sinica*, Bk. I, on the eighth Emperor. Among the same people a son always takes a seat below his father and at his side, never before him. And, indeed, it is a by-word that children can never do enough to equal the merits of their parents. Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xvi: 'While nobody could make a due return to his parents, a person is considered to be virtuous if he pays such regard as lies within his power.' (W.*) Add Xenophon, *Memorabilia* [of Socrates], Bk. II [ii]; Stobaeus, *Anthology*, lxxvii. Although Seneca, *On Benefits*, Bk. III, chaps. xxix and xxx, maintains at length that a son may sometimes surpass a father in benefits. He quotes also the saying of Alexander in Arrian, Bk. VII [xii.]: 'It was a heavy rental that his mother was charging for ten months' lodging.' But however much that merit may be, it is not enough to allow a father to order the performance of a crime. Therefore

When the mother of Alexander the Great urged him to put to death some one who was innocent, and repeated to him over and over again that she had borne him nine months in her womb, and was his mother, that emperor made her this prudent answer: 'My excellent mother, ask for some other reward; for the life of a man cannot be put in the balance with any kind of service.' (Y.)

Ammianus Marcellinus, Bk. XIV, chap. x [XI. xxii]. Add Gellius, Bk. II, chap. vii.

Hobbes, *De Cive*, chap. ix, § 8, feels that this debt of reverence is derived not alone from the law of gratitude, but also from a tacit pact, because it is not presumed that he who frees another from his power, wished him to be his equal, and so under no debt to him, but that it must always be understood, that whoever is freed from an inferior position, promises at least the outward signs by which superiors are usually honoured by their inferiors.

Yet it is an idle superstition, which is given by Constantin l'Empereur, *Baba Kama*, chap. viii, § 3, to the effect that the Jews through fear did not allow a son to let the blood of his father, to cut a vein, or even to pull out a thorn or open a sore, lest blood might flow. Add Selden, *De Jure Naturali, et Gentium*, Bk. VII, chap. ii.

Yet it may happen among those who live in states, that a father should show a son respect because of his public position, preserving, however, the prerogative of a father in private concerns. Thus Fabius Cunctator approved the conduct of his son as consul, because he commanded his father to dismount from his horse in his presence. Plutarch, *Fabius* [xxiv, p. 188 A], and *Apophthegms* [196 A]; Valerius Maximus, Bk. II, chap. ii, § 4; Gellius, Bk. II, chap. ii; *Digest*, XXXVI. i. 13, § 5; XXXVI. i. 14 pr. Add Boecler on Grotius, Bk. II, chap. v, § 6.

But some scholars are not agreed as to whether that perpetual obligation of children, which endures even after the expiration of paternal authority, arises more from the act of generation than from the faithful labour of rearing them. Some favour the act of generation, on the plea that by it a parent gives life, the greatest boon possible, and the occasion of all others, and that parents in begetting, represent God himself, in some fashion. Others prefer to cast their vote for education, by which a child finally learns to fill his place in the world and which requires long and continued care with no less labour and expense. And still others illustrate this by the observation that among animals the male which begets is observed to feel practically no affection for his offspring, while the mother shows affection only until they¹ are able to provide for themselves; yet the *στοργή* [affection] of human beings lasts for ever. And this is a proof that the love of parents and the obligation of children, which corresponds to it, do not rise, or at least not chiefly, 631 from mere generation and its accompanying pleasures, which men have in common with lower creatures, but from the fact that children are trained by their parents to a social life. Indeed, Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xiii, declares:

A father is the author of the child's existence, which seems to be the greatest of all benefactions, as well as of his nurture and education. (W.)

And again, *loc. cit.*, chap. xiv:

The friendship or love of children for parents, and of men for the Gods, may be said to be love for what is good and higher than themselves; for parents are the authors of the greatest benefit to children, as to them children owe their existence and nurture and education from the day of their birth. (W.)

And although in this passage the first place is given to generation and life, no comparison is made between them and education. Philo Judaeus, *Legum Allegoriae*, Bk. II [III. iii]: 'It is not possible for a man to exhibit due gratitude even to his parents, for it is impossible for him to become their parents in his turn.' (Y.)

Quintilian, *Declamations*, v [x]:

Thy obligation to me was nevertheless for bringing thee forth as a piece of myself into the visible scene of this world. 'Twas because of me that thou canst make use of sea and

¹ [For *prolem* read *proles*.—Tr.]

land for thy advantage, and serve thyself by the unwearied courses of the stars, yea and of the bright-shining firmament of heaven. (W.*)

Yet in our opinion the truth seems to lie with the statement that more obligation arises from education than from mere generation. And it appears that Plato, *Grito* [p. 45 D], leans to the same persuasion: 'No man should bring children into the world who is unwilling to persevere to the end in their nurture and education.' (J.) In the beginning of the same writer's *Theages* [p. 121 C], Demodocus says: 'For of this my son, whether one must call it the planting, or the procreating, it is the easiest of all things; but his education is difficult, and I am continually in fear about it.' (D.) And Socrates replies: 'I know no subject which a wise man would be more in earnest about than his own son, how to make the best possible man of him.'¹ For, as it runs in Euripides, *Hecuba* [600]: 'Sooth, gentle nurture bringeth lessoning in nobleness.' (W.) In Quintilian, *Declamations*, cclxxxv, a father says:

I do not now charge him with those common things like light, liberty, and the enjoyment of life. But this I do: Your brave deed, as it was a part of my strength and body, is mine; that death-defying spirit of yours flowed from me. Years ago under my instruction I began the task of making a brave man out of you; of late I continued it with my example.

Add *Idem*, *Declamations*, cclxxviii; Phaedrus², Bk. III, fab. xvi.

Indeed, I could not well believe that a parent had conferred any signal benefit upon a child by merely begetting him, if he should cast him off at birth, or only give him bare food, without any of the refinements of life, and allow him to develop like a beast of the field, to lead a life shameful to himself and profitless to his fellows; as though 'there is nothing on which a father will spend more money than on his son'. (R.) Juvenal, *Satires*, vii [184 f.]. Here belongs a law of Solon in Plutarch, *Solon* [xxii]:

The sons who were born out of wedlock were relieved from the necessity of supporting their fathers at all. For he that avoids the honourable state of marriage, clearly takes a woman to himself not for the sake of children, but of pleasure; and he has his reward, in that he robs himself of all right to upbraid his sons for neglecting him, since he has made their very existence a reproach to them. (P.)

Add Vitruvius, *De Architectura*, Bk. VI, Preface. Juvenal, *Satires*, xiv [70 ff.]:

It is good that you have presented your country and your people with a citizen, if you make him serviceable to his country, useful for the land, useful for the things both of peace and war. For it will make all the difference in what practices, in what habits, you bring him up. (R.)

Aristotle in Diogenes Laertius [V. 19]: 'Those parents who gave their children a good education deserved more honour than those who merely begat them; for the latter only enabled their children to live, but the former gave them the power of living well.' (Y.)

¹ [These words do not occur here, although they represent fairly the general sense of the original.—*Tr.*]

² [For Phaedrus read Phaedrus.—*Tr.*]

The basis upon which the pupils among the Chinese accord so much veneration to their teacher, who stands in the sacred place of a parent, is given by Martinus, *Historia Sinica*, Bk. IV, chap. ii. The same writer (Bk. VI, chap. i, p. 122) records that it is customary among them for a man never to attain a higher position of honour than his father; and so, if, for his services to the state, he receives honours which his father did not enjoy, they are accorded his father even after death, by way of a posthumous advancement. For with them obedience to and respect for one's parents is regarded as the greatest and first virtue.

In the next place there is no logical basis for their further argument: 'Life is the greatest good; therefore the act of a parent, whereby that is given, is the one most fitted to give rise to an obligation in children.' For however much I desire to impute some deed of mine to another, I must first know to whom I am giving a kindness, and whether it will reach him. Nor is it of little bearing upon this matter for me to have reflected, whether I really intend to obligate another to me by my kindness; how much it costs me; whether I undertook it more for another's benefit than that I myself might reap some advantage or enjoyment; whether I was led to undertake it for some reason, and after deliberation, or at the urge of my affection and the enticements¹ of my passions; and whether, finally, what I did may be able to help another without some additional services. Whoever has dwelt upon these considerations with some seriousness will easily decide whether the act of education is far more effective in giving rise to an obligation than that of generation.

Although I can in no way give my approval to all the arguments offered on this point by Seneca, *On Benefits*, Bk. III, chaps. xxx ff.: For surely one cannot allow him to call the life of man, to whom God gave an immortal soul a thing

which I bear in common with wild beasts, and the smallest and some of the foulest of creatures. [. . .] [xxx] A boon which I possess in common with flies and worms. [. . .] (The rest, however, of what he has to say, need not fear to such an extent censure from the wise.) [xxx] 'Consider what the fact of my birth is in itself; you will see that it is a small matter, the outcome of which is dubious, and that it may lead equally to good or to evil. No doubt it is the first step to everything, but because it is the first, it is not on that account more important than all the others. [. . .] <Nor are first things equivalent to very great, merely because the very great could not exist without the first>² [. . .] [xxx] Life is merely an unimportant factor in the art of living well. [. . .] [xxxi] Suppose, father, that I have saved your life, in return for the life which I received from you; in this case also I have outdone your benefit, because I have given life to one who understands what I have done, and because I understood what I was doing, since I gave your life not for the sake of, or by the means of my own pleasure. [. . .] Do you wish to know how far from a benefit it was to give life under such conditions? You should have exposed me as a child, for you did me a wrong in begetting me. I gather from this that the cohabitation of a father and mother is the very least of benefits to their child, unless in addition this

¹ [For *ille cebris* read *illecebris*.—Tr.]

² [Modified from a sentence in chap. xxix.—Tr.]

beginning of kindness be followed up by others, and confirmed by other services. (S.) (And a little further on he calls the benefaction of generation) [xxxiii] something common [. . .] The gift he received from his father was of one sort only, was easily performed [. . .] and one in which he had in view (at least most fathers) everything rather than him to whom he was giving life. (S.*)

13. Finally, as a father should not banish his offspring from his family save for the best of reasons, so they will not pass into another family without his good permission. But if children have a just reason for leaving their home, and yet their parent is so stern as to forbid it, my feeling would be that they are not obligated to give up looking out for their own interests, however much a harsh father may object; and especially when they are willing to give up their hopes of inheritance. For as civil laws rightfully uphold the authority of parents, so they will be cautious in sustaining their idle perversity. Nor, indeed, does it appear that the heads of separate families can keep their children against their will, to wit,¹ when they have a just reason to leave, since not even in orderly states is it easy to deny free men the right of emigration, if no other tie binds them to their country than the common one of citizenship.

14. Here also belongs the question whether children can marry against the will of their parents. On this point we feel that there must be a clear understanding as to what is required by the duty of filial piety, what obedience is due to sovereignty, and what right belongs to fathers as such, and what to them as heads of families². We have said that paternal power as such is by nature so much as is needed for the education and government of children, until they are able properly to look after their own affairs. Therefore, it does not appear to extend to the point where it can declare void the marriage of children, since it is supposed that this state is entered into only by those who have arrived at the full use of reason. Indeed, the duty of filial piety and reverence requires that children both heed the advice of parents on this step and not oppose their will. Catullus, [*Poems*, lxii. 60 ff.]:

It is not right to strive with him to whom³ your father himself gave you, your father himself with your mother, whom you must obey. Your maidenhood is not all your own; partly it belongs to your parents, a third part is given to your father, a third part to your mother, only a third is yours; do not contend with two, who have given their rights to their son-in-law together with the dowry. (C.*)

Hermione says in Euripides, *Andromache* [987-8]:

My marriage, 'tis my father shall take thought
Thereof: herein decision is not mine. (W.)

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So also Xenophon [*Training of Cyrus*], Bk. VIII [v. 10], writes that Cyrus refused to marry without his parents' consent. Yet that marriage

¹ [For *semigrandi* read *sc.* (that is, *scilicet*) *migrandi*.—Tr.]

² [For *familiarum* read *familiarum*.—Tr.]

³ [For *quos* read *quot*.—Tr.]

is not at once null and void, which was entered into contrary to this duty, for the obligation to hear and respect another's counsel, does not at once do away with one's power to dispose of one's own affairs. An added consideration is to be found in the words of Quintilian, *Declamations*, cclvi: 'Nowhere is liberty so necessary as in marriage; for who can love with an estranged heart?' Add *Digest*, XXIII. ii. 21, 22, 25.

But what shall we say of the power held by fathers as heads of families? Indeed, in many states civil laws lay various restrictions on the faculty of marrying. Thus in some states those of royal blood cannot marry save after advising with the king, since it is commonly recognized what great advantage is often sought by the state through such matches. Among the Japanese the monarch himself chooses for his nobles the wife by whom they are to secure their successors, and orders the marriage to be realized. Bernhard Varenus, *Descriptio Japoniae*, chap. xii; add *Constitutions of Sicily*, Bk. III, tit. xxi. In other places marriages between a citizen and a foreign woman, between a noble and a plebeian, are held void. For as in states every man is understood to have free power to marry whomsoever he will, and liberty to leave the state, provided there is no express law, or custom equivalent to law, to the contrary, so in separate families, in view of the fact that most of the reasons of civil laws regarding marriage between certain persons are wanting, the head of the household appears to have no right to forbid and rescind marriages of his children, which otherwise labour under no defect, and provided the children are ready to leave the paternal family. For no one would demand that the head of a family have to bear with a daughter-in-law who is odious to him. *Genesis*, xxvi. 34-5. But if a father see his children scorn his authority without good reasons (see *Digest*, XXIII. i. 12, § 1), he is not forbidden to banish such recalcitrant ones from his family and inheritance by way of punishment. See *Law of the Visigoths*, Bk. III, tit. ii, chap. 8; *Law of the Burgundians*, Tit. XII, chap. v.

The right belonging to heads of families, resident in states, is to be known from the laws of each of them. Among the Japanese all marriages are arranged by the parents of each party, but if these are dead, the duty falls upon the nearest of kin. Bernhard Varenus, *Descriptio Japoniae*¹, chap. xii. Among the ancient Peruvians under the Incas, marriages contracted by children without the parents' consent were considered void and their issue illegitimate, unless the parents later agreed to them. Garcilaso de la Vega, *Comentarios Reales*, Bk. VI, chap. xxxvi. Here it is certain that just as civil laws can invalidate the drawing up of some contracts, either because they lack the proper formulae, or because certain persons are forbidden to enter them, so they can make the validity of the marriage among sons of the family depend upon the

¹ [For *Japon* read *Japon*.—Tr.]

consent of the parents, so that unless their approval is added, a marriage is held void in the eyes of the law, and may be rescinded. See *Digest*, XXIII. ii. 2; XLVIII. v. 7. For carnal copulation and an agreement to live together can no more make a valid marriage, if the civil laws object, than the contract of a ward¹, and the consequent transfer of property without the authority of his guardian, can effectually transfer the dominion over his property. Although sober men are right in warning parents that even when such power is allowed them they should be circumspect and not too severe in² exercising it. Add Boecler and Ziegler on Grotius, Bk. II, chap. v, § 10.

¹ [For *pupulli* read *pupilli*.—Tr.]

² [For *citra* read *circa*.—Tr.]

ON THE POWER OF A MASTER

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| <ol style="list-style-type: none"> 1. The nature of the relation between master and slave. 2. Actual slavery is not an institution of nature herself; 3. Nor directly ordained of God. 4. It appears that slavery originated in a contract. 5. Later on the number of slaves was greatly increased by war. | <ol style="list-style-type: none"> 6. Hence comes the obligation of captives towards their masters. 7. Slaves are in a fashion equivalent to property. 8. Yet they are capable of receiving an injury. 9. On the offspring of slaves. 10. Disadvantages in slavery. 11. The ways in which a slave may be freed. |
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IN the same manner as families are formed of husband and wife, as primary members, from whose union offspring are produced, so slaves are added to them as secondary members, whose labour is used by the heads of families in their undertakings. Since the government of these is usually more exacting than that of children, men require a form of regimen to be laid down in the relation of master and slave which is more rigorous than in that of father and son, inasmuch as children are commonly given a looser rein. Yet we feel that Hobbes errs a bit in calling that relation a state, both because it usually implies a smaller number of persons than can make for the security of those who live in natural liberty (see *Genesis*, xxxii. 7 ff.; xxxiv. 30), and because a master takes slaves to himself not so much for purposes of mutual defence, as that he may handle his affairs more conveniently and on a larger scale by means of their services.

2. Regarding the origin of this relation, we must reject the view of those who assert that the master's sovereignty and slavery were actually established by nature. We observe, of course, the greatest differences between men, and, not to mention other points, it is quite obvious that some of them are so keen as to perceive of themselves what is to their advantage, and quick to undertake upon their own initiative, and without suggestion from others, what will serve their interests. On the other hand, some are so stupid that they do not observe, without the lead of others, what will be of use to them, and are more fitted to undertake mere physical tasks than such as require some mental perspicacity. Such, moreover, is their sluggishness that only under compulsion will they do anything well, nor do they know how to keep or expend to any advantage what they have acquired. These latter Aristotle calls slaves by nature, not because master and slave are actually constituted such by nature, without the intervention of some act of men, but because such men, formed in that mould by nature, are better suited to minister to

others than to act on their own initiative. This is illustrated by the remark of Agesilaus: 'The free inhabitants of Asia are cowards, but the slaves brave men.' Plutarch, *Laconian Apophthegms* [ii, p. 213 c]. Which remark Passienus applied in this way to Caligula: 'No man had ever been a better slave, or a worse master.' (R.) Tacitus, *Annals*, Bk. VI [xx].

3. Johannes Friderich Hornius, *De Civitate*, Bk. I, chap. iii, strikes his customary jarring note, in running counter to the common opinion of lawyers, who trace the origin of slavery to the law of nations. Only the manner, he says, of establishing slavery was taken over by different peoples, that is, a common custom¹ prevailed of reducing to slavery
638 persons taken captive in war. But the sovereignty of a master is not to be sought in custom or the law of nations; rather the cause of a society is always to be distinguished from that of sovereignty. And so God must be assumed to be the cause of the sovereignty of a master, for since victory comes of God, and an enemy is delivered into the hand of the conqueror by divine providence, it follows that the victor can take the life of his enemy. But since it was not to the interest of humanity that an unarmed and prostrate captive be always put to death, when he might be of use, the superior retained his power over the prisoner.

But as men entered war partly for defence, partly to vindicate their rights, so when victory was gained and they were willing to spare the conquered, it lay within their choice, either to reduce them to slavery, or to keep them under guard until they were freed by treaty or ransom. All of these things, as well as the power over such captives, in so far as they accord with right reason, was not immediately established by God, but approved by Him as established by men.

Equally incorrect is his further statement: 'The right of life and death which the victor once had over his captive he keeps,' and so that right which the victor has over the conquered before he exacts faith of him, is the same as that by which he later rules him as a master. For these two rights are very different things. A victor can by the right of war do whatever he pleases to the conquered, slay him or grant him his life; but no one has ever yet, so far as it is known to us, called this blanket power a right of life and death. But a right of life and death, such as a master is said to hold over his slave, denotes a legal power to inflict capital punishment because of some antecedent offence.

Finally, the same author (Bk. I, chap. iii, § 5) says that all sovereignty of whatever nature carries power over the life of a subject; consequently, no difference is discernible in the power itself but only in its exercise; and therefore, the sovereignty of a husband over his wife, a father over his child, a king over his citizens, is the same as that of a master over his slave, save that the former are usually exercised more leniently, the

¹ [For *morem* read *morem*.—Tr.]

latter more harshly. But I have as yet been unable to prevail upon myself to accept this view.

4. Our idea on the origin of slavery is as follows. When in early days men departed from their original simple manner of living and began to devote more efforts to the elaboration of life, and to turn their attention to increasing their possessions, it is highly probable that the more sagacious and more wealthy invited the more sluggish and the poorer sort to hire themselves out to them. Then when both parties came to realize the advantage of this, the latter sort were gradually led to attach themselves permanently to the families of their employers, on condition that the latter should provide sustenance and all other necessities of life, and the former take care of all the work about the establishment as the owners might order. And so the first beginnings of slavery followed upon the willing consent of men of poorer condition, and a contract of the form of 'goods for work': I will always provide for you, if you will always work for me.

How much dominion belongs by nature to a master over slaves of this kind, is easily gathered from the end of this relationship. A master can lay upon such a slave whatever tasks he will, considering, of course, his strength and skill. He can also reprove the carelessness and slothfulness of a slave, by measures of such severity as his nature warrants, although he cannot on this score put him to death. And so the most severe form of punishment a slave of this kind can receive is to be expelled from the family for his laziness. Nor does it appear that such slaves can be sold to others against their will, but when they do not please their master, they should either be expelled from the family or transferred to another, although not without their consent, since they are in fact nothing but labourers for life, working entirely for their master while that status exists. Finally, if they commit some serious offence against others outside the family, while yet in subjection under the terms which we have mentioned, it does not even then appear that masters can assert the right of life and death. But that the master may avoid involving himself in a suit in their defence he can and should expel the culprits from his establishment, which is the equivalent of handing them over. But if such an offence be against the master himself and his family, they can be put to death, not, however, by the force of sovereignty but by the law of war, as though they are enemies. Yet the punishment should be meted out in a different fashion from that practised, according to Tacitus, *Germany* [xxvi], by the Germans, who used to kill their slaves 'not to preserve strict discipline, but in a fit of fury, like an enemy, except that there is no penalty to be paid'. (H.)

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What we have outlined above is the condition of slaves and the master's power as described in *Exodus*, xxi. 2 ff.; *Leviticus*, xxv. 39 ff.; *Deuteronomy*, xv. 12 ff.; *Exodus*, xxi. 26, 27, 32; *Ecclesiasticus*, xxxiii. 25 ff.

5. Now after the convenience of performing one's labours by the hand of others was recognized (on which account Aristotle, *Politics*, Bk. III [I. iii], calls a slave 'a tool that takes the place of other tools'), and when wars began to grow common, it gradually became customary to grant captives in war their life and bodily liberty, provided they served their captors for their lifetime. On the origin of the custom Pliny, *Natural History*, Bk. VII, chap. lvi, says, 'The Lacedaemonians invented slavery,' which cannot be admitted except in the sense that either they first introduced it among the Greeks, or that they also enslaved any Greeks whom they captured in war. Although it argues for the first reason, that, when Herodotus, Bk. VI [cxxxvii], describes how Lemnos was seized by the Pelasgians, he adds: 'For at that time neither they nor the other Hellenes as yet had household servants.' (M.) Thus, according to Diodorus Siculus, Bk. I, chap. lvi, Sesostris forced no Egyptian to labour on his works but completed them all with the labour of captives, and for that reason carved on his temples: 'No native of Egypt has done any work upon this.' Add Busbecq, *Letters*, iii, p. 120; Christophe Richerius, *De Moribus Orientalium*, p. 101.

Now these captives in war were usually treated very harshly, because there still remained in their captors some of the wrath that is felt towards an enemy; and while it was held that severity was excusable against those who had menaced our life and fortunes, and threatened us with the same ills. And this licence proceeded so far that it was held lawful to kill them in anger or for any offence. Add Grotius, Bk. III, chap. vii, § 2. Once having been introduced it was extended, even on a relatively slight excuse, also to the children of such captives, or to such as had been acquired by purchase. Yet in some states it was later restricted, and in others entirely removed.

Therefore, the origin of slavery was due to willing consent and not to war, although war was the occasion for a great increase in the number of slaves and made their lot a harder one. Add Boecler on Grotius, Bk. II, chap. v, § 27.

6. Let us see how Hobbes, *De Cive*, chap. viii, derives the power of a master and the condition of slaves from war. Here we must at the outset reject his contention that out of a mere natural state, which he calls a war of all against all, there arises a right to attack every one, overcome him by force, and reduce him to slavery. But this much is right, that, as by the law of just warfare, an enemy can be deprived of his life, so, when one man has conquered another in war, he may grant him his life, on condition that the captive promise to serve him, that is, do everything that he will command. In this pact the one who has been conquered receives some good, that is, the present of life, which could have been taken by the right of war, while the good which he in turn promises is service and obedience, and the latter, so far as is possible,

absolute. For whoever is obligated to obey a man's commands, before knowing what that other will command, is bound to all his orders without question and without restriction, although Grotius, Bk. III, chap. xiv, shows that the law of humanity orders some mitigation in such matters.

But, as Hobbes correctly observes, not every captive in war whose 640 life is spared is understood to have entered into a pact with the victor, for the death of some is but postponed, to be required at the will of the victors whenever they so please. This was the case at Rome for those captives who were reserved for a triumph, or for their spectacles, while not every one is accorded so much trust that he is left so great an amount of natural liberty whereby he can, if he has the mind, either make his escape, or refuse his services, or plot some evil or loss for his master. For such a person performs the part of a slave, or gives his services, truly enough, but without any exchange of mutual trust, or the restraint of but natural ties, in workhouses, in chains, or under close watch, in the same manner as animals give us their services. Therefore, he continues, the obligation of a slave, who has been secured in war, toward his master, is not born from the mere gift of life, or postponement of death, but from the fact that he is not held in prison or chains, since that obligation, consisting as it does of performance upon both sides, springs from a pact, and in every pact there should be a mutual exchange of trust. Therefore, to the kindness of a grant of his life there is joined a confidence, because of which the master leaves him in bodily liberty, so that, did there not intervene an obligation and contractual or moral ties, not only could the slave make his escape, but he could also slay his master and preserver, since there would still be a state of war between them. From which it follows that slaves who are confined in prisons, workhouses, or chains, are different from such as are joined to their master by a pact, since the former serve him, not out of respect for a pact, but in order to avoid a flogging. And so if they should escape or murder their master, they would not be transgressing natural laws, for to bind a person with actual bonds is proof that he who does so supposes that such a captive is not sufficiently restrained by any obligation or moral bond.

But it is a false statement of his, that a master has no less right over a slave not in bonds, than over one who is in bonds, for he enjoys the fullest right over both. That licence of war which a master has reserved for himself over his captive is something different from sovereignty, for by it the victor can take his life, whenever he pleases, on the plea of a state of war, from which, it appears, the captive is not yet freed, while the very highest form of sovereignty does not properly include a right over life, save for crimes.

7. Now although sovereignty, which is properly the right to

govern another's person, when constituted with the voluntary consent of a subject, regularly cannot, without that one's consent, be transferred to another, since a person often has his own reasons why he would be subject to one man and not to another, yet in those sovereignties which took their rise in force, it is customary for the same to be capable of alienation at the will of those who wield them. But so long as subjects enjoy any liberty, it cannot properly be said that the men themselves are alienated, but only the right to rule over them, in so far as that implies some advantage or gain. For although every sovereign can say of his subject, 'He is mine', yet such proprietorship or ownership is entirely different from that whereby a man says some *material object* is his. For by the former statement I mean only that to me and not to another belongs the right to rule over this man, such a rule, however, as implies that I am under some obligation towards him, and that I cannot exercise that right without limit. But proprietorship over a material thing includes a right to use, waste, or consume it to my profit or pleasure, so that, whatever treatment I may accord it, I am not guilty of any injury to it, but can give this good and sufficient answer, 'It is mine'.

Now although the law of humanity does not give its permission, that all traces of original equality be extinguished toward an enemy, 641 after he has come to terms with us, whatever may be his deserts, and that he can be treated like a beast or some inanimate object, toward which we lie under no obligation, yet the brutality of many nations has gone to such lengths that slaves are numbered among their material possessions, and are treated not as subjects for their master's sovereignty, but as objects for his violence, so that a man can say, 'He is mine', as well of his slave as of his ox. And so in Quintilian, *Declamations*, vi [17], a prisoner of war who had become a slave says, 'I have destroyed myself'. In the Roman law runaway slaves are said 'to make a theft of themselves' (*Digest*, XLVII. ii. 60; *Code*, VI. i. 1), while it held that what was done for a slave by his master, was done not so much for the advantage of the former, as for that of the latter, so that the master might suffer no loss if the slave died, and the only sympathy the poor man might receive would be because of the price paid for him. Yet add Dio Chrysostom, *Orations*, xv, *On Slavery*, p. 241 ff. ed. Morelli [lxv. 21 ff.].

Yet it is not right to conclude that the property belonging to the slave before his captivity falls to his master after captivity, for this can only be allowed in the sense that whatever the slave might be worth previously by his labour, now falls to his master. When a man voluntarily gives himself into slavery, he can turn over his small savings as well as himself to his master, although that is not always necessary. Nay, it seems likely that those who, in former times, sold themselves, kept their purchase price as well as their property, as a kind of personal

holding, or turned it over to those whom they were before obligated to support, such as their children, or aged parents. Although the Jews had a law that a man could not rightfully sell himself, unless he had absolutely no means of self-support. See Selden, Bk. VI, chap. vii.

But by Roman law whoever had allowed himself to be sold so as to share in the sale price, was reduced to actual slavery. What they did was this: Gaius claimed that Seius was his slave, although actually a free man, while Seius also posed as a slave, having already bargained for his share of the price. Then when Seius had been sold, a third party was called into the scheme who brought action in court that a free man had been sold. In this way the purchaser lost both his slave and his money, after Gaius had cleverly gotten out of the way. An example of this is in Plautus, *The Persian*, Act IV, sc. iv and ix [594 ff., 738 ff.].

But if a captive has been enslaved by the law of war, the victor can keep whatever of his property he seizes along with him; but whatever was not seized together with him, shall then stand as though he were naturally dead, at least until he has recovered his liberty. But it is patent that all that a slave acquires during his servitude is acquired for his master, for to whom a person himself fully belongs, to him also will belong all that is produced by that person. And so there will be nothing that a servant can keep as his own against his master, although whatever the latter has made over to him as his very own for his use or supervision, such as food, clothing, dwelling, savings, he can keep and defend against a fellow servant. See Pliny, *Letters*, Bk. VIII, ep. xiv.

8. When the same writer denies that any injury can be done a slave, his statement must be taken with a grain of salt. For the reason which he adds, namely, that since a servant has subjected his will to that of his master, whatever the latter does is done by the will of the former, and no injury is done to a willing recipient—all this only means that a servant cannot complain, no matter what kind of task, provided it be within his strength, his master lays upon him, even if it happen not to be to his liking. In the same way, also, a citizen cannot complain if an absolute monarch administer the affairs of the state according to his judgement, however much that administration may displease him. But we will show in another connexion that that subjection of the will does not hold good to this extent. Yet who would deny in general that an injury is done a slave if some task is required of him beyond his strength, if he is beaten without cause, or, because he did not perform the impossible, if he is denied food? Theano, *Letters*, III. vi 642 [2 Hercher], makes it a requirement for the 'just use' of slaves 'that they be neither broken down by labour nor weakened by want'.

Here we may well note the gross inhumanity of the Jews, whereby they believed that they were not required to furnish clothing and food for a Gentile slave, although they could lawfully exact services from

such by every kind of cruelty. Selden, Bk. VI, chap. viii. This may have been because they themselves had borne such treatment in Egypt (*Exodus*, v. 13-14), for they held that the regulations of *Leviticus*, xxv. 43, concerned only Hebrew slaves.

The Roman laws were more kindly in this regard. See *Digest*, I. vi. 1, § 2; I. vi. 2; *Code*, VII. vi. 1, § 3. Here belongs a frequent saying of Cato, given in his *Life* by Plutarch [*Cato the Elder*, xxi]: 'It was shameful for a man to quarrel with a domestic over food and drink.' (P.) Although in other respects he was harsh enough in maintaining that when old they should be sold, and those who were capable of no service should no longer be fed, for which Plutarch justly censures him on the ground that [v] 'Beneficence may often be extended even to dumb animals'. (P.) Plautus, *The Two Menaechmi* [87]: 'The servant you really want to keep from running off ought to be bound with food and drink. A loaded table—tie his snout to that.' (N.) Juvenal, *Satires*, xiv [126], censures the master who 'pinches the bellies of his slaves with short rations'. (R.) We must also commend a decree of Claudius given by Suetonius, *Claudius*, chap. xxv:

When certain men were exposing their sick and worn out slaves on the Island of Aesculapius because of the trouble of treating them, Claudius decreed that all such slaves were free, and that if they recovered, they should not return to the control of their master; but if any one preferred to kill such a slave rather than to abandon him, he was liable to the charge of murder. (R.)

The same account is given by Dio Cassius, Bk. LX [xxix. 7]. These are excellent words of Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xiii: 'It is possible to be friends with a slave *qua* man. For there would seem to be a possibility of justice between every man and any one who is capable of participation in law and covenant, and therefore in friendship, in so far as he is man.' (W.) Add *Idem*, *Economics*, Bk. I, chap. v; Seneca, *On Anger*, Bk. III, chap. iv; *On Clemency*, Bk. I, chap. xviii; *Letters*, xlvii; Arrian, *Epictetus*, Bk. I, chap. xiii; Stobaeus, *Anthology*, lx [lxii = V. xix].

Now as the other rights of fathers of families have been tempered or restricted by civil laws, so it often happens that this power of the master is found to be limited more in one place, less in another. But when that power remains absolute and unlimited, it should be conceived of as not established by civil law, but passed over and left in the form in which it could be exercised by fathers of families outside the bounds of states. Although the laws of some states incite the harshness of masters toward slaves and ordain greater severities against them than the law of nature allows even to absolute sovereignty. Here belongs the custom of the Romans, whereby, if a master had been murdered, 'the whole household of slaves, which had stayed under the same roof, had to be executed', which in Tacitus, *Annals*, Bk. XIV

[xlv], C. Cassius undertakes to defend by arguments based upon its advantages. Some time later Hadrian, according to Spartianus [*Hadrian* xviii], relaxed its severity in some degree, to the effect that not all the servants were subject to examination, in case a master was found dead in his home, but only those 'who were close enough to know what was going on'. Add *Digest*, XXIX. v. Compare, however, 1 *Samuel*, xxvi. 16. Herodotus, Bk. IV, towards the beginning, relates that the Scythians also put out the eyes of their servants.

9. Regarding the offspring of slaves the questions are raised, first, as to whether they necessarily follow their mother, and second, whether it is just that they also be held in slavery. On the former question the Roman laws ordain, that, as with animals, so with men in servile condition the 'offspring follows the womb'. *Digest*, I. v. 24. Yet Grotius, Bk. II, chap. v, § 29, feels that this is not entirely in accord with natural law, in case the father can by sufficient evidence be known, for since in the case of some animals the males as well as the females exercise a care 643 over their young, which proves that their young are common to both, so if the civil law has made no point of this matter the issue will follow the father no less than the mother. See *Edict of Theodoric*, chap. lxvii. But we feel otherwise on this matter. For we have shown above that in early times the issue belonged to the mother, but that the father acquired a right over it by the marriage pact.

But now since slaves and all that they produce belong to their masters, the issue of slaves will likewise be in the power of the latter, after slavery has been extended to the point that not only the labour but also the body of a slave is understood to belong to his master. Add Grotius on *Exodus*, xxi. 4, where he shows that even the marriages of slaves may be annulled at the will of their master. The passage in Xenophon, *Economics* [ix. 5], has some bearing on this point, where among his rules for the ordering of the household he includes one, to the effect that slaves should not have children without the consent of their master, giving as his reason: 'For honest servants generally prove more loyal if they have a family; but rogues, if they live in wedlock, become all the more prone to mischief.' (M.) Now several reasons can be given why the right of the mother's master is greater than that of the father's. The first is that the loves of male slaves are not so easily watched and circumscribed. See Plautus, *Casina*. Again, the body of a female slave belongs to her master, and during pregnancy it is not so able for a time to meet its tasks, as is not the case with a male servant. And this is favoured also on the ground that things planted go with the soil. But if the master himself be the father of the slave's issue, its legal status will be such as he himself or the laws of the state shall decide. And these latter will also have to determine the fate of what the mother conceived in slavery but brought forth when free, or *vice versa*. Although

humanity always favours the liberty of the issue of slaves. Plato, *Laws*, Bk. XI [p. 930 D E], thus pronounces on the offspring of slaves:

In case a female slave have intercourse with a male slave, or with a free man or freed-man, the offspring shall always belong to the master of the female slave. Again, if a free woman have intercourse with a male slave, the offspring shall belong to the master of the slave; but if a child be born either of a slave by her master, or of his mistress by a slave—and this be proven—the offspring of the woman and its father shall be sent away by the women into another country, and the guardians of the law shall send away the offspring of the man and the mother. (J.)

Now the master does no injury to the issue of a slave, if he decrees that it shall follow that servile state. For since its parent has no property of her own, she can in no way maintain it but by what is her owner's. And since the master must furnish the food for her offspring, and all else necessary to sustain life for a long while before its services can be of any use, and even then what he can do will not be much in excess of his keep, at least at the first, the issue will not be permitted to avoid slavery against his master's will. And this holds true not only so long as the issue is still understood to be, as it were, in the master's debt, but also because his master undertook to rear him, on condition that his service be for life, to which condition he is supposed to have given his tacit consent, especially since he would never have been born, had his master wanted to use his privilege and killed his parents by the right of war. And liberty is understood to belong naturally to all men in so far as no need of our own or of another has preceded, which is capable of making us unequal to another.

Now all this is clear enough of the offspring of those who are reduced to slavery by reason of war. Regarding those who voluntarily enslave themselves to another, equity, and the favour extended to liberty, appear to suggest that, in the absence of any law or express pact, the expense of their rearing shall be understood to be included in what is owed to their parents, and so they shall not be liable to slavery upon that score. Compare Boecler on Grotius, Bk. II, chap. v, § 27.

644 10. We must see, in the next place, what is the disadvantage contained in slavery which many people hold the greatest misery possible, to be escaped by every means, even by death itself. Sadi, *A Persian Rosegarden*, chap. i: 'It is better to sit down to one's own simple bread than to stand at another's table with a golden belt.' Now personal slavery consists in this, that a man owes the labour of his whole life in return for food and the other necessities of life, and if this is received in natural terms, without inhuman cruelty on the part of some masters, or rigour of civil laws, there is no great harshness involved in it. For that perpetual obligation is compensated by the perpetual certainty of maintenance, which is often not the lot of those who work by the day, because of lack of employment, or their own laziness, which can be cured

only by blows. See Arrian, *Epictetus*, Bk. III, chap. xxvi, p. 257 [§ 23]. Lucan, Bk. III [152]: 'Not to ourselves, but to our tyrant, is the poverty dangerous that acts the slave.' (R.) Add Grotius, Bk. II, chap. v, § 27. It is the opinion of some, and this not without cause, that the doing away of slavery among Christians is one of the reasons why one meets everywhere such a pack of wandering thieves and sturdy beggars, which evil has been met in some states by the erection of public workhouses, in which lazy rascals are constrained to a life of labour. Add Bodin, *On the Republic*, Bk. I, chap. iv; Busbecq, *Letters*, iii, p. 118.

Hobbes, *De Cive*, chap. ix, § 9, discourses in the following manner on the differences between slavery and liberty. Liberty, says he, is nothing other than the absence of hindrances to motion. These hindrances are either natural and external, or moral and arbitrary. By the former kind a man's liberty is greater or less according as he has more or less space in which he may move, so that he who is secured in a larger prison has more liberty than a prisoner in a small one. So a man can be free to go in one direction but not in another, as a man who journeys between hedges and fences, is restrained upon both sides from tramping down the neighbouring vineyards and fields. This form of liberty may be called corporal and physical, and in this sense all *slaves* and *subjects* are free who are not restrained by chains or prisons.

Furthermore, the obstacles to liberty impede motion not absolutely but only by accident, that is, by our own choice, in so far as we judge it better for us to refrain from an action than to perform it. Thus a man on shipboard is not prevented from being able to throw himself into the sea, provided he is able to will to do so; but if he is wise he will decide that to remain on the ship is preferable to drowning in the waves. Thus no matter what kind of penalties are established, a man who does not fear to meet them will be able to do what they forbid. And this is that intrinsic liberty of will, in no way separable from it, which is enjoyed by slaves as well as by all other subject persons. Therefore, the distinction must be sought elsewhere.

And, in the first place, although scarcely any master is so stern as to forbid his slave to do the things necessary for the preservation of his life and health, which are naturally a man's first care, yet in general free men are given easier and more frequent opportunities to look after their own welfare, than are slaves, who are sometimes not a little limited in this respect by coarser food and unseasonable labours. Here belongs the saying of Cicero, *On the Orator*¹, Bk. I [II. vi]: 'For he does not seem to me to be a free man, who does not sometimes do nothing.' (W.)

In the next place, free men have as an honour above slaves, the fact that they fill the offices in the state and the more honourable positions in the household, and so possess more of the luxuries of life, both of which

¹ [For *Orotore* read *Oratore*.—Tr.]

advantages are highly suited to men of loftier parts. For the trouble of such labour is requited by its distinction and there is a satisfaction in the abundance of possessions, because we think they will either be to our advantage in the future, or enable us to live more comfortably, or allow us the opportunity to put many people under obligation to us.

But the greatest consideration of all is that free men need obey 645¹ only the state and its general laws, and need fear no punishment but what is defined in them, while in all else they hold it their special delight to suit their own will. But slaves serve one who is even a fellow citizen, are subject to his special orders, penalties, and restraints, and are forced to bear his harshness, which is all the more irksome the more frequent and intimate the contact between them. And this is all the harder because the laws of the state rarely come to the assistance of servants against their masters, save when their harshness comes to a head in some outrageous savagery. Such things as these are the greatest distress to those of gentle natures, although it makes a great deal of difference whom a man serves. In Terence, *Eunuch* [486], the appearance of a servant leads to the conclusion that his master is poor and miserable, though on the contrary, 'All your great houses are full of saucy slaves.' (R.) Juvenal, *Satires*, v [66].

We may add that the troubles of slavery are not a little heightened by human pride, because of which no man thinks himself unworthy to rule. Therefore, when a slave feels that he is as much or even more fitted to rule than his master, he concludes that fortune is doing him an injustice, and desires to better his condition by any means possible. In Xenophon, *Training of Cyrus*, Bk. VIII [i. 4], Chrysantas appears to set forth such a distinction between liberty and slavery:

As you think it right to rule those that are under you, so let us submit to those to whom it becomes us to submit. We ought so far to distinguish ourselves from slaves, that slaves do service to their masters against their wills; while it behooves us [. . .] to perform willingly what appears to be of the highest importance. (W.)

Here also belongs a passage in Dio Chrysostom, *Orations*, xiv, *On Slavery*.

II. A slave is given his freedom in several ways. I. If his master makes him a free present of it. For whatever right over himself a slave transferred to his master, the latter may again return to the slave, although it is customary in many states for the slave so freed to owe his former owner respect. See *Law of the Visigoths*, Bk. V, tit. vi, chaps. 17 and 21. But if the master acknowledge a superior, he cannot give the slave his freedom save in a way that always preserves the right of that superior, and is according to the laws of the state on manumission.

II. If a master drive his slave from his presence, which is in a state held the equivalent of banishment, and differs from manumission not in

¹ [For '64' read '645'.—Tr.]

effect but only in manner; for in both cases the power of the master is given up, but in the latter the liberty is granted by way of punishment, in the former as a favour. For even free servants recognize it to be a punishment to lose an agreeable and wealthy master.

III. If a slave is captured his new slavery removes the old one; and this is true whether the slave be captured alone, or his master with him. But if only the master has been captured the slave passes back into that state in which he would have been, had his master died a natural death; at least until the time when his master shall have been restored to his former full liberty.

IV. A slave attains his freedom, from ignorance of his master's successor; suppose, for instance, his master die without transferring his right to another; for in that case no obligation lies upon him to serve any one else. For no one is understood to be under obligation, unless he can know for whom he must perform what he owes. But the question whether such a person can live as a free man and citizen in a state, will have to be settled according to the civil laws. Thus some say that among the Turks manumission of slaves is of avail only against the claims of the old master, not against those of others, who may again reduce the one thus freed to slavery. It may also happen that a slave attains his freedom, from ignorance of his master's successor, if no heir is to be found for his master, when deceased either naturally or in the eyes of the law. For although such a person's property is held derelict, and passes to the first person to seize it, that is not the case with such a man's servant, as though he could be dragged back to slavery by any and every person. For other things are defended by no right which prevents some man from claiming them as his own, unless another has already secured a 646 right over them. But over a man another cannot assert any right but such as arises from the former's consent, or some antecedent deed which concerns him. So now that the former right is extinct, which the victor secured as his very own over the slave by warfare, his natural liberty returns, even though slavery may be more appropriate to his character. For inclination and aptness of character of themselves give no man a right to drag off a person to slavery against his will, nor can I impose upon a man by force what may be to his advantage.

V. When a slave is thrown into chains or otherwise deprived of his liberty of movement, not because of some preceding crime, or by way of punishment, he is freed from the obligation that arose from his pact, since his master by putting physical chains upon him is supposed no longer to wish to hold him by his obligation. For there exists no pact when no trust is put in the party to it, nor can faith be broken when none is given. Therefore, it will not be a breach of trust for such a slave to run away.

SAMUEL PUFENDORF
ON
THE LAW OF NATURE AND NATIONS
BOOK VII

CHAPTER I

ON THE MOTIVE LEADING TO THE ESTABLISHMENT OF A STATE

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| <ol style="list-style-type: none">1. Introduction.2. Man by nature loves himself more than society.3. Yet from the love of society does not at once follow the love of a state.4. There are many faults in man which disturb civil society.5. Does a state arise by natural development? | <ol style="list-style-type: none">6. May need or helplessness be a cause for the establishment of a state?7. The real cause for founding a state.8. Mere respect for the law of nature does not insure the peace of mankind;9. Nor arbitrators alone, nor pacts.10. Differences in views disturb the peace of mankind.11. A stronger control is needed to restrain men than mere natural law. |
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AFTER the so-called 'prime societies' we must now discuss a state or commonwealth, which is considered the most perfect society, and is that wherein is contained the greatest safety for mankind, now that it has grown so numerous. The reason why men, after being first scattered in distinct families, formed this, will be perfectly patent after we have examined with some care both the nature of civil society, and the inclinations of human character. To make this clear it will be profitable to set forth what is commonly said on this matter.

647 2. Most writers fall back upon the nature of man, which is so drawn to civil society that without it he neither wishes to nor can exist. For this purpose they advance those arguments which were adduced above (Bk. II, chap. iv) on behalf of man's social nature, and drawn chiefly from the miseries of a solitary life, the monotony of solitude, speech which was given man to no purpose except for society, the love of associating with men, the advantage following upon companionship with others, and the like. On the other hand, Hobbes, *De Cive*, chap. i, attempts to show that man is in fact an animal which loves first and foremost himself and his own advantage (Isaeus, *Orations*, ii [iii. 66]: 'No man cares more for others than he does for himself.' Euripides, *Medea* [85-86]: 'What mortal does not know this now; that every one loves himself more than his neighbour?' Isocrates, *On the Peace* [7 and 28]: 'To me all men seem to desire their advantage, and to have more than any one else'); and that man's love for society and other men is only secondary, and extends so far as the possibility of its leading to some pleasure and advantage of his own. He would prove this by the fact that a man is not induced to love the society of another by the mere fact that he is a man, but that he hopes to secure some position or advantage for himself in the company of some one man rather than another. This he illustrates by induction from particular societies.

Those who unite for business purposes have an eye to their own profit, which they hope they can obtain better by taking partners than by conducting their business separately. When they have been deceived in this expectation, every one will consider them fools, if they do not withdraw from such a losing partnership at the earliest opportunity. Those who are united by reason of a service for the state, form a kind of party friendship, which savours more of mutual fear than love, and implies more a false display of externals than a sincere union of spirits, so that such men may form a faction to secure their private advantage by uniting their strength, but scarcely ever is there any real consideration for one another. If a man feels secure in his own resources, he gives little heed to securing associates. When men join together for a good time, or to banish care, each is greatly delighted if he can provoke mirth for others or himself, yet that is well-nigh impossible without calling attention to the folly or boorishness of others, for a man may not with propriety smile at something in others which he knows to exist in himself. For Juvenal, *Satires*, ii [23], says: 'Let the straight-legged man laugh at the club-footed, the white man at the blackamoor.' (R.) Therefore, whoever laugh at others cannot avoid holding them lower than themselves, and seeking some little glory for themselves by comparison with another's stupidity. And although laughter may sometimes be without offence, and raised by harmless raillery, it is still patent that a man is led to engage in it more for his own pleasure than from the charm of society. Nay, those who follow the profession of amusing others, have before them, first of all, the securing of some favour or advantage by a display of festive humour. In fact most men have a deep-seated itching to examine, discuss, condemn, and parade the words or deeds of others, and, if they can enjoy that to the full, they feel that they have tasted the sweetest pleasures of life. Difficult indeed is it to control or remove this by discipline or punishment.

Finally, if several learned men, those who lay claim to more wisdom than all others, meet together for discussion, there are as many who wish to be regarded instructors as there are persons present, and he who sees his words of wisdom scorned by the others not only has no liking for them but feels himself insulted. Here belongs the passage in Arrian, *Epictetus*, Bk. III, chap. ii:

And if some one comes and tells you, 'We were discussing who was the best philosopher, and one who was there said, "There is only one philosopher, So-and-so (naming you)"', straightway your poor little four-inch soul shoots up to two cubits: Then if another who is by says, 'Nonsense! It is not worth while to listen to So-and-so: what does he know? he has the first rudiments, nothing more,' you are beside yourself, and grow pale and cry out at once, 'I will show him the man I am, he shall see I am a great philosopher.' (M.) 648

Add Charron, *De la Sagesse*, Bk. I, chap. xxxvi, n. 6. From all this it is perfectly clear that every voluntary association is due either to need

or the desire for glory, and so the men who thus meet have in mind some advantage, or regard and glory from their associates, or, finally, pleasure from them.

The same conclusion is reached by another argument, based on the definition of *will*, *good*, *honour*, and *utility*. Societies are entered into by men through an act of the will. But when the will acts it implies an object, namely, some good. Yet to what good is the love of individuals drawn save to what each of them has judged to be good for himself? For however good a thing may be of its own nature, yet unless it has some relation to us we take not the slightest interest in seeking and esteeming it. For no matter how happy the king of Persia may be, his happiness has no value for me. All good is attended by some pleasure which touches either the mind alone, or the body as well. All pleasure of the mind is either glory, or ultimately leads to it, while those which affect the body pass under the name of advantages. Therefore, every society is entered into either for the sake of advantage, or of glory, that is, for the sake of oneself and not of one's associates.

Yet a society based upon the mere desire for glory cannot embrace many men, or be of a long duration, because glory, like honour, when the possession of all men, belongs to none, inasmuch as it consists of superiority to others and in comparison with them; nor does the association with others aid a man in finding cause for glorying, except in so far as to be in the company of men of recognized merit is held to be a proof of equal or superior worth. For otherwise a man is worth as much as he can perform without the aid of others. It is, of course, obvious that the advantages of this life can be increased by mutual assistance. Yet it would be far easier and more advantageous, if by our mere command we could require others to give us their services, just as also among the other conveniences of life a thing is considered all the more desirable the more advantages it brings, and the less expense and labour are required to secure and preserve it. Therefore, men will doubtless be drawn more to sovereignty than society, that is, they would prefer to command others, while being themselves uncontrolled, rather than join in mutual labour, were they not restrained by some fear, or foresaw that danger threatens those who wish to order everything by their mere fiat. In accord with this is Arrian, *Epictetus*, Bk. II, chap. xxii:

Every creature is attached to nothing so much as to its own interest. Whatever then seems to hinder his way to this, be it a brother or a father or a child, the object of his passion or his own lover, he hates him, guards against him, curses him. For his nature is to love nothing so much as his own interest; this is his father and brother and kinsfolk and country and god. Therefore if interest, religion and honour, country, parents and friends are set in the same scale, then all are safe; but if interest is in one scale, and in the other friends and country and kindred and justice itself, all these are weighed down by interest and disappear. For the creature must needs incline to that side where 'I' and 'mine'

are. (M.) (The same writer had said just above): Did you ever see curs fawning on one another and playing with one another, so that you say nothing could be friendlier? But to see what friendship is, throw a piece of meat among them and you will learn. (M.)

Cicero, *On Duties*, Bk. III [v. 22]: 'It is no more than what nature will allow of, that each man should look after himself in the first place, and furnish himself with the necessities of life, before he takes care to provide for other people.' (C.)

3. Now although we have shown above¹ that these arguments do not at all prove that man is not a social animal, or is not designed by nature to live in the society of his kind, yet although we presume in man a love of society, it does not at once follow that man is led by nature to a civil society, any more than we can say that because man naturally desires some occupation he is therefore led by nature to the higher studies. For that love can be satisfied by simple societies and by friendship with one's equals. Here belongs the observation of Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. xiv: 649

[. . .] Man is naturally more inclined to contract a marriage than to constitute a state, inasmuch as a house is prior to a state, and more necessary than a state, and the procreation of children is the more universal function of animals. (W.)

Add Kenelm Digby, *De Origine Mundi*, chap. ix, §§ 8 ff. And Hobbes, in the passage cited, approves what we have said, that civil societies are not mere groups but ordered assemblies, the formation of which requires trust and pacts. Their force is not realized by children and the unlearned, or their advantages by those who have never experienced the losses consequent upon their non-existence. This is the reason why the former, because they do not understand the nature of a civil society, cannot enter into it, while the latter, because ignorant of its advantages, give no heed to it, or at least live in it in such a way as not to value its excellence. Therefore, all men, being born as infants, are by that fact unsuited to civil society, and most of them remain so all their lifetime, while it is discipline, not nature, that fits a man for such a society.

Nor is this conclusion shaken by the authority of Aristotle who says that man is φύσει [by nature], or πεφυκέναι [is born], a ζῷον πολιτικόν [political animal], for such a designation sometimes means that there is actually something in a thing by nature, without² any antecedent act on its part or on that of another; in which sense, for instance, a fish is born to swim, a bird to fly, an oak to bear acorns. At other times it means that there lies within a thing an aptitude or ability to receive by some cultivation and discipline that full development which nature intends should be in it, or at least approves as fitting and not repugnant to her purposes. In this sense we may say that a horse, for example, is

¹ [Compare II. ii. 7; II. iii. 16.—Tr.]

² [For *circa* read *citra*.—Tr.]

fitted by nature to prance, while an ass is not, a parrot to chatter, a field to bear grain, a hillside vines, man himself to converse and learn the different arts and sciences. In the same sense also we shall show soon that he is a political creature, despite the fact that all men come into the world as infants, because, when we inquire what belongs or does not belong to men by nature, we are understood to conceive of them as arrived at adult age and endowed with the use of reason. Add Richard Cumberland, *De Legibus Naturae*, chap. ii, § 2.

In the next place we should observe, regarding the words of Aristotle, that he sometimes employs the phrase ζῷον πολιτικόν [political animal] in a wider sense for a social creature, not strictly such as is led or fitted to civil society. Thus he says in his *Politics*, Bk. III, chap. iv [III. vi]: 'Man is by nature a political animal. And therefore, men, even when they do not require one another's help, desire to live together all the same. [. . .]' (J.) And yet it does not follow from the ὄρεξις τοῦ συζῆν [desire to live together], that a man is led to civil government, since that love can be satisfied by less developed societies and intimate associations with others, which can be conceived of without states. Thus in his *Politics*, Bk. I, chap. ii, the same author would prove that man is a political creature, by the fact that otherwise there would have been no purpose in his being endowed with speech. And yet there may be a use for speech in other places than a state, and at any rate men used
650 it in their intercourse long before the first states were established.

In the same way is to be taken the passage in *Nicomachean Ethics*, Bk. I, chap. v:

[. . .] It may be assumed that the final good is self-sufficient. But when we speak of self-sufficiency, we do not mean that a person leads a solitary life all by himself, but that he has parents, children, wife, and friends, and fellow-citizens in general, as man is naturally a social (πολιτικόν) being. (W.)

And yet there can be parents, children, wives, and friends outside the borders of a civil state.

4. The matter will be clearer if we consider what condition is assumed by men upon the formation of states; what is required that a man may actually be called a political creature, that is, a good citizen; and, finally, what there is in the nature of a man that is repugnant, so to speak, to a civil life.

Whoever enters a state gives up his natural liberty and subjects himself to sovereignty, which embraces, among other things, the right over him of life and death, and at the command of which many things must be done that a man would otherwise shrink from, and as many avoided which he would greatly desire; so that a large number of actions must be rated by the good of society, which often appears to differ greatly from that of individuals. And yet a man's natural inclination is to be subject to no one, to suit all his actions to his own

pleasure, and to seek his own advantage in all his undertakings. Surely to overcome such most agreeable inclinations there were needed weighty reasons, and such as have the force of necessity; and so we conclude that man did not enter states of his own free will, led, as it were, by nature, but that he did so to avoid graver evils.

In the next place, we maintain that man is really a political creature, that is, a good citizen, who promptly obeys the commands of his superiors, who works with all his might for the public good, and willingly regards it as above his own advantage, who, indeed, holds nothing good for himself but what is for the public good, and who, finally, puts himself at the service of other citizens. Arrian, *Epictetus*, Bk. II, chap. x:

What then is the calling of a Citizen? To have no personal interest, never to think about anything as though he were detached, but to be like the hand or the foot, which, if they had the power of reason and understood the order of nature, would direct every impulse and every process of the will by reference to the whole. (M.)

Here belongs also a custom of the Persians whereby a person in sacrificing makes his vows not for himself only and his own, but prays for all the Persians and especially for the king. Herodotus, Bk. I [cxxxii].

Yet no one is so ignorant as not to recognize how ill-adapted are the characters of most men to this end. To few is it given to meet all the requirements of a good citizen; most men are restrained by the fear of punishment, and remain their life long poor citizens and non-political creatures. Nay, rather, no animal is more fierce and uncontrolled than man, more prone to vices which are calculated to disturb the peace of society. Most animals are intent upon their food, and in their hunger fall upon each other; but if they have food in plenty they will not easily be moved to strife. Some are driven on by their lust, yet that flame usually blazes but for a part of the year. And whatever their ferocity they rarely turn upon their own kind. 'The fierce tigress of India dwells in perpetual peace with her fellow; bears live in harmony with bears. . . . Wild beasts are merciful to beasts spotted like themselves.' (R.) [Juvenal, *Satires*, xv. 159 ff.].¹ But men strive with each other not merely for meat and drink, and at the urge of venery in every season of the year, but also by reason of other vices unknown to the brutes and often opposed to one another.

Among these causes for strife first place is held by an insatiable desire for superfluous things and ambition, the most baneful of evils. And as man alone seems to have a sense of the latter, so he cherishes it in the most tender fashion, since nothing disturbs brutes but what brings them some actual bodily harm. Sallust, *Catiline* [x]:

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The lust for money first, then for power, was the root of all evils. For avarice destroyed honour, integrity, and all other noble qualities; taught in their place insolence,

¹ [The order of lines is 163-4, 159-60.—Tr.]

cruelty, to neglect the gods, to set a price on everything. Ambition drove many men to become false; to have one thought locked in the breast, another ready on the tongue; to value friendships and enmities not on their merits but by the standard of self-interest, and to show a good front rather than a good heart. (R.)

Added to these are a most vivid memory of injuries and yearning for revenge which are rarely found in brutes and then not so active. And what is worst of all, man delights to turn upon his own kind with such rage, that most of the evils to which mankind is exposed are of their own making. Nor would it be absurd for one to say that it is by the foresight of his Creator that man develops by such slow steps as opposed to brute animals, in order that the ferocity and harshness of his character may be broken by long delays and brought into harmony with other different dispositions. For were man to come suddenly to full strength, he would be more difficult to manage than any creature. See *Proverbs*, xiii. 24; xxiii. 13-14; *Ecclesiasticus*, xxx. 1 ff., 12.

Here belongs what is laid down by Hobbes, *Leviathan*, chap.¹ xi, to the effect that it is the custom of all men to be hunting perpetually and with no set purpose for one power after another, not because a person is always hoping for a greater power than he now enjoys, or because he cannot rest content with only a little, but because he cannot preserve his present power and resources for a life of comfort save by acquiring more, since they are soon exhausted unless constantly replenished. And even when this is accomplished there arises another new one, looking to fame or new pleasures. Furthermore, every one's desire for riches, honours, sovereignty, or power disposes men to strife, enmities, and war, for a way to secure one's desire lies in killing your competitor, or defeating him in some way.

A further point is that within the various kinds of animals there is in general a similarity of inclinations and appetites, but with men there are as many ideas as there are individuals, and with most of them a steadfast purpose to attain one's end. And this last alone can surely suffice to throw into confusion all that join into one group. Euripides, *Phoenician Maidens*, 502 [499 f.]:

Were wisdom gauged alike of all, and honour,
No strife of warring words were known to men.
But no men judge alike, no men agree,
Save touching names; no being hath the deed. (W.)

Therefore, so far from man being by nature a political creature, that is, such as is fitted at once by his birth to play the part of a good citizen, but a few of them, and that only after long discipline, are developed to such a degree. Here belongs a passage of Plato, *Laws*, Bk. VI [p. 766 A]:

¹ [For 'Bk.' read 'chap.'—Tr.]

Man, as we say, is a tame or civilized animal; nevertheless, he requires proper instruction and a fortunate nature, and then of all animals he becomes the most divine¹ and the most civilized; but if he be insufficiently or ill-educated he is the savagest of earthly creatures. (J.)

Aristotle, *Politics*, Bk. I, chap. ii: 'For man, when perfected, is the best of animals, but when separated from law and justice, he is the worst of all.' (J.) A little further on he says: 'If he have not virtue, he is the most unholy and most savage of animals.' (J.) *Idem*, *Nicomachean Ethics*, Bk. II, chap. i: 'The difference between one training of the habits and another from early days is not a light matter, but is serious or rather all-important.' (W.) *Idem*, *Nicomachean Ethics*, Bk. VII, chap. vii: 'For a bad man will do ten thousand times as much evil as a brute.' (W.) Add Seneca, *Letters*, ciii. Polybius, Bk. XVII, 652 chap. xiii [XVIII. xv]:

[. . .] Man, reputed the most cunning of animals, gives considerable grounds for being regarded as the stupidest. For the other animals, which obey their bodily appetites alone, can be deceived by these alone; while man, though he has reason to guide him, is led into error by the failure of that reason no less than by his physical appetites. (S.)

Lactantius, *On the Anger of God*, chap. xii: 'What will be more savage, what more unmerciful, than man, if, the fear of a superior being taken away, he shall be able either to escape the notice of or to despise the might of the laws?' (C.) Plutarch, *Cicero* [xlvi]: '[. . .] No wild beast is more savage than man when his passion is supplemented by power.' (P.) We need not mention the reflections cast so generally upon the vices of the common sort, which make up the largest part of mankind. Add Mornay, *Traité de la Vérité de la Religion Chrétienne*, chap. xvi. And so a great part of civil prudence is to know the evils and deceits of men to the end that they may be kept in mind and avoided. See Bacon of Verulam, *Advancement of Learning*, Bk. VII, chap. ii.

It is sufficiently clear from all this in what sense then man can be called by nature a political animal: Not because there resides in each and every one a natural aptitude to act the part of a good citizen, but because at least a part of mankind can by nature be fitted to that end, and because the safety and preservation of mankind, now become so multiplied, can be secured only by civil societies. Into these, nature always intent upon its own preservation, impels men to enter, just as also it is the first fruit of civil society, that in it men may accustom themselves to lead an orderly civil life.

5. Johannes Friderich Hornius, *De Civitate*, Bk. I, chap. iv, §6, calls a state a work of nature which is produced by natural order and consequence. That is, the first pair from whom was propagated all mankind was bound in conjugal love, and also their children were united in the same most tender affection with their parents. Hence arose a family, which, abounding in offspring and increasing by regular additions,

¹ [For *indiviniissimum* read in *diviniissimum*.—Tr.]

planted new colonies, as it were, until it was large enough to form a state, and all this was the result of an innate love of society, which was increased by the cohabitation of kinsmen. But the view that men withdrew and scattered into woods and desert places and led a wandering life like that of wild¹ beasts, is to be rejected as no better than a pure falsehood.

But to try to exclude the causes working throughout this natural development, and the pacts of men regarding establishment of states, is as if one would say that a tree grows from a seed, from the tree are made planks and timbers, these properly brought together make a ship; therefore, a ship is made by natural development and order, neither has that type of structure any cause peculiar to it, nor were the labours of workers concerned in it. We therefore regard it as fabulous that a great number of men were congregated at the beginning, then scattered in woods and desert places, and finally collected into states. It is no less a pure figment of the imagination that states formed so rapidly from one human pair, or after the flood from four families, without the urge of some special cause or the intervention of pacts. For although the paternal care kept children within the paternal family until they had arrived at man's estate, yet since in those early periods living was gotten almost entirely from agriculture and grazing alone, there was no reason why a father should want to keep his married sons at his side after their
 653 marriage. Nay, rather, we gather from Holy Writ that sons, and especially several sons of one father, had advanced so far that they were able to meet the duties of fathers of families, being accustomed to set out to strange places in order to establish homes for themselves; especially since vacant land lay on every side, and the smiling face of other regions now and then enticed them to distant parts. See *Genesis*, xiii. 5, 6, 9. Nor was Sicily the only land in those primitive times to have such inhabitants as are described by Homer, *Odyssey*, Bk. IX² [112 ff.]: 'These have neither gatherings for council³ nor oracles of law, but they dwell in hollow caves on the crests of the high hills, and each one utters the law to his children and his wives, and they reck not one of another.' (B. & L.) There is, indeed, love between brothers, yet such that they would prefer to live as equals rather than for one to be subject to the other's sovereignty, and they would love each other more steadfastly if their affairs were not intertwined. And so the primitive conditions of mankind as it multiplied, led more to their separation and scattering into different parts of the earth, than to their collection into large groups.

But when the wiser ones recognized that those disadvantages which attend the separation of families could be removed, if several of

¹ [For *adferarum* read *ad ferarum*.—Tr.]

² [For 1 read 4.—Tr.]

³ [For *conoilis* read *conciliis*.—Tr.]

them gathered into the same group and formed a state, they not only decided to combine their families by a pact and sovereignty, but they began to gather their dwellings, scattered before that time over fields and in woods, into the same place, for reasons of greater security and convenience. And in this sense are we to interpret those writers who have described how men were first scattered throughout woods, and were later gathered into one body by the first founders of states.

6. Many think that men were moved by want to gather into states, to the end that they might render more civilized and rich a life, which, if led in solitude, could not but be uncivilized and straitened. Of this so much is true that there would scarcely be an animal more miserable than man, if each individual were thrown upon his own resources with no assistance at all from his fellows. Yet no more can it be denied, that, after men gathered into states, their life began to become refined to the point of elegance. Lactantius, *De Opificio Dei*, chap. iv:

If man had sufficient strength for the repelling of dangers, and did not stand in need of the assistance of any other, what society would there be? Or what mutual reverence? what order? what system? what humanity? Or what would be more harsh than man? what more fierce? what more brutal? But since he is feeble, and not able to live by himself apart from man, he desires society, that his life, passed in intercourse with others, may become both more adorned and more safe. (C.*)

And yet we are convinced that want was neither the only nor even the main cause for the establishment of states, although Plato, *Republic*, Bk. II [p. 369 B ff.], inclines to that view. For even before that time, when men were still living scattered about and divided into distinct families, they had provided themselves with the necessities of life, having learned agriculture, herding, the culture of the vine, the making of clothing, and other arts. See *Genesis*, xiii. 2; xxiv. 35. Let us suppose the father of a family, supplied with fields, herds, and servants. What can he lack to keep body and soul together? And if he does lack something it will be easily supplied by commerce. See Cornelius Nepos, *Atticus*, chap. xiii. There are many states to-day which seek abroad the means to supply their needs or pleasure, and yet they do not feel it necessary to combine with those with whom they trade into one state. While, on the other hand, there are not a few peoples that have led a civil life for many centuries, and yet they lived with no more refinement or ease than did once the old fathers of families, who might make the boast recorded in Valerius Flaccus, Bk. V [VI. 329 ff.]:

Nor do I care for your walls, I who live a free man on the Northern plains. All that 654
I own I carry with me; my wagon is my only care, my only loss, nor will you hold it long as spoil. My banquet is any domesticated or wild animal.

And so those refinements in which the life of many nations now abounds, owe their origin not so much to states as to large cities, for the common sort of the city, having no income from fields and flocks, turns

to the cultivation of different arts in order to find a living. Moreover, there is a rivalry in culture between city people, and from this they pass to luxury which is served in many places by no fewer trades than serve man's necessity. And yet civil life could easily do without them.

7. Therefore, the real and principal reason why the fathers of families left their natural liberty and undertook to establish states, was in order that they could surround themselves with defences against the evils which threaten man from his fellow man. For just as nothing, next to most Good and Great God, can be so helpful to man as man himself, so nothing can do him greater harm, as¹ is shown at large by Cicero, *On Duties*, Bk. II [v ff.]. Although mankind is exposed to various ills, his ingenuity has found for each of them some sort of remedy. Against the onslaughts of diseases have been discovered the arts of physicians; the rigours of the atmosphere are resisted by dwellings, clothing, and fire. The earth has been cultivated by men's industry and banishes famine. Arms or traps curb the ferocity of wild beasts. But against those ills with which man in his baseness delights to threaten his own kind, the most efficient cure had to be sought from man himself, by men joining into states and establishing sovereignty. The Persians undertook to prove this, according to Sextus Empiricus, *Against the Mathematicians*, Bk. II [I. iv. 33 ed. Fabricius], for after their king had died they used to go five days without any law: 'So as to learn by actual experience how great a calamity lawlessness is, which brings with it murder, thievery, and anything else that is worse; and this is done in order that they may be more faithful guards of their kings.' Some lessons can be applied here from what Herodotus, Bk. I [xcvi f.], recounts of the reasons which led the Medes, who had up to that time lived in villages, to choose Deioces their king.

Now after men had so ordered themselves as to be able to be secure from mutual injuries, the natural result was that they enjoyed to a fuller extent such advantages as can come to human kind from their fellows [such as learning from boyhood more beneficial habits, finding different modes of living, and cultivating the arts which have made the life of man affluent and easy].² They also agree with us, who find *fear* the cause for states, which is to be understood not as the turmoil of a trembling and alarmed mind, but as a seemly precaution against future evil. Of which Aristophanes, *Birds* [376], rightfully observes: 'Fore-sight brings us safety.' (R.)

By this definition of fear we avoid the argument of some who reply, that, far from fear furnishing the cause for the establishment of states, if men had actually feared each other they could not have borne the sight of their kind, and so they would have remained for ever apart,

¹ [For *ut* read *ut*.—Tr.]

² [Added by Barbeyrac from *De Officio Hominis et Civis*, II. v. 7, in order to complete the sense of the passage.—Tr.]

one taking himself in this direction, another somewhere else. As though to fear connoted only flight and not distrust, suspicion, and precaution! Nay, it is the part of one who is fearful to take due precaution that he have no probable cause for fear. So when people retire they close the doors because they are fearful of thieves; and when they have done so they fear no more. Those who are upon a journey take a weapon because they fear highwaymen; but when they are fully armed they fear them no more. Here belongs the statement of Thucydides, Bk. I, that the custom of going armed, common enough among the barbarians, was still found among some peoples of Greece as a relic of the old times, when they did not live with any protecting walls, and could not come together without mutual distrust. Worthy of note also is a saying of Pyrrhus, given in his *Life* by Plutarch [xii. 4]: When he had entered Athens and ascended the citadel to sacrifice to Minerva and come down again, he said that he was grateful to the people for their kindness and the trust they had reposed in him, 'but that in future, if they were wise, they would not admit any one of the kings into their city nor open their gates to him.' (P.) States place forts upon their borders, fortify their cities, and store armouries with munitions of war, even in times of the most settled peace, all of which would be useless, did they not fear neighbouring states. But when they are well prepared they have no further fear. And so it is the way of fear to find out means to banish itself. For a similar reason men secure safety from their very selves, because of their mutual fear, by establishing a state. The force of this fear has been fully recognized by those who proclaim that were there no courts of justice one man would devour another. Compare Hobbes, *De Cive*, chap. i, § 2. 655

We have fully shown before (Bk. II, chap. ii, §§ 6 and 12) that men have plenty of reasons why they should fear and beware of one another, which is true enough, despite the assertion of Hornius, *loc. cit.*, that 'the fathers of families lived on equal terms for many centuries without fear of these imaginary attacks upon them. Mankind fell a prey to ambition at a late age, and after states were organized, which gave rise to honours and a distinction of dignities.' As though that frightful murder among the first brothers was not caused by ambition, when Cain was angered because his brother was held more worthy in the eyes of God! Furthermore, ambition is not the sole cause of mutual fear, but the stubbornness of men and their scramble for the same object play a part, of which the former in those simplest of ages caused the violence of the giants, while the latter occasioned strife even among those who were most closely related. See *Genesis*, xiii. 7; xxvi. 15, 20-1. And granted that ambition stirs more mightily the breasts of kings and rages with greater ruin to mankind, yet the minds of shepherds and tillers of the field are not entirely free from its evil influence. See

Vergil, *Eclogues*, III, lines 25 ff., and *Eclogues*, VII; Theocritus, *Idylls*, v and viii.

Hornius goes on to say, 'To attack others with curses and weapons would have been the work not only of a scoundrel but of a fool. For the persons thus attacked could properly slay their assailant; and further, no booty could have been expected of poor men, or such as possessed no more than stores of fruits which the earth discloses everywhere for one to gather with little or no labour and no danger.' As if the hope of but little booty would not be enough to move depraved men to crimes! or as if maraudings and thievery have not been common enough in every period of the world among peoples whose living is gained only from agriculture and grazing! Nay, men are driven into states not alone by fear of robberies, but also in order to prevent their being exposed to every kind of injury which men are fitted to offer and to receive.

We agree to what he adds later, namely, that 'however just may have been one's distrust of another, by no law is it allowable to attack another because of unconfirmed fear'. That right against all men and to all things, which according to Hobbes accompanies the state of nature, is to be extended no farther than sane reason admits, which is in a sense something like this: Man, when living in natural liberty, has a right to use all the means, which sane reason judges necessary for his preservation, against all by whom the same sane reason suggests that he is threatened. Therefore, if a man extends his precaution beyond the bounds set by sane reason, he will, without question, be sinning¹ against the law of nature. And so if a man has anticipated his enemy in killing him, because of an uncertain fear which he could easily have escaped from, it must by no means be held that his deed is permitted by nature. So also they are unquestionably perverted who feel that on the same principle rapine and robbery against a potential enemy can be defended. For rapine and robbery are in themselves such a medium as sane reason can in no way designate as necessary to man's preservation, but as something undertaken rather from excessive avarice and cruelty. Surely no highway-
656 man despoils travellers only because they threatened him with peril.

But the following is a fatuous statement of his: 'However much hatred and distrust there may be between men, still they will not be said to occur for the sake of a state.' For men did not hate and distrust each other in order that they might establish states, but they established a state because they distrusted each other. And even if one man hates only a few who displease him, but² loves others and favours, or at least is not angered at, all other men, yet should each man have but a single enemy, all mankind would be filled with hatreds and enmities. And so it is idle to contend that 'states arose entirely by men grouping together and by their natural increase'. The latter furnished the stuff of which

¹ [For *peccabic* read *peccabit*.—Tr.]

² [For *contra* read *contra*.—Tr.]

states are formed, the former perhaps the occasion for neighbours especially to unite in the same state; but the two do not contain the cause which impelled men to establish states.

8. Nor is it possible for a man to believe that mere respect for natural law, which forbids every manner of injury, could have been able to make it possible for all mankind to live secure in natural liberty. There are, indeed, men to whom order, honesty, innocence, and honour are of first concern, and who would not violate them even when assured of immunity. There are also not a few to whom applies the remark of Aristotle, *Nicomachean Ethics*, IV. viii [IV. i. 39]: 'But some keep their hands off their neighbours' goods from fear; they calculate that it is not easy to take what belongs to others without others taking what belongs to oneself, and so they prefer neither to take nor to give.'¹ (R.) If all were of this mind it looks as though there would have been no need of states at all. But opposed to these is a great mass who hold every sacred thing vile, whenever a hope of gain entices them, and have confidence in their own strength or wit whereby they promise themselves that they will repel or evade those whom they have injured. Not to distrust such is for one voluntarily to offer himself to their knavery and insolence. Sallust, *Jugurtha* [xiv. 4]: 'Virtue alone is not its own protection.' (R.)

Yet as it is wisdom to guard against wicked men, and to place about oneself suitable guards in due time, so that is an overly harsh saying of Hobbes, *De Cive*, chap. v, § 1: 'Each man's hope of security and self-preservation lies only in his being able by his own strength and schemes to forestall his neighbour in mischief, be it openly or by stratagems.' There is, indeed, such perversity in most men, that, whenever they think they will secure a greater good from the violation than from the observance of laws, they violate them readily. Thus Plato, *Republic*, Bk. II [360 c], says: '[. . .] Wherever any one thinks that he can safely be unjust, there he is unjust. For all men believe in their hearts that injustice is far more profitable to the individual than justice. [. . .]' (J.) Yet it would be too much to accuse all mankind of such perversity. Nay, as Hobbes himself confesses, there are modest souls as well, who claim no more for themselves than they allow others and hold before their eyes the maxim: 'What you would not have done to you, do not to others.' I for myself do not see how, on what plea of his own security, a man could fall upon such to destroy them. Nor will sane reason ever approve my undertaking to kill another, when there is no incontrovertible evidence of his wishing and attempting to make away with me, since there are many better ways of establishing peace with him. For the mere perversity of all men, having, as it does, its degrees, does not at once make man the professed enemy of man.

¹ [The quotation is not very apt, and Barbeyrac reproduces here with some justification, perhaps, the form which Pufendorf gave the passage in his later work, *De Officio Hominis et Civis*, II. v, § 8.—Tr.]

Now we confess that no such security is enjoyed in a state of nature as in organized states, that others will fulfil toward me the duties of
657 natural law, yet that lack of security is not such that one must act like an enemy to all. For when I see that my strength is the equal of or greater than another's, and when he affirms by words and pacts his desire to live at peace with me, and has confirmed this attitude by specific acts, why should I hold him my enemy? And how can the mere suspicion that his friendship may be feigned, or that he will change his mind, give me good reason to attack him? These principles are to be seen at this time more clearly in the relations between states, which dwell in respect to one another in a state of nature. For it is held unlawful by the confession of all men for one state to undertake to destroy by force or guile some other, which is unknown to the aggressor either for benefit or injury, and has never pledged friendship with it by pact or act; this merely because they own no common authority which might punish the former for an injury to the latter. All of which goes to prove that Hobbes is entirely wrong in maintaining that in a state of nature 'natural laws are silent', although there lies far greater security in fulfilling them in organized states, where I can get the magistrate to compel an unresponsive person to meet me in the duties of peace. But despite all this, prudence dictates not only that we fortify ourselves betimes against the open knavery of others, but also that we recognize that the probity of all others is liable to change. Although in general no more convenient safeguard is to be found against such dangers than civil society.

9. Furthermore, although natural law dictates that, if some dispute arise, it either be composed amicably or left to the decision of arbitrators, yet even this will not constitute a sufficient guarantee of peace. For easy as it is for man to sin against the other laws of nature, so easy also is it for him to scorn arbitrators and take recourse in arms. Nay, since the parties agreed upon an arbitrator by a pact alone, it will not be difficult, in case his decision be distasteful, for that pact to be trampled under foot by the one whose confidence in his own strength promises him licence of action, among his fellows; especially in view of the fact that the arbitrator can have no authority to force the parties to abide by his decision. And so prudence assuredly advises us not to place too great confidence, when in a state of natural liberty, upon mere pacts and the word of others, but to believe that agreements are likely to be held most sacred, when they are based upon mutual advantage, and when their violation would, therefore, entail a loss for both parties, or when one party can easily be forced to keep his promises. Where profit and impunity are foreseen as the reward of perfidy, it is held rash to believe that one's safety is sufficiently safeguarded by the wording of a mere pact.

And this is proved by the practice of nations which safeguard themselves by treaties with other nations after they have broken a treaty with one state. And in doing so they do not condemn their own lack of faith in entrusting themselves to the faith of others, but because states usually weigh their treaties first of all by the advantage to themselves. So soon as they have rid themselves of a useless or harmful one, they turn to one more advantageous. And it is in this softened sense that we must take the statement of Hobbes, *De Cive*, chap. ii, § 11: 'Pacts of mutual trust are null and void in a state of nature.' Though there is a pleasant appearance to the statement of Livy, Bk. XXII, chap. xxii: 'Every one likes to be believed, and for one man to keep his word often obligates another to keep his.' Yet in a natural state it will be much the safer course to think upon the old saying: 'The man who believed, lost his property; the man who disbelieved kept his.' 'By faith I lost money; by lack of faith I saved it.' Theognis [831].

10. There is yet a further reason why the mere law of nature cannot encompass the peace of mankind. This is the character of natural liberty, to wit, that just as each man looks to his safety with his own strength, so both in securing that end and in the direction of his actions each man uses his own judgement. How greatly this varies in different individuals surely every one realizes. But very few are blessed with ability enough to be able of their own power to see what is for the permanent advantage of mankind in general and of individuals and to be willing to persist in that knowledge! So many in their dulness are imposed upon by gross error posing as reason. The majority are led by the violence of their passions wherever their lust or a false idea of their advantage may take them. In such a medley of opinions and fancies what sure peace and concord can there be, when the fool as well as the wise man thinks his own opinion the fairest, and the fool shows no more inclination to follow the leadership of the wise, than the wise man that of the fool? But since reason alone, as it is found in individual men, is unable to compose such great differences, some sort of agreement of opinions must be sought by a different course.

11.¹ Finally, although it is plain enough on the face of things not only how much the violators of the law of nature obstruct their own happiness, which requires the help of other men for its promotion, and what evils and perils they bring upon themselves, yet also that natural law itself lays it clearly enough upon the consciences of men that those who wantonly injure others against her laws will not go unpunished; Claudian, *On the Fourth Consulship of Honorius* [104-6]: 'Build up mighty cliffs, raise towers, girdle yourselves about with rivers, place before you tangled forests. You will not give wickedness a wall.' And although the advantage which follows upon the observance of natural

¹ [For 12 read 11.—Tr.]

law and the evil which attends its violation, as they concern the advancement or hindrance respectively of every man's happiness, show clearly enough the benefit accruing¹ from men living as social creatures rather than otherwise; yet even with this made clear, natural law is not strong enough to secure the peace of mankind. And this is true for the reason that the mass of men order their lives not by reason but on impulse, and trust their lust as reason, chiefly by the fault of their education and habits, whereby the force of reason goes, as it were, unheeded; and then because a great part of mankind are concerned only with the present and give little heed to the future, are usually stirred only by what strikes their senses, and rise to higher things with difficulty. Hence it is that most of them entertain a greater fear of punishment at the hands of men than of God, and yet His punishment should be feared above all else. This is, I suppose, because the divine vengeance usually moves with slow foot and often unfolds itself in hidden ways. Caesar, *Gallic War*, Bk. I [xiv. 5]: 'It was the wont of the immortal gods to grant a temporary prosperity and a longer impunity to make men whom they purposed to punish for their crimes smart the more severely from a change of fortune.' (E.) And this gives evil men an excuse to refer the misfortunes of wicked souls to other causes (add *Ecclesiasticus*, viii. 11), especially since the most scoundrelly often possess an abundance of those things by which the common sort usually measure happiness, while righteous men are often the victims of many calamities, which wicked men and fools delight to use as a proof that virtue alone does not bring happiness. This is illustrated by the words of Plutarch, *De Sera Numinis Vindicta* [ii, p. 548 D E]:

That revenge which follows injury closest at the heels presently puts a stop to the progress of such as make advantage of successful wickedness. Therefore, there is no debt with so much prejudice put off, as that of justice. For it weakens the hopes of the person wronged and renders him comfortless and pensive, but heightens the boldness and daring insolence of the oppressor; [. . .] [p. 549 B]. And I am apt to persuade myself that upon these and no other considerations it is, that wicked men encourage and give themselves the liberty to attempt and commit all manners of impieties, seeing that the fruit which injustice yields is soon ripe, and offers itself early to the gatherer's hoard, whereas punishment comes late, and lagging long behind the pleasure of enjoyment. (G.)

A further consideration is that the pricks of conscience which precede a crime do not appear so strong as those that follow, when the crime cannot be undone. Curtius, Bk. VIII, chap. ii [1]: 'The human mind is unhappily endowed in this: We for the most part neglect to weigh the consequences till we have acted.' (A.) Again, though before the deed the stir of our passions drowned out the voice of reason, when they are allayed it resounds like thunder in our mind. And so Plutarch

659 continues, in the passage just cited [xi, p. 555 E]:

Yet when a man, either out of avarice or ambition of civil honour and power, or to

¹ [For *aut* read *ut*.—*Tr.*]

gratify his venereal desires, commits any enormous and heinous crime, after which, the thirst and rage of his passion being allayed, he comes to set before his eyes the ignominious and horrible passions tending to injustice still remaining, but sees nothing useful, nothing necessary, nothing conducive to make his life happy; may it not be properly conjectured that such a person is frequently solicited by these reflections to consider how rashly, either prompted by vain glory, or for the sake of a lawless and barren pleasure, he has overthrown the noblest and greatest maxims of justice among men, and overflowed his life with shame and trouble? (G.) (As the same author says, *loc. cit.* [ix, p. 554 A]): Just as when criminals are led out to corporal punishment each man carries his own cross, so wickedness of itself fashions particular torments for particular crimes, skilled as it is in making life miserable <as well as disreputable>. In wickedness there are, in addition to moral baseness, many fears, profound disturbances of the soul, repentance, and constant turmoil. (G.)

But these inner agonies, by reason of the fact that they are not experienced by others, are so much the less effective in restraining their wickedness. Indeed, Hobbes rightly says in his *Leviathan*, chap. xxxi:

There is no action of man in this life that is not the beginning of so long a chain of consequences, as no human providence is high enough to give a man a prospect to the end. And in this chain, there are linked together both pleasing and unpleasing events; in such manner, as he that will do anything for his pleasure, must engage himself to suffer all the pains annexed to it. Thus the violence of others punishes those who practise it, diseases punish intemperance, &c.; and such are what I call natural penalties.

Yet such is the stupidity of most men and the violence of their passions, that only a very few accord all these matters the consideration due them. Therefore, there remained no more effective remedy to curb the wickedness of men than what is supplied by states now that they have been established. Thus Plutarch, *Against Colotes* [xxx], goes beyond¹ his right in censuring these words of Colotes:

Those who have established laws and ordinances and instituted monarchies and other governments in towns and cities, have placed human life in great repose and security and delivered it from many troubles. And if any one should go about to take this away, we should live the life of savage beasts, and should be every one ready to eat up one another as we meet. (G.)

For surely Plutarch had given but a passing glance to man's nature if he believed that, in case civil laws were dispensed with, the order and peace of mankind could abide 'by the rules of Parmenides, Socrates, Plato, and Heraclitus'. And even if the statement of Aristippus were true, as given by Hesychius Illustrius [Diogenes Laertius, II. 68], who, when asked, 'What advantages have the philosophers?', replied, 'If all the laws should be destroyed we would continue to live as we do at present.' Yet what will become of the larger part of mankind, who when left to themselves guide their lives by their passions and lusts? Surely the better conclusion is that of Quintilian, *Institutes of Oratory*, Bk. XII, chap. vii [2]: 'Since those who cannot be brought to a better way of life by reason, can² be kept in order only by terror.' (W.)

¹ [For *aut* read *haut*.—Tr.]

² [For *possumi* read *possunt*.—Tr.]

CHAPTER II

ON THE INTERNAL STRUCTURE OF STATES

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| | 22. The right belonging to those bodies. |
| | 23. On illegal bodies and factions. |
| | 24. On the special functions of citizens. |

OUR next task is to examine in some detail the intrinsic structure of states. Now in order that men might gain for themselves as much security against the wickedness of their fellows as pertains to their condition, no other device could be invented than for each of them to provide for himself sufficient protection, by which the attack of one person upon another would be made so dangerous, that the attacker would feel it safer to restrain himself than to fight, to live at peace with another, than to engage him in war. For the wickedness of man's character and his proneness to injure others can in no way be restrained more effectively, than by thrusting in his face the immediate evil which will await him upon his attacking another, and by removing every hope of impunity. And such defence cannot be offered by any fortified place, whether strengthened by nature or by human device, for if one man remain in such a place it becomes nothing other than a prison, nor can a man easily defend it by his own strength alone. And yet if you open the gates to allies, there will be danger from them as well, unless you guarantee yourself by some further defence against them. Some defence of course, can come from arms, yet not so much that a single man can promise himself any abiding security thereby against the assaults of a host. So also any defence that can come from animals is little enough or uncertain, and not sufficient to repel such perils as we have named. Although Gomara, *Historia Generalis Indiae Occidentalis*, chaps. xliv and lxy, tells of two cases where a dog was of aid against the Americans; and it is said that the emperor of Ceylon in his royal city of

Candy has a body-guard, as it were, of one hundred elephants which serve as the city watch at night, and as the executioners of criminals. But the help of many men is required to train them for such services.

We conclude that no better guarantee could be found against the dangers that threaten from man than that afforded by man himself, in pooling resources, mutually intertwining their safety, and warding off perils by a common confederacy. Compare Hobbes, *De Cive*, chap. vi.

2. It is clear that a confederacy of two or three men could offer little of this security, because the addition of a bare handful of men on the side of the invaders would spell certain victory, giving them also confidence in their attack and promising success and impunity in their undertaking. Therefore, in order to obtain the security which we seek, it is necessary that the number of those who agree to mutual aid be so great that the addition to the enemy of a few men will not appear of outstanding consequence for victory, and that, therefore, a considerable number of men band together. For this reason Plato also, in the *Laws*, Bk. V [p. 737 D], requires for his state a number of citizens 661 sufficient to repel any injuries from their neighbours, and to offer them succour when they are in turn the victims.

A further conclusion from all this is, that the just size of a state should be measured by the strength of its neighbours. And so what were large states in antiquity, when mankind was divided into a great number of states, are smaller than is just, now that great empires have arisen. For 'bodies, no matter how tall and lofty, decrease in size when juxtaposed to still higher ones'. Pliny, *Panegyric* [lxi. 2].

3. In the next place the many who come together for this end must agree on applying the means suitable for that end. For no matter how great the number of them be, nothing will be accomplished unless they agree on the best way in which that common defence should be established, and prevent each and every man from desiring to direct his strength as he sees fit. For they will be but a hindrance to each other, torn by conflicting opinions and working to opposite ends. Or even if they do by impulse or design agree sufficiently on one line of action in hope of victory, booty, or revenge—such as is sometimes to be seen with an infuriated mob, as in Tacitus, *Annals*, Bk. [I], chap. xxxii, lines 6 and 7—yet later they are so torn apart by differences of character and counsels, by rivalry or envy in which men naturally contend with each other, or finally by fickleness and inconstancy, that they are henceforward unwilling either to render mutual aid or to live at peace with one another. Compare what is set forth on the weaknesses of the Athenian democracy in Polybius, Bk. VI, chap. xlv. And so such unions of many men will be the least likely to prevail for any length of time, unless they are held together by some common fear, so as to prevent their being able later to depart at their pleasure from what they had once agreed to.

It follows from this that the mere consent of several men, although confirmed by a pact, cannot give that security which we seek; that it is not enough merely that several form a society for mutual aid, and exchange promises that they will direct their actions and strength to the same end and the common good. But something else must be added in order that those who have once agreed to peace and mutual aid for the sake of the common good will be prevented by fear from later departing from that agreement, when they conclude that their own private advantage differs from that of the group.

4. To illustrate this point Hobbes examines in some detail the nature of certain animals which appear to lead some kind of a social life, of which the most conspicuous are bees and ants. For although these animals lack reason by which they can enter into pacts and submit themselves to government, nevertheless, by agreeing together, that is, in their case, by desiring and avoiding the same things, they so direct their actions to a common end that their groups are not subject to conflicts. The reason why this is not true of men, and why a great number of men cannot dwell together in peace for any length of time without sovereignty, will be a matter well worth inquiring into.

Now the reason why a most provident nature has joined those little creatures into groups, seems to be because they live on and are sustained by food through the winter, while practically all other animals either perish in the winter or pass through it without going out for food. Moreover, the food for these animals can be gathered and preserved much more easily, if several join their efforts, than if each works for himself alone. From which it is patent that the groups of these little creatures have an end different from that of states, although there is to be seen in them a kind of society of all possessions, in that they all labour for and are maintained from a common store. Hobbes offers as a further reason for this difference, the fact that the govern-
662 ment of these animals is only an agreement, or many wills with but one object, not a single will, as is the case with states; that is, that every one of them agrees to do his task along with others, and to gather the food into one store, but that the wills of all have not combined into one will, as always happens in states, with the result that the decision of a single man or council is held to be the will of all.

Now the reasons why, in the case of these animals, living, as they do, by mere instinct and appetite, the simple agreement of their inclinations is so persistent that it requires nothing further, are in general as follows.

I. Among men there is a struggle for honour and dignity, among animals there is not; and so there is not observable in the latter the envy, rivalry, and hatred that among men issue from that source.

II. The natural appetite of bees and their sense-judgement, so to

speak, are uniform and directed to the common good, which with them does not differ from private good. 'That which is not in the interests of the hive cannot be in the interests of the bee.' (H.) Marcus Antoninus [Aurelius], Bk. VI, § 54. Their single desire is to have full hives, while with men there are as many feelings as there are heads, and practically nothing is thought good unless its possessor secures thereby some distinction and preferment above others.

III. Animals without reason either see or think they see no defect in the administration of their groups, since they established them not upon deliberation, but by mere natural instinct, and know not how to compare them with others. Nor does it occur to any bee to form a cell in any other shape than that of a hexagon. But in a group of men there are any number who in scorning their present condition lay claim to more knowledge than all others, and undertake to establish new forms of government. And because of the diversity of their conclusions every innovator strikes out a different path, to the rending apart of the state, and finally to civil war.

IV. Although animals have some use of the voice, being at any rate rather quick to show their feelings to each other, still they lack that power to gloss over facts by the enticements of language, which is a necessary requirement for one who would arouse and excite the mind, and by which, for instance, a good is represented as better or worse, an evil as more or less heinous than they actually are, or both are given a very different face from what they really bear. In fact a man's tongue is only too often a kind of trumpet of war and sedition, which can not only sound forth false rules of life and conduct, but also suggest and commend them to others with great enticement of language, and mould them into characters most inimical to the genius of a peaceful society. And it was not without justice when the comic poet [Aristophanes, *Acharnians*, 530] once said that Pericles had thundered¹ and lightened and confounded all Greece.

V. Brutes draw no distinction between contumely or contempt and actual damage, or rather they cannot feel contempt. Therefore, so long as they find the necessities for their bodies, they raise no complaints over their associates. But those men are the greatest bane of the state who are permitted to enjoy the greatest leisure. Nor do animals come to blows over position or dignity, before they have been victorious over hunger and bad weather.

VI. Finally, the agreement of those brute creatures is natural, while that of men rests upon a pact, that is, is artificial; or rather it is moral, enforced only by moral ties, which are far from doing away with the natural diversity and severity of men's characters, and their power to take a different course. It may be added that in a hive of bees there

¹ [For *tenuisse* read *tonuisse*.—Tr.]

is properly no sovereignty, and for that reason their ruler carries no sting, although sovereignty is the very soul, as it were, of a state. And yet it is surely a marvellous miracle of nature that 'while the king lives they are all of one mind; when he is gone they break faith'. [Vergil, *Georgics*, IV. 212 f.] Add Xenophon, *Training of Cyrus*, Bk. V.

663 We should, however, carefully note that the foregoing comparison between bees and a gathering of men is made for the sole purpose of setting forth why no hope need be held out for continued agreement and concord in a great group of men, when there is no sovereignty. But we would not be understood as saying that these inclinations which contain the seeds of discord are found to the same degree in all men alike, or that sane reason does not suggest such arguments from the very nature of man, as command him to incline more than any other animal to concord and mutual helpfulness. And so our purpose is not at all frustrated by Richard Cumberland, *De Legibus Naturae*, chap. ii, § 22, when he undertakes to refute those six reasons of Hobbes by pointing out, that man loves honour, which naturally arises from beneficence; that he understands more perfectly the power of the public good to safeguard his own private good; that he enjoys the use of reason which disposes him equally to obey and to command, as chance may require; that he understands how to sharpen or grace the force of his reason by the most appropriate words; that he recognizes law, by the force of which he distinguishes an injury from a loss incurred without injury; that, finally, there is added to the agreement once arrived at by men, not only a steadfastness derived from nature, but that also art, as the assistant of nature, supplies various safeguards against unforeseen accidents, and a duration, by means of writing, beyond man's span of life. All this is of no consequence until he has shown that a great multitude of men, free from all sovereignty, cannot be disturbed by only a few, and that all men recognize and understand quite fully the dictates of sane reason, and have fully subdued all their passions and base lusts. And surely those men erect states upon shifting foundations, who show too great respect for men's moderation and weigh all other men, and especially the vile mob, upon the scales of their own probity.

5. Now what that is which is fitted to bind for a long time the consent of many men, will be clear enough to the person who fully investigates the mental constitution of mankind, in which two faults meet us which more than all others prevent any large number of men from being able to agree for long upon a common end. The first is the diversity of inclinations and of judgement in discerning what is of most advantage to a common end, to which is joined in many people a slowness to apprehend which one of several things is most advantageous, and an obstinacy to maintain to the bitter end what has once pleased a man's fancy. The second is sluggishness and aversion to do of one's own

accord what is useful, when there is no incumbent necessity which will force such slackers¹ to perform their duty. The first of these evils may be cured by uniting the wills of all in a perpetual bond, or by so constituting affairs that there will be for the future but one will for all in those matters which serve the end of society. The second may be alleviated if some power be established which is authorized to inflict upon those who hesitate before the common advantage some present evil and such as will impress itself upon their senses. Here belongs the passage in Cicero, *Tusculan Disputations*, Bk. IV [xx]:

They say that even grief [. . .] was appointed by nature, not without some good purpose: in order that men should lament when they had committed a fault, well knowing they had exposed themselves to correction, rebuke, and ignominy. For they think that those who can bear ignominy and infamy without pain, have acquired a complete impunity for all sorts of crimes. (Y.)

Now a union of wills cannot possibly be encompassed by the wills of all being naturally lumped into one, or by only one person willing, and all the rest ceasing to do so, or by removing in some way the natural variation of wills and their tendency to oppose each other, and combining them into an abiding harmony. But the only final way in which many wills are understood to be united is for every individual to subordinate his will to that of one man, or of a single council, so that whatever that man or council shall decree on matters necessary to the common security, must be regarded as the will of each and every person. For whoever voluntarily grants his power to another is held 664 to agree with his will. Arrian, *Epictetus*, Bk. I, chap. xii [7]: 'The good man [. . .] has submitted his mind to Him that orders the universe, as good citizens submit to the law of the city.' (M.)

By a similar course of reasoning such power as may be feared by all, cannot be constituted in such a way that each and all shall physically pour their strength into one receptacle, and themselves remain thenceforth utterly weak. But one person is understood to possess the strength of all only in such a way that each and every one has obligated himself to apply his strength as that individual may desire. When such a union of wills and strength has been made, then there finally arises a state, the most powerful of moral societies and persons.

These matters will be understood more clearly, if we consider that subjects by the submission of their wills do not destroy their natural liberty of will, by which they are able in actual deed to withdraw what they once gave, and refuse the obedience which they promised; nor are the strength and faculties of subjects actually turned over to the sovereign in such a way, that, for instance, the strength which lay in the shoulders of all subjects passes to the shoulders of the sovereign. Therefore, the wills and strength of subjects, in order that they may be subject

¹ [For *tergiversante* read *tergiversantes*.—Tr.]

to the beck of their sovereign's will, are balanced, as it were, by two weights or considerations. The first of these is based upon the pact itself, whereby they submitted themselves to their rulers, to which the greatest strength is added by the command of God Himself, and the sacredness of an oath, in which there lies the greatest efficacy to move the minds of men, the more the latter have happened to receive good training from their youth, and the more they hold before their eyes the necessity and advantage of civil sovereignty. But those who strain against the pressure of this weight by reason of the wickedness of their minds, while they stupidly think of sovereignty as a thing to suit the fancy of a few, and found to be a nuisance to all others, or are slothful and averse freely to do what their duty requires, all such are forced to obey the commands of their rulers by the second weight, namely, fear of punishment and extrinsic coercion.

Now since he who would coerce another should be the stronger, and since that strength wherein sovereigns exceed the strength of individual men arises from the fact that it is at their nod that citizens apply their strength, it follows that it is due to the obedience of good citizens that rulers are able to direct and coerce the evil. And it is easy for him who has legally secured sovereignty, and shows even a moderate interest in performing his duty, to bring it about that the greater part of the total strength of a state lie in the hand of the ruler. For he can always hope that the majority of the citizens will be mindful of the command of God, their pledged faith, and their oath, while it never fails to be to the advantage of the larger and better part of the people that the state be at peace and secure, and that the lawful sovereigns be established in their authority. But there is also at hand some machinery, as it were, by which the power of rulers is considerably increased, such as strong forts, and a standing army bound to their commander by special ties; and these can coerce almost any number of men, especially if unarmed and scattered throughout a large territory, provided, however, that sovereigns take proper precautions that their citizens do not combine into a faction.

6. That this union may be understood more thoroughly, we must recognize that so long as several physical persons have not united into one moral person, whatever they do, or whatever obligations they contract, they do and contract as individuals, and so there are as many actions and obligations in number as there are physical persons. And although many men are often described by the word 'multitude', which
665 apparently denotes a unity, yet, to be more precise, 'multitude' is not a collective word, that is, a word which denotes one thing composed of several, such as are, for example, the words army, fleet, assembly, senate, &c. But, as a matter of fact, it means nothing more than a number of things, without specifying whether they are homogeneous or

heterogeneous, united or dispersed. And so a multitude of men is not actually a single body but several men, each one of whom has his own will and his own judgement on all matters to be laid before him. And therefore to a multitude, as distinguished from individuals, there cannot be attributed a single action and one distinct from that of the individuals within it, or a special right. Therefore, even though a man may be in a multitude, that is, have many men about him not united in one body, of whom the majority, or all the rest, do something or enter into some agreement, if he himself has not agreed to it or participated in some other way in that act, the act will in no way concern him. For a multitude, or many men, to become one person, to whom one action can be attributed and certain rights belong, in so far as this one person is distinct from individuals, and the rights be such as the individuals cannot attribute to themselves, it is necessary for them to have united their wills and strength by intervening pacts, without which a union of several persons equal by nature is impossible of comprehension.

7. The number and the nature of those pacts by the intervention of which a state is built up are discovered in the following manner. If we imagine to ourselves a multitude of men endowed with natural liberty and equality, who voluntarily set about to establish a new state, it is necessary for the future citizens, as the first step, to enter into an agreement, every individual with every other one, that they are desirous of entering into a single and perpetual group, and of administering the considerations of their safety and security by common council and leadership. (Although in such a pact the individuals usually reserve to themselves the privilege of emigration.)

Such a pact is entered into either absolutely or conditionally. Absolutely, when a man pledges himself to remain with the group, whatever form of government the majority may finally decide upon. Conditionally, when he stipulates that the form of government be such as he approves of. Furthermore, when this pact is entered into, it is necessary for each and all to give their consent. Whoever does not do so, for so long as he continues in the same place with the rest, remains outside the future state, nor is he required by the agreement of the rest, however numerous they be, to join their group at all; but he continues in his natural liberty, wherein he will be permitted to decide matters of his safety according to his own judgement.

But after such a group, already taking on the rudiments and beginnings of a state, has been formed by the pact mentioned, it is yet further necessary for a decree to be passed upon the form of government that shall be introduced. For until this decision is reached, it will be impossible to take consistent action on matters concerning the common safety. At this step those who have joined themselves to the group absolutely, will be forced by the agreement of the majority to

consent to that form of government which these latter have agreed upon, although they might have preferred another, if, indeed, they wish to remain in the spot where the group is fixed. For in making no exception to the pact, they are understood to have submitted themselves to the will of the majority, at least in that point, for they can have no grounds for demanding that all the others prefer the judgment of a few to their own. But he who has joined the group conditionally will not become a member of the future state, nor be obligated by the agreement of the majority, unless he has expressly agreed to the form of government to be introduced¹.

8. After the decree upon the form of government, a new pact will be necessary when the individual or body is constituted that receives the government of the group, by which pact the rulers bind themselves to the care of the common security and safety, and the rest to render
666 them obedience, and in which there is that subjection and union of wills, by reason of which a state is looked upon as a single person. From this pact there finally comes a finished state.

But when a democracy has been established, this last pact does not appear so clearly, since the same individuals are in different respects both rulers and subjects. Yet a pact requires two distinct persons, nor does it seem to be sufficient if they differ in respect, for instance, one and the same Titius can in different respects be father, son, husband, son-in-law, father-in-law, merchant, &c., in which case it will surely be no pact if Titius, as merchant, promise something to the same Titius, as father. And so it must be understood that in popular government the individual citizens and the council, in whose hands lies the direction of the state, do not differ only in bare respect alone, but are actually different persons, although of a different kind, to whom belong a distinct will, distinct acts, and distinct rights. For the will of the individual citizens is not forthwith the will of the people as a whole; nor is the action of individual citizens taken without further ado as an act of the people, and *vice versa*. Nor do individuals hold the supreme sovereignty, or any part of it, but the people possess it; for it is one thing to possess a part of the sovereignty, and another to have the right to vote in the assembly in which is vested the supreme sovereignty. And so thus far nothing appears to prevent a pact from intervening between the assembly of the people and the individual citizens.

But it might perhaps be objected, with some point, that such a pact between a sovereign people and subject citizens would be useless, because each citizen in agreeing to a democratic form of government is understood to have subordinated his will to the will of the majority, while it appears that sufficient necessity is at the same time laid upon² each individual, by his love for himself and his possessions, to labour

¹ [For *introduendā* read *introducendā*.—Tr.]

² [For *iniustum* read *iniunctum*.—Tr.]

with all his strength for the public good, with which his own safety is also intertwined. And still, although perhaps it is not so necessary in democracies as it is in other forms of states, that that pact, or the mutual promise of sovereign and subject to perform his respective duty, be expressly stated, it must, nevertheless, regularly be understood to intervene tacitly, at least. For whether that decision to establish a democracy be conceived in the form of a bare agreement of many wills uniting into one, or of a pact of individuals with every other individual in the form, 'I will submit my will to the assembly of all, provided you also do the same,' yet from such a pact, exactly considered, there results no other obligation than that every individual is required to acquiesce in that form of state, so long as it remains unchanged by all the citizens.

And yet a greater obligation is discoverable in the citizens of democracies. For they are obligated individually to abide by the decrees and orders which issue from the assembly of them all, and at the same time there lies upon each an obligation to exert all his strength for the care of the state, and to consider his own advantage after that of the state. For on what other excuse might a citizen be censured or fined for failure to attend the assembly frequently enough? But since there is such an obligation, it must also have some origin, and that can be nothing other than the pact which we have mentioned. Thus in¹ Thucydides, Bk. II [xl], a citizen of the democracy who was uninformed about the affairs of the state is denominated 'a useless citizen'. Add the argument of Socrates with Charmides in Xenophon, *Memorabilia*, Bk. III, p. 486 [vii. 2].

But when it is decided to establish a democracy, or a monarchy, this second pact is more clearly discernible. For upon the designation of nobles or a king, mutual faith is exchanged, and both parties undertake mutual engagements, for after the sovereignty has been proffered and accepted, the king and nobles, no less than the citizens, are bound to performances not before owed. Prior to that pact the citizens were no more obligated to obey one man, or a small group, than were they to look out for the safety of the state. From what, then, can mutual faith and an obligation to performances not owed beforehand, trace their origin, than from a pact?

What we have said thus far on the two pacts and one decree, can be 667 illustrated by what Dionysius of Halicarnassus, Bk. II, at the outset of his history, recounts of the founding of the Roman state. For first of all a multitude of men came together to found a new home, between whom there intervenes a kind of tacit pact. The next step is for them to deliberate on the form of the state, and after they have agreed upon a monarchy, the sovereignty is then tendered to Romulus. Likewise, when an interregnum² occurs, they often deliberate again on the form of the

¹ [For *adud* read *apud*.—Tr.]

² [For *inter regno* read *interregno*.—Tr.]

state, since the group is then held together only by the first pact. See the deliberation of the Persian nobles in Herodotus, Bk. III, and of Brutus and his associates in Dionysius of Halicarnassus, Bk. IV.

It should be carefully noted that this method of forming a state by the intervention of two pacts and one decree is in the highest accord with nature, and common to all forms of states. Yet it is possible for a monarchy to be established by a single pact, in case many men, before any preceding agreement between them, have, each of them for himself, put themselves under one person, whether all at one time, or at different times, practically in the same way as armies are gathered together which are composed of strangers and mercenaries. And, in the same way, those who join a state which is already established, have need of but a single agreement, whereby they ask to be received into the state, while those who represent the state receive the same after requiring of them obedience.

Now we would not have it thought that these remarks on the pacts which give rise to a state, are a creation of our imagination, because the origins of most states are unknown, or at least it is not entirely certain that they were established in that manner. For one thing is sure, namely, that every state had at some time its beginning. And yet it was necessary that those who compose a state be not held together before its establishment by the same bond as they are afterwards; and that they be not subject to the same persons to whom they are afterwards. Yet since it is impossible to understand that union and subjection without the above-mentioned pacts, they must have interposed, tacitly at least, in the formation of states. Nor is there anything to prevent men from being able to reason out the origin of a thing, despite the fact that there remain no written records upon them.

9. It may be worth while in this connexion to present a little more in detail the opinion of Hobbes, who recognizes in the formation of states but a single pact between individuals, and everywhere maintains that none passes between a king, or nobles, and citizens. And the reason that has led him to make such statements is clear enough from the scheme of his works on politics, as it is clearly set forth in his *Leviathan*. He attacked first of all those seditious men who in former years endeavoured to circumscribe the royal power, and to place it under the control of subjects, or even to do away with it altogether. To take from them their excuse for rebellion, namely, that the pledge between a king and citizen is reciprocal, and that when the former does not keep the promises he made by a pact, the latter are freed from obedience; and to prevent turbulent citizens from making a case of broken faith out of any actions of a king which do not suit them, he undertook to deny that there was any pact between a king and his subjects. And when he had conceived the idea to accord all kings as such an absolute and unlimited

power, the result was that he did away with every pact, because it seemed to be the principal instrument in limiting that power.

But although it be the highest interest of mankind that the royal power be held sacred and free from the cavils of churlish men, yet that does not necessitate our denying matters as clear as daylight, and refusing to recognize a pact, when there exists a mutual promise about performing that which was not due before. When I subject myself to a prince, I promise him obedience, and stipulate for myself defence, while the prince in accepting me as a citizen promises me defence and stipulates from me obedience. Before that promise, neither of us was under an obligation, at least not a perfect one, I to obey him, or he to defend me. Who now would undertake to exclude such an act from the class of pacts? Nor is such a pact rendered superfluous because it appears that there was a prior agreement among those who voluntarily establish a king over themselves, to elevate this or that man to the throne. For as mere election, without the acceptance of the candidate, confers upon him no power over his electors, so it is easily understood from the nature of the matter, that those who voluntarily confer upon another power over themselves, wish that in its exercise he strive toward the end set for that power, and that he have accepted what was proffered him, on the understanding that his electors will not fail of their end through any fault of his. 668

Therefore, in the case of those who offer sovereignty to another, just as they promise what the nature of their subjection requires, so they also, on the other hand, bargain to secure from him the things for which civil sovereignties are established. What else is this than to enter into a pact?

10. Nor, indeed, when we admit the existence of a pact between king and citizens, do those inconveniences necessarily follow, which Hobbes seems to have had before his eyes. All pacts, for that matter, have this feature, namely, that they imply a necessity to do some particular thing. But there is the greatest difference possible between those pacts by which a man subjects himself to another, and those by which neither accepts any sovereignty over the other. The right of a master over a slave, at least over one who voluntarily accepts slavery, is established by a pact, as also the power of a father over him who offers himself for adoption, and the command of a general over mercenaries. And yet that does not prevent the former from having the faculty to command, and the latter from being under necessity to obey, nor can the latter throw off the restraint when the orders of their superiors do not suit them. Xiphilinus, in his *Epitome of Dio, Life of Nero* [LXI. vii. 3]: 'Every sovereign power, when given over by a private citizen, passes at once out of the hands of the giver, and comes to belong to the recipient to use against him.' That is, in pacts which contain no submission of

the will and of strength, special and definite services are designated, to be performed by each party in accordance with the intrinsic quickening of the conscience, and when a man refuses to meet them of his own accord, no recourse remains but war, or coercion by a common master.

But in pacts whereby one person is subjected to another, it falls to the latter to define what the former should perform, while at the same time the faculty is conferred upon him of compelling his subject against his will to such performances, while such a faculty in no sense belongs to the latter over the former. Therefore, a ruler cannot be accused of breaking the pact unless he has renounced all care of the state, or has adopted the character of an enemy towards his own subjects, or has clearly with evil intent departed from the rules of government, on the observance of which as a condition, the citizens promised their obedience. These things any prince can avoid during his entire reign with the greatest ease, provided he is willing to remember that not even the highest of mortals are exempt from the laws of human destiny, and that 'no ruler was ever deceived who had not first deceived others'. Pliny, *Panegyric*, towards the end [lxvi].

Finally, that prince must be either a very great scoundrel, or fool, who cannot bring it about that it is to the interest of the greater or stronger part of his people for his position to be secure. And he should strain all his energies to secure this, if he heeds the reflection of Livy, Bk. VIII, chap. xxi: 'Could it be believed that any people or even any individual would remain, longer than necessity constrained, in a situation which he felt painful?' (S.) If, then, it is to the interest of the greater part of the people that the prince be secure in his position, as must needs be the case, if he receives justice and prudence into his
 669 counsels, his fortune stands fixed upon a firm foundation. If a man cannot do this much, he is fit for any other business rather than bearing sway.

11. Let us examine more closely the reasons on which Hobbes builds his assertion. At the outset we hold it to be unfitting that he undertakes to derive the obligation of citizens to rulers from a pact, 'whereby each individual obligates himself to every other not to resist the will of him to whom he has submitted himself.' *De Cive*, chap. v, § 8. As it is, those who have agreed among themselves to confer sovereignty upon a person are understood also to have agreed that all subject their will to him, that is, that his will shall represent the will of all in the conduct of the state. Nor is it unusual for such an agreement about conferring sovereignty upon a person, and for the laws under which sovereignty is entrusted to some one, to be strengthened by mutual pacts and oaths on the part of the people. Yet to reach an agreement about conferring sovereignty upon Gaius, and to grant Gaius sovereignty upon an exchange of faith, are very different things.

Furthermore, there is nothing repugnant in citizens taking pledges of each other on granting obedience to a king, just as there are pacts where all obligate themselves for one, and one for all. Yet there is no necessity at all for that being done, and in practice it is rather rare. Whoever comes into a state as a stranger pledges faith to the king, but in no place, so far as we know, is he required to make an agreement with the rest of the citizens about his obeying the king.

Finally, it seems highly dangerous to derive the obligation to a king from a pact of this kind with every other citizen: 'Out of favour to you I transfer my right to the king, so that you as well, out of favour to me, may transfer your right to him.' For by this device every citizen will appear to have made his necessity to obey depend upon the obedience of every other citizen, and as a result, when any one of them does not render obedience, all the rest would be free from theirs. And yet for this reason alone it is necessary that every citizen be obligated to the supreme power for himself, and unconditioned by another's obedience, so that even if one or another chafe at their restraint, the sovereign can avail himself of the strength of the rest in reducing the refractory one to his place.

No less incongruous is what the same writer presents, chap. vi, § 13:

The obligation to show obedience to the supreme civil sovereignty does not arise immediately from that pact by which citizens have transferred all their right to the state, but mediately, namely, from the fact that without obedience the right of sovereignty would be vain, and in consequence a state would under no circumstances have been established.

But why use such crooked paths when one may walk a straight and level road? Surely the reason which seems to have moved him is an idle one. He tacitly presupposes that things which have been agreed upon by a pact cannot lawfully be refused; and yet that some things can rightfully be commanded by a king, which a citizen can rightfully refuse, for instance, if the king should command me to kill myself, or the king, or my father when sentenced to death, and that, therefore, the obedience of citizens must be derived from some other source than a pact with the king.

But we maintain that the legitimate power of a king and the duty of citizens exactly correspond, and we emphatically deny that a king can lawfully command anything which a subject can lawfully refuse. For a king cannot lawfully command anything more than agrees, or is supposed to agree, with the end of instituted civil society. If in evil design or open folly he orders something contrary to this end, he will by no means be held to be acting lawfully. Whether, however, subjects can lawfully resist any such commands is another question, which we shall discuss elsewhere. The examples which Hobbes adduces have nothing to do with the matter. If it should happen that the king can

lawfully command a person to do such things as he mentions, that is, if for a citizen to do such a thing can appear to work to the safety of the state, the subject will not be within his rights in refusing to do it. See *Judges*, ix. 54; 1 *Samuel*, xxxi. 4. Zonaras, Pt. III, records that when the emperor Theophilus was standing held by a fear that was like chains
 670 upon him, Manuel drew his sword and said, 'I will slay you if you do not follow me. For it is better that you die than be captured by the enemy, and bring such a disgrace upon the Roman state.' By these threats the emperor was with difficulty freed from his stupor, followed Manuel, and escaped. Nay, more: 'It is better for kings to die in battle than to serve their inferiors.' Quintus Calaber [Smyrnaeus], Bk. XIII [269 f.]. But when such commands are unreasonable, and a citizen is executed for refusing to perform them, no sane man, I imagine, would say that he was lawfully put to death.

What the same author presents in the final section of this chapter, to the effect that citizens make over their right to the king after the manner of a *donation*, is not even consistent with his own views. He says, chap. ii, §§ 8-9, that it is a donation when a right is transferred to another by only one of the parties. Yet when sovereignty is conferred upon a king there is a mutual transfer of right, or else a reciprocal promise: The citizens promise obedience, the king guidance of the state, duties to which neither was bound before that act. For just as before the conferring of sovereignty citizens could resist the commands of Gaius whom they later made king, so Gaius could likewise resist the same when they demanded his defence and care, or, in other words, could deny it as something he did not owe them. Compare *Luke*, xii. 13-14.

12. Nor is there any greater efficacy to destroy pacts between sovereigns and subjects, in the reasons which he later adduces, chap. vii, § 7 ff. He tries to prove, first of all, that a democracy is not established by pacts of individuals with the people as a whole, but by mutual pacts of individuals with each other. His argument is that in every pact the parties to it must be in existence before the pact itself; yet the people does not exist before the establishment of a state, when, that is, they were not a single moral person, but a multitude of individual persons. Therefore, before the establishment of a state, a pact could not have been entered into between the people and citizens. Yet after the state was established, it would have been useless to enter into such a pact, because the people embrace in their will the will of that citizen to whom, it is supposed, they are obligated, and therefore he can release himself at will, and is in consequence actually free.

But it is obvious that there is a third course still left open. Before a state is established, many men do not form a people, that is, a democratic group. Therefore, a pact cannot be entered into with it as such.

After it is established, it is idle to enter into a pact, in the sense that one citizen or another wishes to make a special agreement with the people about the administration of the state. For whoever approves of a democratic form of government is understood by that very act to have obligated himself to obey the decrees issuing from the majority of the people, which obligation would be impaired by a special pact. But, as a matter of fact, in the very establishment of a democratic state, a mutual pact could have been and actually was entered into between the people and individuals, the nature of which has already been set forth. It would be equally pointless were one to reason thus: A husband could never enter into a pact with his wife, because before their marriage she was not yet his wife, and there was no point in doing so after the marriage, when she had already subjected her will to the will of her husband. And yet a pact could be entered into by the very act of her becoming or being chosen his wife. Epicurus once toyed with a sophistry not so very different. Lactantius, *Divine Institutes*, Bk. III, chap. xvii:

'When we are in existence, death does not exist: when death exists, we have no existence: therefore, death is nothing to us.' [Epicurus, in Diogenes Laertius, x. 125.] How cleverly he has deceived us! As though it were death now completed which is an object of fear, by which sensation has been already taken away, and not the very act of dying, by which sensation is being taken away from us. For there is a time in which we ourselves do not exist, and death does not yet exist; and that very time appears to be miserable, because death is beginning to exist, as we are ceasing to exist. (C.*)

Furthermore, however much a man may be unable to conceive of such a pact in a democracy, or may hold it useless, he will still not be allowed to exclude it from other forms of states, where those who rule and those who are ruled differ from one another as natural persons. For 671 in them, at any rate, a pact is required whereby the rulers are obligated to undertake the care of the state and to regard the safety of the people as the highest law, while the ruled promise them obedience. From this any one knows what is to be thought of the following thesis of Hobbes, *De Cive*, chap. vii, § 9: 'Since citizens, by not entering into a pact with the people but into mutual pacts between themselves, were bound to everything which the people did, they were therefore bound to the deed of the people in transferring the sovereign right of the state to nobles or to a king.' For it does not follow that if a council of the people decided to transfer the supreme power to nobles or to a king, the individuals were bound to stand by that decree; therefore, no pact passes between the people transferring the sovereignty, and the nobles or the king to whom it is transferred.

Nor is Hobbes' next argument any stronger: A king, although chosen by a people, cannot be obligated by it to anything, for upon his being chosen, the *people* is at once dissolved and the consideration at

once ceases which it held as a *person*; wherefore, the obligation which was entered upon to the person, ceases, and is dissolved along with it. Yet what foundation there is for such a theory as this, that when a person ceases, the obligation which concerned it likewise ceases, must be understood of those cases when a person ceases by natural death, or when that quality upon which alone an obligation was founded no longer exists. And yet when a free people transfers sovereignty to a king, that people does not cease by natural death, nor is the obligation of the king founded upon that quality of the people whereby it is understood to be free, but whereby it will thereafter continue to be a group of citizens subject to one man's sovereignty. Just as a suitor who agrees with a virgin about marriage cannot claim, after the consummation of the rite, that his obligation toward her has ceased, because she is no longer a virgin as she was when the pact was entered into. For the obligation was not based upon the quality of virginity, but he agrees with a virgin that she will enter upon the status of a wife. And when a king is set up a people is dissolved only in so far as that the supreme sovereignty is no longer vested in an assembly composed of all the citizens, but it is by no means dissolved into a multitude held together by no common bond; rather it remains one group, bound together by one sovereignty and by that original pact.

The fact is that Hobbes imposes upon the simpler minded by the ambiguous meaning of the word 'people'. In democracies 'people' signifies the entire body of citizens which in different respects rules and is ruled, while in aristocracies and monarchies it signifies the entire body of citizens which is ruled. See *Idem*, *De Cive*, chap. xiii, § 3. And yet who would undertake to deny that there can be an obligation towards such a people subject to a monarch or nobles, even though such an obligation had been contracted while it was yet free, but on contemplation and understanding of their future subjection?

Finally, Hobbes in the conclusion of his *Leviathan* expressly says that God was made King of the Jews by the force of a pact entered into between Him and them. Why then does he try to deny the existence of a pact between a mortal king and citizens? And in fact he had said a little before that when a man submits to his conqueror he is necessarily held obligated to him like a real subject, for a *contract*, lawfully entered into, cannot properly be violated or broken.

13. Now by such pacts as these a multitude of men unite to form a state, which is conceived as a single person with intelligence and will, performing other actions peculiar to itself and separate from those of individuals. And as it is distinguished and marked off from all individual men by one name (Statius, *Achilleid*, Bk. I [457-8]: 'A scattered and confused mass came together into one body and countenance, and was arranged in order under a single monarch'), so it has its own laws and

property, which neither individual men, nor groups, nor all together 672 can lay claim to, save him who holds supreme sovereignty, while from it, in the same way, there proceed actions peculiar to it which individuals can neither hold for their own use, nor claim as their own. *Digest*, I. viii. 6, § 1; II. iv. 10, § 4; III. iv. 7, § 1; XLVIII. xviii. 1, § 7. Add Seneca, *On Benefits*, Bk. VI, chaps. xix-xx. And so the most convenient definition of a state appears to be this: 'A state is a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all, so that it is able to make use of the strength and faculties of the individual members for the common peace and security.' For the definition given by Dio of Prusa [Chrysostom, *Orations*, xxxvi. 20]: 'A city is a number of people living in the same place and regulated by law' (M.), is based upon the political principles of the Greeks, and will perhaps be better discussed in another connexion. Not much better than it is that of the Platonic state as the most perfect form, in Apuleius, *De Philosophia* [II. xxiv]: 'A state is a union of a considerable number of men, among whom some govern and others are governed, but all cleave together in harmony and mutually give help and assistance to one another; they guide themselves in the performance of their duties by the same laws—which, however, must be just—; † they govern a society which is contained within the same walls, † and are accustomed to have the same desires and aversions in all things.'¹

Hobbes, in the introduction to his *Leviathan*, has very ingeniously depicted a state as an artificial man, in which 'he in whom is vested the supreme power' is considered the 'soul', which imparts life and movement to the whole body; the 'magistrates and governors' are the artificial 'joints'; 'penalties and rewards', as attached to the supreme power and used to quicken each member to the performance of its task, are the 'nerves', which perform the same function in a natural body; 'the wealth of individual men' is a man's 'strength'; the 'safety of the citizens' his 'occupation'; the 'councillors' who call to the attention of the state what it should take cognizance of, a man's 'memory'; 'justice and laws' his 'artificial reason'. The 'concord' of a state is a man's 'health'; its 'tumult' his 'sickness'; its 'civil war' his 'death'. Finally the 'pacts', by which the various parts of this political body are joined together, are the counterpart of that divine command, 'Let there be', or 'Let us make men', that issued from God in the beginning, when He created the world. Hence it is apparent at a glance that Isocrates in his *Areopagiticus* and *Panathenaic Oration* is wrong when he proposes the form of a state as its soul, whose power is that of the mind in the body, for the form of a state corresponds better to that which in a

¹ [Pufendorf's quotation varies considerably from modern texts. In particular the passage between †† is hopelessly corrupt, and what is printed here aims only in general to give the probable sense.—Tr.]

human body is the structure and arrangement of all its members and parts.

14. Now the will of a state functions either through one simple person or through a single council, according to whether the supreme control has been vested in the former or in the latter. When the sovereignty is vested in one man the state is understood to desire in every business which concerns the end of states, but no other, whatever is his will, it being presupposed that he is of sound reason. So, for instance, if the king proclaims war, if he concludes peace, if he makes a treaty, the state is said to have wished and done it; not so, if he eats, drinks, sleeps, marries, or indulges in vices¹. Euripides, *Suppliants* [1188 ff.]:

Let yon Adrastus swear—

He answereth for them all, despot of their folk,
For all troth of the land of Danaus' sons. (W.)

Therefore, a distinction can be drawn between the public will of a monarch which represents the will of the state and his private will, which expresses itself, like that of any other man, in matters not concerned with the state.

The question now arises: In case he in whom is vested the will of the state reaches some other decision than that which he should, and so
673 is guilty of error in the exercise of the public will, is the action which proceeds from such a depraved will to be regarded as the action of the state? For in submitting his will to the will of his prince, a man is understood to have done so with the thought in mind that his sovereign would will nothing but what is just and for the advantage of the state. On this point it seems we must say, that an action which proceeds from an abuse and debasing of the public will, is still in itself a public action, belonging to the state, because it is performed by the sovereign as such. Thus, if a monarch or senate passes bad laws, pronounces wrong judgments, appoints unfit officials, or starts unjust wars, they are still acts of the state, just as when a driver overturns his chariot, it is the act of the driver, although he may be pronounced unskilled or careless. Yet in the sight of God no man is responsible for such an action, unless he has contributed to it by his positive and effective consent. Therefore, subjects are not accountable for a misdeed of the state, nor are those who voted against it in the sovereign assembly and were defeated by the majority. The inconveniences which fall upon innocent citizens from such public misdeeds are to be classed among those evils to which man in his mortality is exposed, and which he must bear, like drought, floods, and all other acts of nature. Although no little precaution against such inconveniences is furnished by basic laws, good education, and especially religion.

It follows, on the other hand, that whatever has been planned or

¹ [For *vitiat* read *vitia*.—Tr.]

done by individual citizens, or a group, even all of them apart from the king, either without or contrary to his authority and command, whether on matters that concern the state or are purely private, is under no circumstances to be regarded as the will or action of the state, but as the will and action of private men; indeed, there will be as many wills and as many actions, as there are men who are said to have willed or done something. The same conclusion must be reached regarding what is done by individual citizens or groups on their own initiative, without the authority and command of that council in which resides the supreme control. Therefore, among seditious ideas and such as work to break up the inner unity of a state, and especially in a monarchy, Hobbes, *De Cive*, chap. xii, § 8, includes the fact that the common sort do not distinguish clearly enough between a state or people and a multitude. For a people or state is a unit which possesses a single will, and to which a single action can be attributed, neither of which can be said of a multitude of subjects as opposed to a man or council endowed with sovereignty. Although the statement which follows, namely, that 'the people rules throughout the entire state', comes to nothing in a display of idle subtleties. For the word 'people' signifies either a whole state, or else the multitude of subjects. In the first sense his statement that 'the people, that is, the state rules in every state' is meaningless, in the second sense it is false that 'the people, that is, the citizens as distinguished from the king, rule in every state'. In place of his next statement, that 'in monarchies the people rules, for the people expresses its will through that of one man', it would have been simpler to have said that in a monarchy the state¹ is held to have willed what the monarch willed. Nor is the old paradox, 'The king is the people', to be explained in any other sense. His other remarks are true enough: That the common sort always speak of a great number of men as a people or state, and say that a state has rebelled against its king, which is impossible; and think that the people or state desire or refuse what is desired or refused by some troublesome and grumbling citizens, who under the name of 'the people' incite citizens against their state, and subjects against their sovereign.

15. But when the headship of a state reposes in a council composed of a number of men, each of whom retains his own will, a decision must be reached, first of all, as to how great a part of it, when agreed, shall represent the will of the entire council, and so of the state. For just as otherwise no man is bound to follow another's opinion any more than his own, unless he has subjected his will to the other's, so if a man has made the express reservation, when entering a society with others about conducting some undertakings in common council, that he is unwilling to be bound to anything to which he has not himself con-

¹ [For *citas* read *civitas*.—Tr.]

sented, under no circumstances does he bind himself to the decision of the majority. And so there are bodies where the dissent of one person can render void an agreement of all the rest. Although when a man is unwilling even to listen to reason, and out of mere stubbornness obstructs the proper conclusions of all the rest, he may be cast out of the society as a hindrance, or at times even threatened with ill. For although such a person is not bound by his own consent to follow the opinion of the majority, yet he is bound by the general law that a man should deport himself to the advantage of others, and that a part should conform to the good of the whole.

In this connexion we may add the argument of Petrus Suavis, *History of the Council of Trent*, Bk. IV, p. 788, that the French were not bound by the decrees of the council, because they had protested against them, where he adds the decision rendered by the Parlement of Paris: 'The authority of the whole body is transferred to the majority when the cause of all is common and does not concern the individual members; but when the whole cause concerns every member and each one is owed his share, universal assent is required and the side of the negative is the stronger, nor are absentees obligated in any way unless voting. Of this nature are ecclesiastical gatherings, by the decrees of which, however well attended the council may be, those churches are not obligated which are not represented, unless they please to accept them.'

Although it must be confessed that in such councils, especially when they are composed of many men, business is carried on with the utmost difficulty, and often they can have no outcome at all, because of differences in opinions arising from the invincible obstinacy of some members. And when a man joins some group or council absolutely and without exception, it is regularly presumed, that, since he cannot demand of all the rest that they follow his views, or give up what they think useful or necessary, because of one man's opposition, he has obligated himself to follow and approve what the great majority of his associates have agreed upon. For if he regard this concession as a great hardship, he should have stated his exception to it at the outset, when he joined the society. After he is in, it is surely too haughty and grasping a thing to vaunt his own wisdom above that of all others. Yet if it is a trial to a person to be unable to force his opinion on all the rest against their will, he will be free to leave the group in question. But it is never right when you have been outvoted to follow the example of the incident recorded in Agathias, Bk. IV [v]:

Every one of them, displeased that his own view had not prevailed, went about his duty in a very careless and lazy fashion, and was the happier at all misfortunes, so that he might be able later to brag and more freely to boast among his friends, and prove that there was no other reason for the piece of bad luck, except that they had not taken his particular advice.

Therefore, in all councils the votes of a majority have the force of those of all the members, not because there is any necessity by nature for it to be so, but because there is scarcely any other way for them to carry on their business. See *Digest*, II. xiv. 7, § 19; II. xiv. 8; L. i. 19. Pliny, *Letters*, Bk. II, ep. xii:

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Votes go by number, not by weight; nor can it be otherwise in a public assembly, where nothing is so unequal as the equality which prevails in them: for although every member has the same right of suffrage, not every member has the same strength of judgment to direct it. (B.*) *Idem*, Bk. I, ep. xiii: Individual members are at liberty to express dissent; but when once carried, the whole house was bound to support the decision of the majority. (M.*)

It is by this general rule that we must understand the passage in Aristotle, *Politics*, Bk. IV, chap. viii: 'In all of them there exists the right of the majority. For both in an oligarchy, and a democracy, and in the gatherings of a people, whatever seems good to the majority of those who share in the government¹ has authority.'² (J.) Although it sometimes happens that the opinion of a few may be defeated, although it is a course more to the interests and honour of the state; for since in all such universal establishments for carrying on the affairs of men, it is impossible to devise means that will have no possible shortcomings, the best course is to follow what is for the most part expedient. Add Bodin, *On the Republic*, Bk. III, chap. iv, p. 456.

Hence it is idle to maintain that since it is agreeable to nature that what proceeds from the more prudent should prevail over that from the more imprudent, it is repugnant to nature that the more imprudent will of a majority should prevail over the more prudent will of a few, and that in this way the former can obligate the latter to undertake some act of folly. Indeed, in deciding upon the theoretical truths opinions are rated not by number but by weight. Nay, the very multitude of those who approve is treated as an indication of error. Seneca, *On the Happy Life*, chap. ii:

When we are considering a happy life, you cannot answer me as though after a division of the house: 'This view has most supporters'; because for that reason it is the worse of the two. Matters do not stand so well with mankind that the majority should prefer the better course; the more people do a thing the worse it is likely to be. (S.)

Plutarch, *Apophthegms* [p. 188 A], tells us that once when a remark of Phocion was received with general applause, he turned to his friends and inquired: 'Have I not unawares spoken some mischievous thing or other?' (G.) *Idem*, *The Education of Children* [ix, p. 6 B]: 'For to please the many is to displease the wise. To this saying of mine that of Euripides himself bears witness:

'I'm better skilled to treat a few, my peers,
Than in a crowd to tickle vulgar ears;

¹ [For *ireip.* read *reip.*—Tr.]

² [Pufendorf has taken considerable liberty with the text.—Fr.]

Though others have the luck on't, when they babble
Most to the wise, then most to please the rabble.' (G.)

For that reason, according to Quintilian, *Institutes of Oratory*, Bk. X, chap. vii [21]: 'And those who wish to appear learned to fools are decidedly pronounced fools by the learned.' (W.) And 'A few good judges are far more formidable to a man of sense than many fools.' (J.) Plato, *Symposium* [p. 194 B]. Add Valerius Maximus, Bk. III, chap. vii, § 1 ext. Dio Chrysostom [*Orations*, xi. 145], *De Ilio Non Capto*: 'Long-continued belief by foolish men does not make a thing true.' (M.)

Yet such a rule as this cannot be applied to the conduct of business in a council the members of which enjoy equal rights. For who will render the decision as to which opinion is the more prudent? Surely not the parties to the contest, for no man on one side of a question will submit to the judgement of one who is intent upon the other side, and upon carrying out his own desires. And how rare a man is he who is not better pleased with his own prudence than with another's? Nay, how numerous are those who delight to cavil at the finest project for no other reason than because they were not the authors of it! Nor is it such an easy matter to leave the decision of such controversies to a third party, since it is no trouble to question the prudence or integrity of the arbitrator, with the result that another one is needed to settle this further dispute. Nay more, usually these matters are of such a nature that they cannot conveniently be referred to arbitrators outside a society. Therefore, it is considered the most convenient thing to follow a method which admits of no difficulty or obscure judgement, than
676 which none can be found more practicable than to count the number of opinions. Pliny, *Panegyric* [Lxii], toward the end: 'It is better to trust men as a whole than singly. For individuals can deceive and be deceived: No single person ever tricked all, or all a single person.'

Furthermore, whoever is accorded a vote in any council is held to have enough prudence to enable him to understand the matters discussed by it. And this is true at least of those councils to which men are not admitted without some choice or election. Nor would it always be a wise thing if some one man of the council, for example, the presiding officer, should be given the power to declare by his vote which plan is the better. For by such power he will be permitted to favour the minority over the majority, nay, even to reject them both on the plea that neither is worthy, and in that way the actual control of affairs would be in the hands of such a president, just as absolute princes can follow even the minority of the counsellors, yes, and follow an opinion which is different from any that has been proposed.

16. But it is to be observed, in connexion with the matter of a majority of votes, that in some bodies it is not enough for one opinion to prevail by one or a few votes, but in some cases it must exceed the

other by a certain number. Thus in [the *Canon Law*] *Decretals*, I. vi. 6, a pope is elected upon receiving the votes of two-thirds of the cardinals, as appears to have been the case in the election and decrees of the decurions. *Digest*, III. iv. 3, 4, and *Digest*, L. ii. 45. Prudentius, *Against Symmachus*, Bk. I [604 ff.]:

Decrees of the senate were made in this fashion. In early times a law was not valid unless three hundred of the Fathers had agreed on a matter. Let us maintain our ancient laws: that the weak voice of the minority shall yield, and, when it represents but a small fraction, keep silent.

According to Andrea Maurocenus, *Historia Veneta*, Bk. XVII, to a decree of the senate banishing the Jesuits from the territory of the state, the clause was added that the decree could not be annulled, unless there were one hundred and eighty senators present, and five-sixths voted for it. But when there is no special agreement on that point, the opinion which has but one vote more shall be considered the stronger, and the view of the whole body. Add Grotius, Bk. II, chap. v, § 17, and his notes, and the remarks of Boecler; *Digest*, IV. viii. 17, § 6. It is idle to advance in opposition the statement in *Sext*, V. xii. 29: 'It is just that what concerns all should be approved by all.'¹ For it does not follow therefrom that it is unjust for the more convenient dispatch of business, that a few dissenters should yield to the majority. Furthermore, that rule does not concern societies or councils which have the administration of public affairs, but private societies are based only upon a pact or a partnership to hold something. Such a partnership, of course, gives no right to the partners to decide upon some policy with relation to their common holding, against the will of one of their number who feels that it will be to his prejudice. On this principle is to be explained *Digest*, VIII. iii. 11, and X. iii. 28. But the statement of the *Canon Law*, *Decretals*, I. vi. 6, that the regulation requiring a two-thirds vote for the election of a pope, should not be used to the prejudice of other churches, in whose elections the opinion of the larger and 'saner' party should prevail, is based upon the consideration that a superior, that is, the pope can, by their theory, decide which is the 'saner' side, when any question arises. Therefore, no consideration can be given the 'saner' side when it is not the more numerous, save when there is provision for appeal to a superior. Add *Decretum*, I. lxiii. 36.

17. But if the votes are equal, no action will result, and the matter will stand as before, because the movement is not strong enough to warrant a change, and the equal weight on each side holds the matter in suspense. So also in trials before a court, the defendant is acquitted when the votes are tied, although penalties for suits of slander and libel appear not to fall under this rule. Quintilian, *Declamations*, ccliv: 'A tie vote favours the defendant.' Antiphon, *Orations*, xiv [v. 51]: 'A

¹ [The exact words in the original are: 'Quod omnes tangit debet ab omnibus approbari.'—*Tr.*]

stand off arms the defendant rather than the plaintiff, since also in counting votes a tie helps the defendant rather than the plaintiff.' Add Aristotle, *Problems*, Sect. xxix, chap. 13; *Digest*, XLII. i. 39; Seneca, *Controversies*, Bk. I, cont. v [3]: 'One judge condemns, the other acquits; among discordant judgements let the milder prevail.' This right the Greeks call the 'vote of Minerva', upon which one may consult a dissertation of Boecler. Although the Hebrews even held that the accused was not found guilty, if only one more vote was cast for his condemnation than for his acquittal. The reason for this doubtless was, that, because the judges were supposed to vote with the same religious scruple as the witnesses gave their testimony, in view of the fact that one witness was not sufficient to secure conviction, so one judge was not sufficient to condemn. For the rest of the judges by opposing each other had, as it were, mutually destroyed their authority.

We should make this further observation, that when the voting is by companies or tribes, the minority of any tribe cannot increase the number of their side in other tribes.

18. Finally, when there are more than two opinions, the question arises as to whether they are to be voted upon separately, so that the one is carried which commands more votes than each of the others, or whether two or more, though opposed, may be combined¹ to beat a third, upon the elimination of which the others may then be taken up, so that the one of the remaining questions is carried which has the majority of the votes. If we fix our eyes upon mere natural equity, without reference to agreements or special laws, it appears that we should distinguish between opinions which are entirely different from one another, and those where one includes a part of another, or which, in other words, differ only in quantity, so that they can be united on the points in which they agree, while the former cannot. Thus those who fix a fine upon a man, at twenty units of value, may be united with those who fix it at ten units, against such as would acquit him altogether, and the defendant will be fined ten units, because this is agreeable to the majority of the judges, in view of the fact that those in favour of the twenty, are included with those in favour of the ten. Here belongs *Digest*, XLII. i. 38, § 1, and IV. viii. 27, and *Sext*, I. xxii. 1. It is to no avail that Grotius, *Sparsio Florum* [p. 98, ed. Amst.], differs from the decision in the passage cited (27), in that he feels that a defendant should be fined ten units, because the majority agreed to that, while what they disagreed on should be rejected. For, I would urge in reply, they all agree upon a fine of five units, and the majority is decisive only when there is a difference of judgement. This was the reason for the custom of the Roman senate of bidding a member to 'divide the motion', if it embraced two parts, only one of which was favoured. See

¹ [For *pussini* read *possint*.—Tr.]

Cicero, *Letters to Friends*, Bk. I, ep. ii. Seneca, *Letters*, xxi [9]: 'I think we ought to do in philosophy as they are wont to do in the Senate; when some one has made a motion, of which I approve to a certain extent, I ask him to make his motion in two parts, and I vote <for the part which I approve>'.¹ (G.)

But if, for example, the judges be divided about a defendant, a part voting to banish, a part to execute, and a part to free him, surely those in favour of banishment will not be able to unite with those who would condemn him to death, against those who would free him; nor these last with the ones in favour of banishment, against those who would have him die. For² these sentences are entirely different from each other, since there is no banishment in death, nor is it a part of death. And although the banishers and acquitters should agree that the accused should not be slain, their sentence does not produce this effect directly, but only by consequence. Yet they are in themselves, as a 678 matter of fact, different, for whoever votes for acquittal frees him of all punishment, while a banisher favours a punishment. See Pliny, *Letters*, Bk. VIII, ep. xiv. Polybius, in *Selections on Embassies*, 129 [XXIII. i. 5 ff.], reports that when certain Achaeans were held captive in Rome, and what should be done with them was laid before the senate, there were three opinions: One to release, another to condemn, and a third to hold them for a while; and the senators were so divided that those in favour of freeing them were more numerous than the others taken separately. Whereupon Postumius the praetor, who was presiding, an enemy of the Achaeans, employed a trick to their prejudice. For when the time for voting came, the praetor passed over one opinion, and asked for a vote on only the two, in this way, by ordering that those who wished the men who had been summoned before them to be released, should pass to one side, and those who opposed that view to the other side. Thus it turned out that those who wished them held for a while, joined with those who did not wish them cleared, and the two prevailed over those who had urged their release. In Gellius³, Bk. IX, chap. xv, the following is given as the outline for a debate:

Suppose seven judges try a prisoner—that judgement is to prevail which the greater number shall determine—the seven judges presided—two of them thought the prisoner should be banished; two of them that he should be fined; the remaining three that he should be put to death. Punishment is demanded according to the decision of the three, from which the prisoner appeals. (B.*)

This was put forth at the time as a problem that was *ἀνόπος* (insoluble). The same argument is found in Quintilian, *Declamations*, ccclxv, where he says, quite rightly, among other things: 'You cannot add together those who disagree. Compare those who agree.' See also

¹ [The last six words (*quod probō* of the original) seem to have been omitted by accident.—Tr.]

² [For *Mam* read *Nam*.—Tr.]

³ [For *Gallium* read *Gellium*.—Tr.]

the argument of Libanius, *Declamations*, xxx. In Heliodorus, *Ethiopica*, Bk. I, Cnemon is said to have been condemned to death by 1,700 votes, to banishment by 1,000. But since some of the former had voted for stoning, others for casting him into a pit, the thousand who voted for exile formed the larger number. Add Cujas, *Observations*, XII, chap. xvi; Ziegler on Grotius, Bk. II, chap. v, § 17.

It is also observed by Grotius, Bk. II, chap. v, § 22, that when several persons do not constitute an all-inclusive body, properly speaking, but are only joined together in consideration of a certain thing in which they do not all share equally, not only should their order be fixed in accordance with the manner of their participation, but their votes should be counted in a geometric proportion.¹ Here belong *Digest*, II. iv. 8; XVI. iii. 14; XLII. v. 16. Where we should observe that since such a society is based only on some thing held in common, and not on such a pact as established some all-inclusive organization, and one whereby every man has subjected his will to that of the majority, so the vote of him who holds a larger share prevails over that of him who holds a lesser share, yet so as the former can under no consideration deprive by his vote² the latter of his right, or act to his prejudice. And on this basis we are to understand what is the will of the state, when the control of affairs lies in the hands of more than one individual.

19. It is obvious that a council which must deliberate and legislate on the affairs of a state must be composed of at least three members. See *Digest*, L. xvi. 85. For if there were only two, there would be no one who could see that one side carried, in case they happened to disagree, and so in such a case nothing could be done. See *Decretals*, I. xliii. 1. Nor does it make any difference that even two men, for instance, the Roman consuls, are called colleagues, for that term often denotes an equality only in numbers. See *Digest*, L. xvi. 173; XXVI. vii. 14; XLVI. iii. 101. So the Latin writers speak of the college of the tribunes, although one of them by his veto could make void a decision of all the
679 rest. Nor do those who call each other by the name of 'colleague' always constitute a council, in which the wills of all have by a pact gathered into one will. It may happen that several men form a society, and yet each man keeps his own will entirely free from that of others. Therefore, the fact that a contract for a society can be entered into between two persons has nothing to do with the case. *Digest*, III. iv. 7, § 2, does not mean that a college can be established at the very first by one person, but that upon failure for some reason of the rest of the members, a college already constituted can be continued for a time by one man, until others are chosen to take their place.

It is a rule that no consideration is given to absent members in such

¹ [That is, as they share in some common element.—Tr.]

² [For *suam nequam* read *suum nequaquam*.—Tr.]

councils, when they have been legally notified (see *Decretals*, I. vi. 36), but their right is added, as it were, to that of those who are present. Here one may apply the saying of Seneca, *Controversies*, Bk. VII, cont. iv: 'Whenever two form a partnership, complete control is in the hands of the one who is present,' although it would be my judgement that this should be restricted to routine business, and such as can suffer no delay. It is likewise an exception, if the laws require a definite number of colleagues. See *Digest*, III. iv. 3; L. ii. 45. In some places the absent members are able to delegate their powers to those who are present, and to vote either through these or in writing. See *Sext*,¹ I. vi. 46.

20. When a state has been formed in the way described, the person or persons on whom devolves the sovereignty, is called a monarch, senate, or people, according as this sovereignty rests in a single man, one council, composed of a few members, or of all the citizens; while all others are known as subjects. Here we must observe that a man may become a member of any state in two ways: by an expressed or by a tacit pact. For those who establish states in the first place are surely not held to have done so with the thought that they would cease with the death of their founders, but they had before their eyes the obtaining in this way of advantages which would be lasting and perpetual, and would be a source of gratification to their children and all their posterity. Therefore, it is held that they also had in mind that their children and descendants should upon birth enjoy the common advantages and rewards of the state; and since these cannot be secured without sovereignty, which is, as it were, the soul of a state, all who are born in a state are also understood to have subjected themselves to that sovereignty. Hence it is that those who have once accepted the sovereignty in a state are under no necessity of requiring anew an express subjection from each newly-born child, although all of those who first conferred sovereignty upon them may be dead.

Furthermore, since every state is situated upon some certain part of the surface of the earth, in which the citizens have gathered themselves and their property for safety, and since this safety would be easily imperilled, if men could come and go there who did not recognize the sovereignty of the state, it is understood as a common law of all states, that, whoever has passed into the territory of any state, and all the more if he wishes to enjoy its advantages, is held to have given up his natural liberty, and to have subjected himself to the sovereignty of that state, at least for so long a time as he desires to remain there. But if he refuses to recognize this, let him be regarded as an enemy, to the extent that he can lawfully be expelled from the borders of the state. In this way it is obvious also that those who come to a state after its establish-

¹ [For *Vltio*. read *VI.30*.—*Tr.*]

ment, are no less subject to its sovereignty than those who first joined together to establish it.

Finally, it should be observed, in this connexion, that some scholars are not entirely agreed upon the meaning of the word *citizen*. Indeed, Hobbes, *De Cive*, chap. v, § 11, appears to make *subject* and *citizen* equivalent terms, so that women, boys, and slaves would also
 680 be citizens. But it is my opinion that since a state is established by a submission of wills to one man or to a council, those, or their successors, are primarily citizens, by whose pacts a state was first formed. And since this was done by fathers of families, it would be my judgement that the name 'citizen' belongs to these first of all, but only indirectly and through them to the women, boys, and slaves of their establishments, whose wills were included in the will of the father of the family, in so far as they enjoy both the common protection of the state, and some rights by reason of that relation. But lodgers, foreigners, and such temporary inhabitants are not citizens, because they wish to remain only for a time, but not to secure there a fixed protection and location for their fortunes. The definition of Aristotle, *Politics*, Bk. III, chap. i, whereby he measures a citizen by his 'sharing in the administration of justice, and in offices' squares only with democracies. As he himself adds: 'The citizen then of necessity differs under each form of government; and our definition' as given above, 'is best adapted to the citizen of a democracy; but not necessarily to other forms' of commonwealths, namely, that he share in magistracies and judicial procedures. *Idem*, *Politics*, Bk. III, chap. viii [III. v]: 'Since there are many forms of government there must be many varieties of citizens.' (J.)

21. Now we observe that in states two kinds of special bonds in particular are added to citizens, by the first of which some of them gather into special bodies, which are still subordinate to the state, while by the second they are included, by those vested with the supreme power, in some part of the public administration. These bodies which are subordinate to the state, whether coming under the name of colleges, or societies, or some other such designation, can be divided first of all into those which preceded states, and those which followed upon their establishment. Bodies older than the state are families whose measure of power and right, as granted to their heads, has been already set forth. Of which right so much remains to them as is not taken away by the nature of the state, or by civil laws or public manners.

Of the bodies which arise after the formation of states, some can be called public and some private. The former are such as are established by the authority of the supreme civil power. Private bodies are such as either have been formed by the agreement of the citizens themselves, or depend upon some external authority which in another state can be held only as some private right and undertaking.

Private bodies are again either legal or illegal, of which the former are, or should be, countenanced¹ by the state, the latter not. I say 'should be countenanced', for if, in a state where the worship of God is corrupted, some who are filled with the spirit of the true religion hold their own private gatherings without disorders and plottings against the state, surely no one would call such meetings unlawful, however much the supreme powers may disapprove of whatever does not agree with their belief, since they themselves are obligated to recognize and acknowledge that truth. So if, in a barbarous state which scorns every form of learning, some individuals meet privately to follow that pursuit, surely no one would call their association unlawful.

Both are again divided into regular and irregular. They are the former, when the will of all members is united in accordance with certain agreements; the latter, when there is observable not so much a union of wills as a consent or agreement without any bond, such consent arising from some common affection, such as hope, desire for gain and revenge, ambition, anger, and the like.

22. It should be observed, with regard to all lawful bodies, that 681 whatever rights and whatever power they have over their members are all defined and limited by the supreme power, and cannot be opposed to or prevail against it. For otherwise, were there a body not subject to limitation by the supreme civil power, there would be a state within a state. Therefore, if any state was ever formed of several absolute and independent bodies, it was first necessary for them to have given up so much of their former power and right, as the genius of a state required, since they would otherwise have fallen short of the end which they proposed for themselves.

But we must see what the supreme authority had in mind to accomplish, in a state already constituted, by forming and licensing such a body. For if, in express terms, it contributed to and confirmed in that body an absolute and independent right in a certain kind of business, which concerns the status of the state, it most certainly relinquished a part of its sovereignty, and created an irregular and two-headed state, a thing no sane man would do, except when driven to it by necessity. But when the sovereign wishes to retain his power unlimited and undiminished, he must see to it, that such a subordinate body so controls its right, that it works no prejudice to the supreme sovereignty, and that it does not extend and amplify itself in ways that tend to release it from its position as a subordinate body.

Now the argument by which the power of such bodies is circumscribed, is to be sought in the documents by which one of them is organized or confirmed, or even in the general laws of the state, which are held to bind each and every citizen in so far as they have not been

¹ [For *probantur* read *probantur*.—Tr.]

expressly repealed. Hence it follows that, if the administration of that body be gathered into one person, whatever he does in accordance with its constitution, or the common laws of the state, will be considered as the action of the entire body, but all else done by him is his own action, which does not concern others, and for which he alone is accountable. But if the administration of that body is vested in a group of several members, and it does something contrary to the laws and its constitution, those alone who agreed to it are liable to the penalty on that account, while those who opposed it, or were absent from the meeting, are innocent. And it is well that these last for their own security protest against the decision of the rest, and enter their objection in the minutes, so that they may not by any chance be involved in the punishment of the rest. But, on the other hand, a member may not protest against a decision of an independent assembly, since that involves a denial of its supreme power.

Regarding the debts of such bodies, one must inquire, in the first place, in whose name they are contracted¹, for the debt of one of its members, on his own account, is not a debt of the whole body. Although when he has been condemned to pay something, execution may be taken not merely on the rest of his property, but also on what is his by virtue of that body. The debts contracted by one or more of the directors of the body in accordance with the laws of its foundation are binding upon the whole body as such, and upon the individual members in proportion, provided the body have no common resources. Yet there is this exception, that the creditors of that body who live outside the state may, when payment is refused them, treat whatever members of that body they may seize, as if they had individually obligated themselves for the entire amount, just as in other matters any citizen in foreign lands may suffer reprisals for a debt of his countryman. But all debts contracted contrary to the laws of the institution lie upon those who gave their express consent to them, but not upon such as dissented, save in so far as they have shared in the profits therefrom; and since such debts do not concern the resources of the body, they must be met *pro rata* from the resources of the individuals who agreed to them. But if a member make a loan to the body as such, he has a claim on nothing
682 but the resources of that body, and if these prove to be insufficient, he has but himself to blame. Compare Hobbes, *Leviathan*, chap. xxx. If a controversy arise between a member and the entire body, the judge will be not the body but the state, to which the body is subject. For since they have at their services a common judge, it would be inappropriate for one to deliver judgement in its own case.

23. Unlawful bodies are not alone those which men form for the purpose of manifest² villainy, such as societies of thieves, beggars, gipsies,

¹ [For *contradicta* read *contracta*.—Tr.]

² [For *manifest* read *manifesti*.—Tr.]

pirates, highwaymen, &c., but also any associations of citizens, held together by special pacts, entered into without the consent of the supreme powers, and repugnant to the end of states. These last usually are termed conspiracies or factions. Their purposes are of all kinds, for sometimes their members work to secure the control of the state, at other times they undertake to guide public affairs in a certain channel for their own pleasure and profit. Some would enrich themselves from the state's coffers, others seek from the faction impunity for their crimes. Nay, even those which parade some plausible excuse, such as defence, the cure of certain abuses, or the removal of evil officials, as well as those whose reason for existing is kept secret, are open to suspicion and are dangerous. For it is an invasion of the duty of the administrators of the states, and furthermore, when such men have grown confident of their power they can easily turn against the state itself. Otho remarks in Tacitus, *Histories*, Bk. I [lxxxiv]: 'You have transgressed thus in your zeal for me. But amidst that general hurry and confusion, and in the gloom of midnight darkness, an opportunity might have been given for an attack on me.' (O.) Therefore, it is unlawful to do many things under cover of a faction, which are otherwise fair and proper enough. Thus to petition one's sovereign, or to accuse a man, is not unlawful, but to gather a great body of men for that purpose looks like faction and sedition. It is usually forbidden in army regulations, under penalty of death, for soldiers to gather in a large throng and demand their pay. Add *Acts*, xix. 39-40; Hobbes, *De Cive*, chap. xiii, § 12-13; *Leviathan*, chap. xxx, where he compares lawful bodies to the 'muscles' of the human body, and unlawful ones to 'tumours, abscesses, and sores, generated by the gathering of noxious humours'.

24. A special bond, in addition to the common one binding all citizens, is laid by the supreme powers upon those whom they select to direct some department of the administration in their name and with their authority, and who are designated public ministers and magistrates. These are different from the private ministers of the prince, who serve him, as they would any one else, in matters common to princes and subjects. But among those who serve the sovereign as such, some distinction is observable, in that some of them exercise a bit of sovereignty or of administration, and so after a manner represent the person of the ruler, being in consequence properly and rightly entitled to the designation of public ministers; while others are merely concerned with expediting and executing public affairs. To the first class belong the regents and administrators of the kingdom during a king's minority, captivity, or insanity; then those set in authority over provinces, cities, or districts, as well as the army and navy; treasurers¹, judges, public

¹ [For *perfecti* read *praefecti*.—Tr.]

prosecutors, censors of doctrines, ambassadors to foreign powers, and the like. To the second class belong counsellors, since they have no share in the administration, but merely advise their sovereign as to what they consider the proper course; likewise those who are engaged in the routine business of states, such as clerks, those who collect, keep, or
683 dispense the revenue; also soldiers, those who give manual service in the exercise of justice, and the like, whose positions and degrees in any state can easily be learned. Compare Hobbes, *Leviathan*, chap. xxx; Bodin, *On the Republic*¹, Bk. III, chap. vii.

¹ [For *repul.* read *republ.*—Tr.]

CHAPTER III

ON THE CREATION OF SUPREME CIVIL SOVEREIGNTY OR MAJESTY

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| <ol style="list-style-type: none">1. Supreme sovereignty has resulted from the pacts by which a state was formed.2. This was done with the will and approval of God.3. Is majesty directly derived from God?4. How have some gone about to prove this belief?5. Civil sovereignty was not a product of wars. | <ol style="list-style-type: none">6. Can a prince develop from the father of a family?7. How may he who is freed from vassalage receive majesty?8. When a free people or a monarch resigns the sovereignty into another's hands, can that produce majesty?9. In whose power is it to grant the kingly title? |
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LET us now see from what immediate and proximate source is produced that supreme sovereignty which is found in every state, and by which, as by the soul, it lives and is animated. And, at the outset, we presuppose that for sovereignty to meet its end, there is required, in the first place, natural strength, through which a subject can be coerced by the threat of some evil, in case he should presume to refuse to do what is commanded him, and, in the second place, a title, by which right others can be commanded to perform or omit something, and to which there corresponds in them an obligation to obey its commands. Both of these flow directly from the pact by which a state is formed. For although no man can transfer his strength in any physical way to another, yet the sovereign is understood to possess the strength of others, since they are so obligated to exert it at his direction, that there resides in them no power to resist or to refuse his command. Indeed, there is no other transfer of strength possible between men.

Now since all members of a state, by the act of submitting their wills to the will of another, have bound themselves not to attempt resistance, that is, to obey him who would direct their strength and resources to the public good, it appears that he in whom resides the supreme sovereignty has such strength that he is able to force whom he pleases to his orders.¹ Livy, Bk.² II, chap. lix: 'The effectiveness of authority all depends on the goodwill of those obeying it.' (F.) So also the pact in question supplies a clear title, whereby that sovereignty is understood to be lawfully established, not upon violence but upon the free subjection and consent of the citizens. This, therefore, is the most immediate cause from which supreme sovereignty comes about as a moral quantity, for upon the offer of submission by one person and its acceptance by another, there at once arises for the latter the right to command the former, that is, sovereignty. And as pacts can confer

¹ [For *adjussa* read *ad jussa*.—Tr.]

² [For *lib.* read *lib*.—Tr.]

upon another a right over some possession of ours, so submission can give him the right to dispose of our liberty and strength. And so, for example, if a man of his own free will makes himself over to me by a pact to be a slave, he actually bestows upon me the power of a master.

684 Against this it is silly to repeat the old saying: 'A man cannot confer upon another what he does not himself possess.'

But if sovereignty is to secure a special efficacy and sanctity, there must be added to it some other principle beside the submission of subjects. Therefore, he who says that sovereignty results directly from pacts does by no means detract from the sanctity of supreme civil authority, or base the authority of a prince merely on human and not divine right.

2. Now it is unquestioned that sane reason has spoken plainly enough to mankind, to the effect that, after they had multiplied, they could not live in honour, peace, and safety, without establishing states, which are unintelligible without supreme sovereignty. And for this reason it is held that states also and supreme sovereignty came from God as the author of natural law. For not only are such things as God established by His intervention immediately, and without any deed of men, due to Him, but also what men have contrived under the guidance of sound reason, with due regard for times and places, in order that they might fulfil the obligation enjoined upon them by God. Compare 1 *Timothy*, ii. 2. And since, with a great multitude of men, natural law cannot be conveniently observed without civil sovereignty, it is patent that God, who enjoined the former upon men, also commands that civil societies be set up, in so far as they serve as the means to the observance of natural law. And therefore God expressly approves sovereignty in Sacred Scripture, acknowledges it as His own, and guards by the most severe laws its sanctity and veneration. But whether God ordered the establishment of a state at a certain place and time, is not clear. For the precept of the sons of Noah about courts, which may be advanced in this connexion, states no particular time and place for their constitution, and so it can mean that when the processes of law have been set up, they should be observed.

Boecler on Grotius, Bk. I, chap. iii, § 6, does not differ much from this, when he speaks as follows, on the origin of supreme civil sovereignty:

The supreme power is to be sought not alone in an act of men but also in the command of God and the law of nature, or in such an act of men as is made in an effort to conform to the law of nature. For whoever enjoins society also enjoins an order in society; but the soul of society is sovereignty, and among societies the most perfect is the state.

Which is true enough, provided we add, that the command of God to establish states manifested itself through the dictate of reason, by which men recognized that the order and peace which natural law considers as its end, cannot exist without civil society, and especially after

mankind has so increased in numbers. And in this respect the state differs from other human institutions, the introduction of which is likewise urged by sane reason, yet not in such a way as that, without them, the order, safety, and welfare of mankind could not be preserved.

With regard to the *fourth*¹ commandment, which enjoins obedience to the civil sovereignty, it is to be observed that it does not exclude the immediate causes whereby sovereignty was produced, just as the commandment forbidding theft in no way excludes the origin of dominion. And unless I am mistaken, the phrase 'God's viceregents on earth', who hold civil sovereignty, can conveniently be taken to mean that, in so far as mere reverence for the law of nature and its Author does not secure peace and seemly order among mankind, this end is now reached through the force of civil sovereignty. In which sense the following words are also plain: Therefore, 'in order that a state may be a state, and attain its end, there has been established by God through the law² of nature, an order of commanding and obeying, in which, by the very will of God and the dictate of natural reason, there is a something supreme and dependent upon no one, subject to no one's pleasure, which, as it is subject to God alone, so it is His counterpart and 685 representative; and this is the supreme civil power. But it is entirely in the hands of men to decide whether they will commit that supreme power to one or to several, and on what distinct plans they will undertake to outline the form of a state.'

The view of Grotius, Bk. I, chap. iv, § 7, on the origin of supreme sovereignty is not so irreligious but it can be tolerated if given an adroit interpretation. 'Men', he says, 'led not by an express command of God' (for of course none is to be found) 'but by their own volition' (yet not without the dictate of sane reason and the pleasure of God), 'having experienced the weakness of distinct families in warding off violence', (as their number increased) 'united into a civil society, whence arises civil power, which for that reason is called in 1 *Peter*, ii. 13, an "ordinance of man"' (as instituted directly by men). But what Grotius says elsewhere, to the effect that the state is called '“of God” because God approved a salutary institution of men,' I can by no means admit in the following sense, as if, namely, God approved the establishment of civil sovereignty, after it was done, and, as it were, in *ex post facto* fashion, as He deigns to sanction the condition of slaves, which is unquestionably an institution of man. *Ephesians*, vi. 5-8; *Colossians*, iii. 22; 1 *Timothy*, vi. 1; *Titus*, ii. 9. But it should by all means be added, that men were able antecedently to know the will of God, upon observing the condition of mankind as it multiplied; and that as their safety could not be secured by a separate life outside the bounds of states, so while following in this matter the guidance of reason, as it

¹ [Commonly counted now as the fifth.—Tr.]

² [For *lige* read *lege*.—Tr.]

agrees with the purpose of natural law, men must be held to have fulfilled the will of God.

3. Although we feel that what has been said is sufficient both to impart a sanctity to the origin of civil sovereignty, and to secure the veneration of citizens for sovereigns, it may still prove to be worth while for us to consider what solid basis underlies the argument of J. F. Hornius, *De Civitate*, Bk. II, chap. i, who holds that we should take a loftier flight in these matters. He sets out with the statement that 'the cause of a state' (*civitas*) is not the 'cause of a commonwealth' (*respublica*) and of supreme sovereignty'; and so, although he admits that states are established by pacts, he asserts that supreme sovereignty is conferred immediately upon princes by God Himself, and that nothing proceeding from men has anything whatsoever to do with it. Therefore, when free peoples voluntarily select a king for themselves, they do not confer majesty upon him, but only designate the person upon whom it is conferred by God; just as in most cities the election of magistrates falls to a certain class of men, and yet they receive their power not from that class but from the sovereign power in the state.

Now although this assertion may entice many people by its show of piety, yet it quite obviously tears to shreds all the conventions and fundamental¹ laws which are agreed to between kings and subjects, touching the administration of sovereignty. And, first of all, he cannot be allowed to attribute majesty to kings alone, and withdraw it entirely from free republics. It is true that the usage of the last few centuries has restricted the word 'majesty' to a place among the titles of kings, and yet the supreme sovereignty in every form of state may receive the same designation. So also his definition of majesty, feeble though it be, as 'the supreme power everywhere over a state', applies as well to a senate or a popular assembly. Although there is some pre-eminence in kings, from the fact that the individual members of a senate or popular assembly are subject to the supreme sovereignty, while the person of a king recognizes no superior upon earth. Yet the actual force of sovereignty over subjects remains the same in every form of state.

Furthermore, he praises God as the sole cause of this majesty, who 'pours it forth directly upon kings after their election by the people'. I wonder, at this point, whether he has conceived majesty to be like a physical quality, a thing done quite obviously by those who designate civil sovereignty as 'a creation of God, so that no other creature in an equal or superior kind of causation, nor from any innate principle, has
686 made any contribution to the institution of this type of administration'. Such a statement only betrays a crass ignorance of moral matters. For an argument which sets forth how those who suddenly rise from an obscure position to the throne, are surrounded by an unwonted

¹ [For *fundamentales* read *fundamentales*.—Tr.]

radiance and splendour, which could have had its source only in God, should be declaimed before those who cannot discern between empty verbiage and solid facts. That kings are the special care of God contributes nothing to the proof¹ of his thesis, while the divine providence has given no less evidence² of its care in the case of others as well, who were destined to be of signal service to mankind. Not a few kings have drunk poison from their jewelled cups, or fallen victims to the treachery of their own people. Upon the subject of the physical constitution of some kings, which was supposed habitually to produce effects not unlike miracles, the best course would be to consult physicians. Nor is there any proof, as he would have it, to be found in the punishment either of insolent kings, or of bold and rebellious subjects; or in the testimonies, collected in great numbers, which nevertheless recognize God as the author quite as much of aristocracies as of regal sovereignty; or in the divine prophecies about the accomplishments of certain kings, which are not wanting in the case of free peoples as well. And what was done in the instance of the Jewish peoples is no evidence at all for the origin of regal sovereignty in general, since there had been many kingdoms long before theirs was established. Nay rather, their experience touches more the manner of conferring the sovereignty upon one man or another in a particular people.

4. Let us weigh the arguments with which he endeavours to prove that all human causes are far too inferior to produce majesty, a quality most august. Among these the one that takes the prize is, that 'since neither individual men nor an unorganized multitude possess majesty, they cannot confer it upon a king'. And yet it can and often does happen that a moral quality, such as sovereignty, may be produced in another by the united action of those who individually do not possess it formally before that time, so that they are rightly regarded as the productive cause of that quality. See *Digest*, XLI. i. 46. In the same way the voices of many men, when modulated to each other, produce a harmony which did not before exist in the individuals. Therefore, I cannot give my approval to that reasoning of Socrates, whereby he endeavoured to encourage Alcibiades to pluck up courage to come before the public assembly: 'If you despise them individually, you should also despise them when they are gathered into a body.' Aelian, *Varia Historia*, Bk. II, chap. i. Moreover, since sovereignty results from the non-resistance of subjects, and their willingness for the sovereign to dispose of their strength and property, it is easily seen that seeds, as it were, of supreme sovereignty, lie scattered in individuals, and that it germinates and grows by the pacts which bring sovereign and subjects together. So that it is extremely inept to deny that supreme sovereignty derives its origin from men for the reason that it

¹ [For *arobandum* read *probandum*.—Tr.]

² [For *specimica* read *specimina*.—Tr.]

is not observable in the natural faculties of an individual; as if one were dealing with some physical quality, or there were no moral qualities aside from physical!

In fact I doubt if the wise Christian kings among this number are greatly taken with eulogies of this kind: 'God has transferred to a prince the right to rule man, which He always held alone by virtue of His creation,' yet in such a way that God still retains His first right, and thus has granted power to kings 'by imposition' and not 'by thorough-going abdication'; as well as with the other flatteries by which courtiers delight to exalt their princes to the dishonour of God. You might well believe that such men doubt whether God is still left any right over mankind after kings are established, and whether these kings should acknowledge their Maker as a superior! That supreme civil sovereignty is entirely different from the sovereignty of God, which He possesses by virtue of the act of creation, is perfectly clear, and so it is absurd and blasphemous to say that 'The sovereignty of God, which He alone holds by virtue of the act of creation, is communicated to men by His singular benevolence'.

87 In the next place, when he would prove further that God alone is the 'immediate' cause of majesty, he distinguishes between 'an efficient immediate cause, and an immediate method of establishing'. For he maintains that majesty is immediately established only by God, while most kings receive the sceptre mediately. Therefore, we should separate those formulas, 'God is the immediate cause of majesty', and 'God immediately constitutes a prince', or 'God immediately confers majesty'. For it may be accepted, if one says that God confers majesty by the intermediary vote of a people, by succession, or by seizure. To which effect Themistius, *Orationes*, xvi [vi, p. 73 c], says: 'Do not think that the soldiers were the cause of such an election as this. Rather, this decision came down from heaven; the public proclamation from above, and it was merely completed upon earth by the instrumentality of men.' But, continues Hornius, in the production itself of majesty God does not permit another secondary and proximate efficient cause.

Now if a man will consider this more deeply, he will see that such men as Hornius have conceived majesty to be a physical entity, which, upon being created by God, wanders about over the world with no home or resting-place until it lights upon a king, who has been selected by a people, and invests him with its august splendour. And such a man will surely be in difficult straits if he should be pressed as to whether that majesty, before it finds a seat in some king, is substance or accident, and if the latter, how it can exist without a subject. Furthermore, when was it created, at the beginning of the world, or later? Is there also but one majesty in the entire world, bits of which are distributed to individual kings? Do different kings have their own special and

entire majesty? When a king dies does his majesty perish with him? Or does it survive him, separated like the soul from the body, or finding by a kind of metempsychosis a dwelling in a new king? Add the account in Petrus Suavis, *History of the Council of Trent*, Bk. II, p. 213, of the disputes over the nature of the *character sacramentalis*, where the fathers twist and turn in a remarkable manner, because of their ignorance of moral things. But it is idle to inquire about the immediate cause of majesty, or supreme sovereignty, abstractly considered, since it exists only in a concrete form. It is as if I should wish to inquire in a special way about the cause of human nature abstractly considered, once the cause of men concretely considered was definitely known. And since Hornius leaves power to the people, before any one person has yet acquired sovereignty, to decide what king they want and when, or to introduce any form of state they please (see *Deuteronomy*¹, xvii. 14), I should like to know what would become of majesty, if all peoples would decide upon an aristocratic or democratic form of government. We realize, of course, that election is properly and exactly but a form of securing sovereignty, and yet nothing appears to prevent a certain person from being selected, and sovereignty, now first coming into being, from being conferred upon him by one and the same act. For surely it is childish to hold that in moral things, when some right or moral quality is said to be conferred upon another, it must first have existed somewhere in separate form. Nay rather, it is clear to all that rights and other moral qualities come about by pacts from a mutual agreement of wills. Compare Hobbes, *De Cive*, chap. ii, § 4; and above, Bk. III, chap. v, §§ 2-4.

Nor is it difficult to remove his other scruple: 'If a people is the secondary cause of majesty, it will have to have received of God the power which produces sovereignty. But that fact cannot be proved.' And yet since God has implanted in men a care for themselves, and has enjoined upon them the preservation of peace and seemly order, endow- 688
ing them at the same time with reason, so that they can discern the means which make for that end, among which the establishment of civil sovereignty holds first place, who will question further whether God has granted men the faculty to establish it? The philosophic axioms which the same writer interposes here and there are in part of trifling value, in part crudely transferred from natural things to moral, which we have no time at present to discuss one by one.—The account in Ovid, *Fasti*, Bk. V, of the origin of majesty is a poetical fiction.

5. The author goes to no less trouble to confute the views of those who have derived supreme sovereignty from a different source, where much that he has to say is correct enough, although some points deserve censure. He is correct in his opinion that wars, as engendered by the

¹ [For *Deuterno.* read *Deuteron.*—Tr.]

ambition or lust of tyrants, have in no way given rise to supreme sovereignty. For the very phrase 'wars engendered by tyrants', presupposes the existence of states. And yet the wide spreading of violence on the part of many men, and their craving to oppress others, could have been the occasion for the fathers of families, scattered about as they were, to join together to found states. It is clear enough that most, if not all, large empires are indebted to war for their additional territories. Although this should not lead us to assign the beginning of supreme sovereignty to wars. For at least that first band, which, at the beginning, agreed to an attack upon others, voluntarily consented to the command of a leader, while no lawful sovereignty arose over those who were attacked, until by a pact they had promised the victor obedience and had pledged faith.

6. Yet it is not entirely impossible for this sovereignty to have arisen from that of the father of a family who ruled over several small settlements. Of course the paternal sovereignty primarily concerns the rearing of children, and that of the master the securing of property, nor are they changed by any increase in the number of children or of slaves. And yet the gulf between the sovereignty of the head of a family and that of a state is not so great that no transition from the former to the latter is discernible, save through the creation by God of a new majesty. For if a father of a family, endowed with a large household of children and slaves, should, by some form of emancipation or manumission, allow both classes to hold property in their own name, and to establish their own families, upon the condition that for their common security they should thenceforward submit themselves to his government, I do not see what he would need further¹ for the dignity of a prince, provided he have so much strength as is needed to attain the end of a state. And if at his death he had made some disposition as to his successor, and surely if his sons gave their consent, that disposition would have to be followed. If he had not, they would all decide, as at an interregnum², what form of government or head they wanted for the future. Nor would there be any violence offered to the law of nature, if the free vote of all should call a younger son to the place of his father. See *Genesis*, xxvii. 29, 37.

7. The same author attempts to show further, that not even he can be called a cause of majesty, who, although having it himself, confers the royal dignity upon some subject of his, setting him free³ for the future from every bond of subjection to himself; for instance, if a king should release a vassal from his feudal dues, and allow him as a full lord to rule over what he formerly held as a fief; or if he grant a citizen of his a province, which is at the same time freed from all future

¹ [For *de futurum* read *defuturum*.—Tr.]

³ [For *remissio* read *remisso*.—Tr.]

² [For *integerrimum* read *interregnum*.—Tr.]

dependency. For a cession of this kind is merely a manner of securing sovereignty, and can be classed as a form of election.

But the source of sovereignty in such a case will be clear enough to one who looks into it more closely. The king, by his right of freeing a vassal and subject from his duty toward him, makes one man capable of exercising supreme sovereignty, and creates others over whom it can be exercised. For that fief cannot henceforth be under the vassal as an absolute and independent prince, unless it has been freed from subjection to the lord. Because of this fact the supreme sovereignty does actually arise from the consent of the people. For if that lord can by his own authority confer this province on whomsoever he please, he received that power at the first with the consent of the people, whether freely given, or elicited by the violence of a just war. But if the lord cannot do that by his own authority, then such a transfer will require the express consent of the people. 689

8. Finally, this writer concludes with the contention that not even when a people had formerly lived under a democracy, and then chosen a monarch, is this act the cause of the majesty of a king. For sovereignty is not conferred upon a monarch until the people has surrendered its own right; and yet at the moment when a people renounces its right, it has no longer that sovereignty; therefore, it only chooses one, who, receiving his power from God, reigns for the future. But by the same argument one could deny that dominion passes from one man to another. For another person cannot become the owner of some possession of mine, unless I have renounced my dominion over it. But when that is done I myself hold no dominion, and consequently cannot transfer it to another; I but choose a person upon whom dominion must be conferred, such dominion arising anew, whence I know not.

He passes the following judgement on the voluntary abdication of monarchs: 'When territorial sovereignties are abdicated, and sworn faith returned to peoples, majesty itself returns to its first author, to be returned again and bestowed upon the designated heir.' This is clearly metempsychosis of majesty, about which no man in his senses will expect us to waste any words. Nay, whoever abdicates sovereignty gives an opportunity to his successor, whereby a people can confer sovereignty upon him by submitting themselves anew, or whereby he may actually lay hands upon the sovereignty, a right to which had been given him by a decree of the people sanctioning the order of succession.

9. It may not be inappropriate, in this connexion, to inquire briefly whose right it is to confer upon a person the royal title and insignia, or whatever be the name whereby the highest and independent power belonging to one man over a state is expressed. Here it is clear that to confer a name and title lies with the same persons as can confer the thing itself, that is, the supreme sovereignty. And so a people

which either first comes together to form a state, or, leaving a previous form of state, desires thereafter to be under a king, by the act of conferring upon one person sovereignty over itself also gives him the right to bear the name and title of king, and to represent his exalted position by fitting insignia. And just as such a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings or states, before he may carry himself like a king and be regarded as such. But, in the same way, as it would entail an injury for the sovereignty of such a king to be called in question by a foreigner, so it would also be an injury to deny him the royal title. Nor does the fact that such a ruler may hold sway in a state which is content with modest bounds, militate against this view, for a kingdom signifies not a specific quantity of land and power, but a certain form of state, which can be great or small.

But if a man who, at the time, recognized the sovereignty of another as his superior, is to be able to become a king, he must secure the consent of that superior who will free both him and his dominions from the bond by which they were tied to him. Hence also he who is under a feudal tie may not comport himself as a king without the consent of his lord. And unless he is loosed from that bond, he will have
690 but a weakened royal dignity, even though he secured his lord's consent to the name. Thus the successors of Alexander the Great did not dare to assume the royal title, until his family, to which the sovereignty rightfully belonged, was extinct. And even then that act required the consent of the subject people, who were not allowed by the military forces at the disposal of the generals to deny it. See Cornelius Nepos, *Eumenes* [xiii]; Plutarch, *Demetrius* [p. 896 D]; Justin, Bk. XV, chap. ii; Appian, *Syrian Wars* [lii]; Diodorus Siculus, Bk. XX, chap. liv-lv. Thus, just as the man who subdues a territory by arms, can by right of war take over the sovereignty, so can he assume the name of king. Justin, Bk. XLI, chaps. iv-v.

Now a king can convert one of his provinces into a kingdom, if he separates it entirely from the rest of the nation, and governs it with its own administration, and one that is independent from the other. It is a commonplace of history that the Roman senate used to bestow as an honour the title of king and friend, which could rightfully be done in the case of those to whom it had itself given the kingdom, or over whose kingdoms it had obtained some superior right. But to confer that title upon other independent princes was an insolent claim of unjust authority. And yet the pope has not blushed to claim that very authority even over free and independent European states. See Petrus Suavis, *History of the Council of Trent*, Bk. V, p. 354, where he recounts the basis upon which Paul IV raised Ireland to the status of a kingdom; and De Thou, *History of His Own Time*, Bk. XLVI, on the title of Grand Duke conferred upon Cosimo de Medici.

CHAPTER IV

ON THE PARTS OF SUPREME SOVEREIGNTY AND THEIR NATURAL CONNEXION

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| <ol style="list-style-type: none">1. The sense in which supreme sovereignty may be said to have parts.2. The legislative power.3. The power to inflict penalties.4. The judicial power.5. The power of war and peace, and of concluding treaties.6. The right of setting up magistrates.7. The right to levy taxes.8. The examination of opinions. | <ol style="list-style-type: none">9. Sovereignty is a stronger obligation than a pact.10. Who may properly be said to have a part of sovereignty?11. The connexion of the parts of supreme sovereignty is set forth,12. And illustrated.13. Although many would separate those parts;14. Grotius also among the rest, and his opinion is examined. |
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ALTHOUGH supreme civil sovereignty is in itself a single and undivided thing, yet because it functions in different acts, according as it is concerned with the different means necessary to the preservation of a state, it is commonly understood to have several parts, on the analogy of what are called potential parts. For supreme sovereignty as a whole is not such a thing as is made up of heterogeneous parts, which may coalesce into one thing by being joined to each other, and held by a certain bond, yet so that the individual parts may also subsist separately. But just as the soul is one thing, pouring out life and vigour into the whole body, and is conceived of as having potential parts, according as it produces diverse operations in proportion to the diversity of its objects and organs, after the same image supreme sovereignty also, as it is concerned with prescribing general rules of conduct, is called the legislative power; in so far as it settles the controversies of citizens 691 by those rules, it is the judicial power; when it arms citizens against foreign foes, or orders them to keep the peace, it is the right of war and peace; in so far as it takes to itself ministers for the business of the state, it is called the right to set up magistrates; and similarly in its further functions.

2. What these parts of supreme sovereignty are, can be most clearly seen from the nature and end of states. A state is a moral body which is understood to have one will. But since it is made up of many physical persons, each of whom has his own will and inclination, and since these wills cannot be physically compounded into one, or combined into a perpetual harmony, it follows that the one will in a state is produced in the following fashion: All the persons in the state submit their will to that of one man, or of a council, in whom the supreme sovereignty

has been vested. And since the individual citizens must comport themselves in accordance with the will of the state, that will must be set before them by clear signs. Therefore, it is understood to be the task of the supreme sovereignty to make clear and to prescribe what should be done or avoided. And since it would be impossible to issue special commands for each act of each citizen in so great a multitude of men, general rules are prescribed whereby what must be done, or what must be avoided, is made known to all men and for all time.

Furthermore, since the greatest diversity of judgements and desires is to be observed among men, because of which an infinite number of disputes can arise, the interests of peace also require that it be publicly defined what each man should consider his own, and what another's, what should be held lawful, and what unlawful, in the state, what honourable, and what dishonourable. So also what a man still retains of his natural liberty, or, in other words, how every one should temper the use of his right to the tranquillity of the state. And, finally, what every citizen can by his right require of another and in what manner.¹

3. Moreover, the chief end of states is that men should by mutual understanding and assistance be insured against losses and injuries which can be and commonly are brought upon them by other men, and that by these means they may enjoy peace or have sufficient protection against enemies. Now the first requirement for peace is that every man be so protected from the violence of others, that he can live in security, which means, that he have no just cause to fear others so long as he has not provoked them by injuries. Of course the state of human affairs does not make it possible for men to be guaranteed freedom from injuries, so that, in other words, they can never experience such in any way. Yet they can see to it that there be no probable cause for fear, and this security is the end for which men subject themselves to others. And if this be not greater, as a result of union with others, than if one is protected only by his own strength, it would be folly to turn one's back upon natural liberty, in which every man chooses his own means of defence.

Now it is not sufficient for this security, if each of those who would gather together into a state, should agree in word or writing with all the rest, not to kill them, rob them, or do anything from which they would suffer harm. For the proneness to evil of the minds of most men is manifest, and it is only too well known from experience, what little strength there is, in the mere respect for one's own word and in the dictates of sane reason, to hold most men to their duty, when you have removed the fear of punishment. For this reason it is not enough to

¹ [This last sentence was added by Barbeyrac from the author's *De Officio Hominis et Civis*, 2, 7, 2, in order to fill out the thought of this paragraph, which is obviously incomplete, and was so recognized by Pufendorf himself in the above-mentioned later work.—Tr.]

have one who will prescribe laws of conduct, if he holds no further power. Here you may apply the rule of Columella, *On Farming*, Bk. I, chap. iii: 'The field should be weaker than the farmer, for, if he has to struggle with it, and the farm prevail, the owner is crushed.' Therefore, in order that men may observe both the common precepts of natural law, and the regulations of each state for its good, there is need of fear of punishment and the power to inflict it. That the punishment may meet this end, it should be made so severe that it obviously involves a greater hardship to have broken the laws than to have observed them, and that in this way the severity of the punishment surpasses the satisfaction or gain which is secured or anticipated from an injury. For of two evils men cannot avoid choosing what appears to be the lesser. And thus the heads of other men protect my own. And although sometimes rashness, or an extraordinarily violent emotion, may lead some men to prefer the perpetration of a crime to refraining from wrongdoing, yet that may be considered one of those unusual things which it is beyond the condition of man to avoid. 692

Now this faculty to inflict punishments on those who transgress the commands of the ruler, is understood to have been given by the act of individuals in submitting to the state the use of their strength. By which also they obligated themselves at the command of the ruler to coerce wrongdoers, or at least to refuse to defend those who are to be punished. For it is idle for a person to obligate himself to face punishment without shrinking, because of man's natural aversion to whatever destroys our life. In general Hobbes, *De Cive*, chap. vi, § 6, is correct in denying that any greater power belongs to man over man, than that by which one person can prescribe to others whatever¹ he thinks is to the advantage of the state, and can by punishments compel the recalcitrant to observe it. But to his statement, that 'whoever rightfully inflicts punishments at his judgement, can rightfully force all men to all that he himself wishes', some limitation should be added on the basis of the end of states. This is, that he who holds supreme sovereignty is not understood to be able to will anything but what sane reason can discover to be appropriate for that end.

4. Moreover, since even when the most explicit laws are put into writing, time and again a dispute can arise over their proper application to particular cases, and since there are many things to be considered, if it be said that some offence was committed against them, it follows that the judicial power is understood to come to the assistance of both the powers just mentioned. Its function is to take cognizance of and to decide between disputes of citizens, to examine individual cases which are accused of being unlawful, and to pronounce a sentence appropriate to the laws. Hobbes (chap. vi, § 8), however, appears to

¹ [For *quae cumque* read *quaecumque*.—Tr.]

entertain an improper idea of the judicial power, since the faculty of passing judgements about the use and exercise of any part of sovereignty is understood to be in each part.

5. Now although by this means the security of citizens is preserved against fellow citizens, still that is not enough to obtain the end of states. Because it is idle for men to foster peace among themselves, when they cannot protect themselves against foreign foes, which those certainly cannot do whose strength is not united. For it is due to union that many are stronger than one, since otherwise even a thousand, if separated, are no stronger than one. And so, for the security and safety of all mankind, there must exist in a state a power whose function it is to assemble, unite, and arm as many citizens, or hire in their place as many mercenaries, as seem required for the common defence against the unknown numbers and strength of enemies, and also, when it seems advantageous, to conclude peace with enemies. And since leagues are serviceable in periods both of peace and of war, in order that both the resources of different states may be better combined, and a stronger foe be either repelled by united opposition, or reduced to order, it shall lie within the province of supreme sovereignty to enter leagues which are serviceable in both periods, and to require all subjects to observe them, and at the same time to secure from them some advantages for the state.

693 6. And since a state's business, which goes on in time both of war and of peace, cannot be carried on and executed by a single man without the aid of subordinate ministers and magistrates, a state will also need such power as may constitute men to look into the disputes of citizens (see *Exodus*, xviii. 15; Philo Judaeus, *On the Creation of the World*, beginning; Josephus, *Antiquities*, Bk. III, chap. iii), to search out the policies of neighbouring nations, to train soldiers, collect and dispense the resources of the state, and, finally, in every way to look out for its advantage. And this power can also compel officials already constituted to fulfil their functions, and demand of them an accounting for their administration. Add Boecler on Grotius, Bk. I, chap. iii, § 6, p. 218.

7. Furthermore, since neither in time of peace nor in time of war can the business of a state be carried on without expense, the state requires a power which may reserve for such uses a certain part of the wealth, or the produce of the country held by a people, or may require individual citizens to contribute as much of their wealth as is judged necessary to meet the expenses; and in the same way it may command and exact whatever services are required of citizens. Here belongs also the power to superintend other lawful means whereby the wealth of a state is increased, among which the most important is the right to levy taxes on all imports and exports, as well as to appropriate some moderate part of the cost of goods consumed at home.

8. Finally, although it be beyond the power of man to take away the intrinsic liberty of the will, and at the same time by some intrinsic means to compose men's judgements about things into a lasting harmony, every precaution should be taken that such judgements, however much they vary, should not disturb the tranquillity of the state. For since all voluntary actions take their beginning from and depend upon the will, while the will for action, whether positive or negative, depends upon the opinion of that good or evil, of that reward or punishment, which every man thinks will be his lot because of something he does or avoids, and so the actions of all men depend upon their own individual opinions, there will surely be need of external means to make those opinions and judgements, so far as possible, agree, or to prevent at least their differences from disturbing the state. Therefore, it is desirable that a state openly profess, as it were, such beliefs as agree with the end and use of states, and that the minds of the citizens be filled with them from childhood on, inasmuch as most mortals are accustomed to think about matters as they have been trained, and as they see the men about them are persuaded. Only a very few are gifted enough to sift out by their own wits what solid facts underlie human affairs. In fact there is practically no dogma concerned either with religion or science, which cannot give rise to dissensions, discords, recriminations, and ultimately wars. And this does not happen because of the falsity of the dogma, or because to admit its opposite would bring such calamities upon mankind or upon states, but because of the nature of men, who seem wise in their own eyes, would appear so to all others, and are most highly incensed at all who disagree with them. Any one will appreciate this who has done no more than observe the quarrels of scholars over some trifling matter, quarrels of as great heat as if they were battling for their altars and firesides. Now although quarrels of this kind cannot be checked at their outset, the supreme sovereignty can still prevent them from disturbing the peace of the state, by enacting penalties for the offenders. Plato, *Laws*, Bk. XI [pp. 934 E-935 A]:

No one shall speak evil of another; and when a man disputes with another he shall teach and learn of the disputant and the company, but he must¹ abstain from evil speaking; for out of the imprecations which men utter against one another, and the feminine habit of casting aspersions on one another, and using foul names, beginning in words light as air, they proceed to deeds, and the greatest enmities and hatreds spring up. (J.)

However, our concern is not properly about these dogmas, but rather about those which, thrusting themselves forward under the guise of religion, or in some other way, overturn the law of nature, and the principles of sound politics, and so are of a nature to infect the state with mortal diseases. Nor is there any danger for any true doctrine

¹ [For *prusus* read *prorsus*.—Tr.]

from the enactment of such penalties, for no true doctrine disturbs the peace, and whatever does disturb the peace is not true, unless it be that even peace and concord are opposed to natural laws. Therefore, surely the examination of such beliefs, and the power to drive¹ them out of the state, can rightfully be assigned to the supreme civil sovereignty.

According to Diogenes Laertius, in his life of Theophrastus [38], Sophocles the son of Amphiclides had a law passed, 'That no one of the philosophers should preside over a school unless the council and the people had passed a resolution to sanction their doing so; if they did, death was to be the penalty.' (Y.) Plato, *Laws*, Bk. VII [p. 801 c d]:

A poet shall compose nothing contrary to the ideas of the lawful, or just, or beautiful, or good, which are allowed in the state; nor shall he be permitted to show his compositions to any private individuals, until he shall have shown them to the appointed judges, the guardians of the laws, and they are satisfied with them. (J.)

Here belongs what is set forth in the preface of Casaubon, *Exercitationes contra [in] Baronium*, and in his letter to Fronto Ducaeus, no. 624 ed. Graevius. Nor is the observation of Hobbes, *De Homine*, chap. xiii, § 8, beside the point:

There are writings of Roman citizens in the period of the democracy or soon thereafter, as well as of Greeks in that of the Athenian republic, filled both with precepts and examples designed to infect the minds of the common sort with hatred for their kings, and this for no other reason than because they see in such writings praise of the wicked deeds of perfidious men, such as murderers of kings, provided they call them tyrants, before they do away with them. But the mind of the masses is to this day more corrupted by reading books and listening to the orations of those who desire a kingdom within a kingdom, one, namely, of the church within that of the civil state. For from this source there arise in place of a Cassius and a Brutus, men like Ravalliac and Clement, who in serving the ambition of others by assassinating their own sovereigns, thought they were serving God.

Add the same writer's preface in his *De Cive*, and his *Leviathan*, chap. xxi, where the evils are recited which have arisen from the theory of Aristotle on liberty; likewise chaps. xxix, xlvi, xlvii. Compare *De Cive*, chap. vi.

9. Our next task is to show that these parts of supreme sovereignty are naturally so united and bounded up with one another, that, if we should imagine some of them to be independently within the control of one man, and some within the control of others, the regular form of a state would be entirely destroyed. To understand this more thoroughly, we should observe that there are two chief bonds by which the wills of several men or groups are intertwined, so that they think together as one, namely, pact and sovereignty, of which the latter binds far more closely than the former. Those who are held together only by a pact, are bound by the law of nature, that they will willingly perform what has been agreed upon, while in all else their mutual equality remains unimpaired. And so long as each

¹ [For *pro scribendi* read *proscribendi*.—Tr.]

party keeps to its agreement, there can be concord and unity among them to a sufficient degree. But when one of them with evil design goes back upon the pact, he is guilty of breaking natural law, true enough, but for the other parties to the pact, who were interested in its observance, there is left nothing by which they may reduce the violator to order save war, in which the guilty party is often as strong as the injured. Thus between such as are joined by treaty on equal terms, there is concord so long as each one willingly performs what he promised, but when one of them acts with perfidy, the bond ceases to exist, and cause is given for war. It appears from this that mere pacts are not strong enough bonds to hold many men together in one body for any length of time, especially since it is not always the fewer and weaker that break from a pact to the hurt of the more numerous and stronger, but often the majority to the hurt of a few. And even should we assume that to the principal pact there has been added a clause to the effect, that all the rest shall fall with their united strength upon a violator of the pact, yet, aside from the fact that this will be useless when a number have together left it, unless the men thus allied set 695 up a democratic sovereignty, that is, unless those who were allied before, unite into one state, there will be need of another pact on the question, how that person is to be coerced who refuses to stand by this additional pact, and so on *ad infinitum*.

But sovereignty is a far stronger bond to bind several persons into one body. For whoever are controlled by the same sovereignty are no longer the equals of him in whom is vested the sovereignty, for in that power is conferred on one man or council to set some evil, and inflict it by way of penalty upon those who have failed to meet their requirements, a far greater necessity of obedience lies upon all than if they were bound together simply by a pact, which had not done away with the equality among associates, and then had to decide on their own affairs according to their own judgement.

10. It should also be observed that, if any undertake to maintain that the potential parts of sovereignty, as they call them, in one and the same state are entirely vested in several distinct persons and councils, they also admit it to be necessary for him to whom belongs some part of the sovereignty, to be endued with power both to require citizens to observe the decisions and ordinances of that part, and to defend that right of his; and, finally, to be able to ordain, by his own judgement and right, when and how that part of the sovereignty should be exercised. For it is anything else but sovereignty to have only the right to indicate to others what you want done by them, and still to be lacking in power also to compel them, when recalcitrant, to observe what was laid down. And it is but a precarious hold which we have on a thing, when we cannot defend it against another, while he

who exercises a right at another's dictation, is only his minister and executor.

11. With this much settled, it will easily appear, so close is the union between all the parts of supreme sovereignty, that one cannot be torn from another without destroying the regular form of a state, and creating an irregular body which will be held together by nothing but an insecure pact. For if we allot one person legislative power and another punitive, to each independently of the other, the former power will necessarily be empty and hollow, or the latter will but minister to it, inasmuch as to enact laws which you cannot enforce is arrant folly. And it partakes of the character of a mere minister and executor to have strength with which you may compel others, but which can be exerted actually only upon another's decision. But if, on the other hand, you should give the latter final judgement regarding the application of his powers, you would by that act reduce the legislative power to nothing. Therefore, each power must necessarily depend upon one and the same will.

It is also clear that the right of war and peace, as well as that of raising money, cannot be separated from this judicial right. For no one can rightfully force citizens to take up arms, or to assume the costs of war and peace, but him who can rightfully punish those who refuse. Furthermore, it would be absurd to assign the right to strike treaties which concern peace and war, to any other one than him who holds the right to decide upon peace and war. For otherwise this latter will be a mere minister, or else the former, in encompassing the means that serve the execution of his right, will have to consult and will depend upon the decision of another. Thus, if you would turn some business over to a man, and yet not give him at the same time the power to appoint his assistants, without whom the business cannot be carried out, and to require an accounting of them, you have made him in fact no more than their equal. Therefore, the power to appoint magistrates cannot be separated from the other parts of supreme sovereignty.

696 Finally, in the same power will be vested the examination of beliefs, especially of such as in any way concern the end of states, and exert some influence upon the consciences of men, by quickening or obstructing their obedience to the supreme sovereignty. For if a man commands citizens to do something upon penalty of natural death, and another persuades them that by such a deed they will incur the penalty of eternal death, and each of them does this by his own right, which belongs to him apart from others and independently, it follows that not only can citizens, although innocent, be rightfully punished, but that the commonwealth will be dissolved into an irregular status with two heads. For a man cannot serve two masters, and yet he whom we feel we must follow, in fear of eternal damnation, is no less our

master than he whom we obey in fear of temporal death. And if the right to regulate beliefs is lost, superstitious citizens will be moved to rebellion by spectres of their own making. Compare Hobbes, *loc. cit.*; *Leviathan*, chap. xxix; J. F. Hornius, Bk. III, chap. i, § 3. What other power over matters of religion belongs to the supreme civil sovereignty in Christian states, we leave to others to determine in greater detail. Add especially Grotius, *De Imperio Summarum Potestatum circa Sacra*, chap. i. Nor have we time at this point to discuss the passage in Philo Judaeus, *De Praemiis et Poenis* [ix], who, after pointing out that the same man Moses was

king, lawgiver, prophet, and priest (adds): Now since all these things belong to one class, they ought to be held together and united by mutual bonds, and to be perceived in the same man, since he who is deficient in any one of the four is imperfect in his authority, as he is consequently invested with but crippled authority over the common interests. (Y.)

12. These points will come out more clearly if we examine the different kinds that there are of such a division of prerogatives. Let there lie, therefore, with the prince the power of war and peace, with the senate the right to pass laws and execute justice, with the assembly of the people the right to levy taxes. Now if the king calls the citizens to arms, and they refuse obedience, either the king will have the right of himself to force them by punishments, or else he will have to hand them over to the senate for judgement. If we admit the first alternative, it is not clear how he who does not have the execution of the laws will exact punishment of citizens who are not as yet under military law. If you say that in this case alone the king possesses the right to lay penalties upon the disobedient, you thereby give a king the right to proceed against every citizen at his pleasure, and so you reduce the right of all others to nothing. For when he has ordered them to take up arms, he will punish them unless they obey, and when he has led them into the field, military law will give him the right of life and death over them. And nothing is easier for a commander than to make away with a soldier whom he hates. See Livy, Bk. II, chaps. xxiii, xxxii, lviii; Bk. III, chaps. x, xx, xxiv; Bk. IV, chaps. i, v, lviii; Bk. V, chaps. ii, x, and *passim*; Diodorus Siculus, Bk. XIV, chap. lxxiii; Curtius, Bk. VII, chap. ii; Polybius, Bk. I, chap. ix.

But if the king finds it necessary to bring the objectors before the senate, it will either condemn them, and exact punishment simply upon the order of the king—which is contrary to our supposition, since it is a sovereign body—or else it will take under consideration the crime with which they are charged. This examination is useless, unless that body can inquire as to whether or not the war now undertaken by the king is in the interest of the state. But in that case the king's right is reduced to nothing.

If, with the powers outlined as above, we compare the right of the

king with that of the people, we shall observe the same inconveniences. For the words of Tacitus, *Histories*, Bk. IV, chap. xxxiv [IV. lxxiv], on the manner in which wars are waged between most nations, hold just as good to-day as they ever did: '⟨To maintain the tranquillity of nations⟩ arms are necessary: soldiers must be kept in pay; and without a tribute supplies cannot be raised.' (O.) Therefore, if the king has no power by virtue of his sovereignty to require his citizens to pay taxes, his right to wage war will resolve itself into nothing more than the mere faculty to persuade them, that, at the moment, it is to the advantage of the state to take up arms. But if the people on its side is not empowered
 697 to investigate as to whether or not the war for which they must contribute taxes is advantageous or not, then what else is theirs but the laborious drudgery of levying and collecting taxes, both of which duties are opposed to our original hypothesis? Nor will things move any better, if we distribute the parts of supreme sovereignty in some other way. Add Bodin, *Republic*, Bk. II, chap. i, p. 287, with, however, the valuable comments upon him by Arnisaeus, *De Republica*, Bk. II, chap. vi, sect. 1, § 56. On this point we may well bring to bear the remark of Asinius Gallus in Tacitus, *Annals*, Bk. I, chap. xii: 'The State has but one body, and must be governed by the mind of a single' (R.) man or council.

These matters can be illustrated by the example of the soul of man, the function of which is much the same as that of supreme sovereignty in a state. For if we imagine the potential parts of a rational soul, the understanding and the will, to exist separately in different subjects, of which the one would be endowed only with intellect, and the other only with will, such a subject could not be called a man, nor could the actions of a man be expected of it, the one always dull as if immovable, the other accomplishing nothing as though blind. On which point there is bearing in the epigram of the *Anthology*, Bk. I [IX. 11]: 'One man, crippled, and another blind supply for each other that of which fortune has deprived them. For the blind man takes the burden of the lame upon his shoulders, and at his direction makes his way.' (P.) These two could in some way supply the defects of nature, so long as each was willing to help the other. But had they disagreed and broken their agreement, neither of them could have held further to the right path.

Therefore, if any man should want entirely to separate the parts of sovereignty, he will under no circumstances establish a regular state, but an irregular body, the members of which, in possessing separate parts of the sovereignty, are held together not by a common sovereignty but only by an agreement. It will be possible, after a fashion, to preserve concord in such a group, so long as the opinions of the members of the state agree after a friendly manner on the public good, and every citizen is ready of his own accord to do his part towards meeting this

end. But when dissension has arisen, nothing is left but to turn to arbitrators, or to decide the issue by war.

13. Although these matters are evident enough, yet there are not a few who still defend a division of the parts of supreme sovereignty, so that they may thereby conjure up I know not what mixture of states, which, upon being properly adjusted and applied, are fit to produce the most auspicious state, if the gods so will. It is idle for them to call upon the authority of Aristotle, who in his *Politics*, Bk. IV, chaps. viii and ix, discourses upon a mixed state, something very different from that which is concerned in a division of the parts of supreme sovereignty. And stranger even than this is the fact that some of his interpreters on that passage, and among them Michael Piccart, have from that mixed form scrambled up such others as very likely never even occurred to Aristotle. The same commentator maintains that the mixture quite the most desirable and most to be coveted is: 'If the king should have the right to conduct war, coin money, negotiate treaties, levy taxes, and distribute rewards; the senate should exercise those rights which require wisdom, for example, pass and execute laws, and administer public justice; the people, finally, should handle those things of which it has intimate personal knowledge,¹ namely, control the accounts in the public treasury, supervise the assignment of lands, elect magistracies, oversee buildings, highways, aqueducts, food production, and other resources of the Commonwealth.' Thus it does not imply any division of supreme sovereignty, if, for example, the senate be empowered to condemn, and the prince or assembly to pardon, for in this case the prince can by his right pardon all on whom the other party has pronounced sentence, while the latter acts the part of only a petty judge, and its sentences will receive confirmation from the former. Hence it is clear enough, that if, in any state, capital sentence lies within the power of the senate, and with the king the right, as they call it, of granting grace, in actual fact the senate holds only from the king the power to 698 take cognizance of crimes and to pronounce sentences in accordance with the laws—and this in order to keep justice clear both from favour and from hatred, and to divert unpopularity from the king—but that the right of life and death lies originally and fundamentally with the king.

Some find a division in the judicial power itself, in case the king have the right of life and death only over foreigners, and the assembly over citizens. But if such power of sentencing citizens lie with the assembly, as though with petty judges, nothing is withdrawn from the power of the king; while if the assembly hold it independently and without restriction, the king will wear an empty title, and exercise but the function of a judge over aliens. What is added on a division in the right of issuing money is too inept to warrant our repeating it.

¹ [Reading *rationem domi didicit*, for *rationem didicit*, as Barbeyrac quotes the passage.—Tr.]

Arnisaeus, *Relectiones Politicae*, Bk. I, chap. vi, § 1, devotes great pains to this subject, and besides giving many other accurate observations, is correct in rejecting some spurious forms of a mixed state. But at the end of his work (§ 57) he could¹ conjure up no better example than to assign to the king the right of war and peace, of levying taxes, of coining money, and of distributing rewards, while he orders the senate to concern itself with judgements and appeals, assigning to it also the reform of morals through legislation, and the right of life and death; to the assembly he assigns the care of the treasury and the appointment of magistrates. Judgement can be passed on this example in the light of what has already been said.

14. Grotius, also, Bk. I, chap. iii, §§ 9 and 17, makes his own contribution upon the division of the parts of supreme sovereignty. He is right enough when he denies that a division of supreme sovereignty can be made between the king and the people, on the basis of a simple agreement, that if the king governs *well*, the people shall obey him, but if *ill*, it will be possible for the people to bring him to order. His position is, that such bounds should rather be assigned to the power of each as can easily be recognized by distinctions of times, persons, or duties; but that an act's mere goodness and badness, consisting in the application of a means suitable for the public safety, over which there is often good ground for argument, are not of such a nature as to distinguish parts of sovereignty. That it would surely engender the greatest confusion, for in any inquiry about the same matter, on the score that the action of the king concerning it had been beneficial or otherwise, the king would pull one way, the people another.

Another position also is well taken, to the effect that, if a king makes his people promises under oath, even such as concern the administration of his sovereignty, the supreme sovereignty is not thereupon divided.

But in all the rest he falls into the common error. So one way in which he thinks the division of the parts of sovereignty can be effected, is, 'if a partition is expressly established'. He offers by way of example, that, in the time of the emperor Probus, the senate approved the laws of the rulers, took cognizance of appeals, appointed proconsuls, and gave the consuls assistants. As if it were not known how the Caesars, who wished to hold themselves in the background, exercised their sovereignty under the guise of the old republic, leaving the senate the conduct of a few affairs and such as were of little concern in the government, but carefully keeping in their own hands the real power of sovereignty, which lay first of all in the control of military affairs.

His second manner of dividing sovereignty he expresses in this way: 'If a people while still free shall lay a reservation upon the future king by way of a permanent command.' But it is not clear what sort of

¹ [For *potuit* read *potuit*.—Tr.]

a thing a permanent command is, at the time when a person no longer has the power to command. For every command presupposes a coercive force, to be exerted when it has been violated. Therefore, a people in establishing a king will either retain, or not retain, that power over him. If they do, the king will hold an empty title, the people the power of sovereignty; if they do not, the command will be vain. He should, therefore, have said that a people, while still free, can bind a king to observe certain rules in his administration of the state. But that this will not lead to a division of sovereignty we shall show below. 699

Finally, he thinks that sovereignty is divided, 'if in its transfer an additional stipulation is made, from which it is understood that the king can be constrained or punished'. Yet the sovereignty is not divided, for the people has it entirely in its own hands; if a people has the right to compel and punish a king, no matter what the cause, there is put into his hands by that exalted title only the function of an eminent magistrate, since a punishment proceeds from a superior as such. Now coercion may be of two kinds, moral and physical, that is, by reason of sovereignty or of violence of war. But there is no sovereignty over an equal as such. Therefore, when Grotius maintains¹ that a people is at least the equal of its king, because it can in a particular case coerce the king, he must at the same time admit that neither has sovereignty over the other, which is repugnant to the nature of a state. But coercion by violence of war can take place only between equals, that is, two parties neither of whom has sovereignty over the other. And it is in the sense of such coercion that we must understand the illustration given by Grotius, that a creditor has naturally a right to coerce his debtor. Surely a creditor cannot naturally coerce a debtor by reason of sovereignty residing in him, for otherwise every one who wished to become the debtor of another would first have to submit to his sovereignty. Yet the only way a debtor can be coerced by his creditor to pay his debt is either by calling in the aid of a judge—and there is no such person between a king and a people—or by appeal to the violence of war, if they live in natural liberty. And yet if we should allow a people this last method of coercion, we would have to admit that a king, as well as a people, lives in natural liberty, that is, that the state is dissolved.

In conclusion, we agree with Grotius, that there is nothing in civil institutions which is entirely free from disadvantage, and therefore one should not infer at once that, because of the inconveniences certain to arise from divided sovereignty, the question is to be decided not by what appears best to one man or another, but by the will of him from whom the right arises. But it will have to be granted us in our turn that, if such a division may strike the fancy of a people, it is not establishing a regular state, but an ill-adjusted and sickly body.

¹ [For *insert* read *infert.*—*Tr.*]

CHAPTER V

ON THE FORMS OF STATES

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| <ol style="list-style-type: none"> 1. Accidents of states do not establish a new species. 2. There are also irregular forms and systems of states. 3. There are three forms of a regular state. 4. Democracy appears to be the oldest form of state. 5. There is supreme sovereignty no less in democracy than in monarchy. 6. How a democracy is established. 7. The ordinary requisites of democracy. 8. How an aristocracy is established. 9. How also a monarchy. 10. In states there are faults of men and of status. 11. Yet these do not establish a peculiar species of state; | <ol style="list-style-type: none"> 13. On the mixed state of more recent writers. 14. Wherein consists the nature of irregular states. 15. Irregularity is best observed in examples. 16. Empires which have provinces are not by that fact alone systems. 17. On systems which arise because of a common king. 18. On systems which have been formed by a treaty. 19. How the affairs of state are managed for all in such bodies. 20. Whether in such bodies a majority obligates a minority. 21. How such systems are dissolved. 22. On a comparison of the forms of government. |
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- 700 12. No more than do various accidents of democracies and aristocracies.

Just as supreme sovereignty is found in every state as in a common subject, so, in so far as it resides either in one man or in one council composed of a few, or in all the citizens, it gives rise to different forms of states. And on this subject we feel, first of all, that we will be suffered to use the word *form* to express that nature or arrangement of states, which results from the diversity of the subject in which the supreme sovereignty is fully vested. That there is often a great departure from this in the *actual administration of a state* is a well-known fact; thus, for instance, in a *democracy* some things are administered as in a *monarchy*, some as in a *polyarchy*, when the performance of certain tasks is turned over by the people to one man, or to a few men. And because it is a matter of great concern, whether a man exercises his own power, or what is really another's, and held by him but for a time, from which he may be thrust at any moment by the rightful holder, a person speaks most *ἀκρίτως* [improperly] when he declares: 'It is in reality a polyarchy when a king allows himself to be led about by the nose at the bidding of a few men who abuse his long suffering, or a monarchy when a popular assembly suffers the same of a demagogue, or even when in a supreme senate one man by his prudence, eloquence, or influence, controls the rest'; and in the first case there remains but the *empty name* and *outward form* of a monarchy, in the second of a democracy, in the third of a polyarchy. Just as no man of intelligence would believe that the form of state had

been changed by a change in the persons or number of ministers, any more than that an interregnum takes place when a minister who had been empowered with the administration of affairs under a prince is suddenly unseated by the latter's successor. The capacity and inclination of one or more men, who exercise sovereignty by their own right, or as it is delegated to them, do indeed affect and modify the administration, but in no way the form of a state. Thus even though sovereignty may be administered in some places excellently, in others corruptly, no new form of state is, without more ado, produced as a result of the different exercise of the same power. And so just as a healthy man does not by that fact alone differ in species from an invalid, nor do misshapen limbs create a new species of mankind, so the faults of governors or governed, or the corruption of laws do in no wise constitute a different form of commonwealth.

2. It should also be observed that most writers who have discussed political science have concerned themselves with explaining the regular forms of commonwealths, while many have apparently not even thought of irregular forms, and only a few have touched upon them in a perfunctory manner. Hence it was that if there ever was found a civil body which did not square with one of those three forms which are commonly called simple, scarcely any other name was left for it than that of a mixed state. And yet, not to mention the fact that such a designation is imperfectly applicable to some commonwealths, it is naïve indeed to hold that, besides those three regular forms, there are no other irregular ones. For even were it true that the laws of architecture require some certain type of buildings, not all men have constructed their dwellings 701 by those laws. We hold that the regularity of states lies in this: that each and every one of them appears to be directed by a single soul, as it were, or, in other words, that the supreme sovereignty, without division and opposition, is exercised by one will in all the parts of a state, and in all its undertakings. From this it is not difficult to gather what an irregular state is. Furthermore, there are also systems made up of several perfect states, which, in the eyes of those who are not versed in these matters, assume the false form of one state; and these also must have their place in our explanation of the forms of commonwealths.

3. There are but three forms of a regular state, based upon the subject proper of the supreme sovereignty, according as that subject is one simple person, or one council, composed of a few, or of all the citizens. For supreme sovereignty is committed either to one man or to one council composed of a number of men. This council, again, is composed either of all the citizens, or of a smaller but select part. Therefore, the first species is when the supreme sovereignty is vested in a council which is made up of all the citizens, and in which every citizen has the right to vote; and this is called a *democracy*. The second, when

the supreme sovereignty is vested in a council made up of select citizens, is called an *aristocracy*. The third, when the supreme sovereignty is vested in one man, is called a *monarchy* or kingdom. In the first that which holds the reins of government is called the *people*, in the second the *nobles*, in the third the *monarch*. Pindar, *Pythian Odes*, ii [87-8]: '[. . .] Whether at the tyrant's court, or where the boisterous host, or where the wise, have care of the State.' (S.)

4. We shall, first of all, examine a democracy; not, indeed, because we hold that it surpasses the other two forms in dignity, outward splendour, or convenience (Philo Judaeus, *On the Creation of the World*, censures polytheists as 'men who do not blush to transfer that worst of evil constitutions, ochlocracy, from earth to heaven' (Y.)), but because that was certainly the oldest form among most nations, and reason likewise shows it to be more likely that when a number of men, endowed with natural liberty and equality, decided to unite into one body, they first wished to administer their common affairs by a common council, and so to establish a democracy. Nor is it to be presumed that a free father of a family, who voluntarily gathered together with others like him into a state, after having observed the disadvantages of a separate life, could in a moment, as it were, so forget his former status, in which he used to dispose at his own pleasure all matters touching his safety, as to be willing to submit himself all at once to the judgement of one man on common affairs, with which also his own safety was involved. Nay rather, it must have been held at the beginning to be the fairest procedure, that what concerned all should be the care of all, until the majority had relinquished that status, either voluntarily, or by compulsion, at the hands of some citizens or foes. What Plato has to say on the Athenian state in his *Menexenus* [pp. 238 E-239 A] makes for this conclusion:

The basis of this our government (where the sovereignty resides in the people, but the magistracies are conferred upon the best) is equality of birth; for other states are made up of all sorts of unequal conditions of men, and therefore their governments are unequal; there are tyrannies and there are oligarchies, in which the one party are slaves, and the other masters. But we and our citizens are brethren, the children all of one mother, and we do not claim to be one another's masters or servants; but the natural equality of birth compels us to seek for legal equality, and to recognize no superiority except in the reputation of virtue and wisdom. (J.)

702 Now it appears that, at the first, most states were formed by those who were of the same blood. Isocrates, *Panegyric* [iv. 105]:

It seemed unjust to us (the Athenians) for the many to be ruled by a few; that those who in property, indeed, were poor, but in other respects were not inferior, should be excluded from offices and honours; and that, although it was a common fatherland, some should bear rule, while others should be treated like foreigners, and men who were citizens by birth should be excluded by law from public activities.

Add Libanius, *Progymnasmata*, *Loci Communes*, *Contra Tyrannum* [iv].

Nor is this denied by ancient history, which, while speaking often of kings, shows that the majority of them enjoyed more the authority of persuasion than the power of command. So also Justin, at the opening of his first book, describes the kingdom, called by Aristotle that of the heroes, which can by no means be considered inconsistent with democracy. Thucydides, Bk. I [xiii], says of the oldest kingdoms: 'Before that there had been hereditary kingships based on fixed prerogatives.' (S.)

And so, in general, nations lived under a popular regimen and in liberty, until little by little that enormous mass of petty states was reduced, usually by force and warfare, into a few large ones.

The antiquity of the kingship is, indeed, upheld by Aristotle, *Politics*, Bk. I, chap. i [I. ii]: 'And this is the reason why <Hellenic> states were originally governed by kings; as the barbarians still are: because they were under royal rule before they came together. For every family is under regal authority.' (J.*) These last words are illustrated in the answer returned by Lycurgus to one who advised him to introduce a democracy into the state: 'Go thou and first establish democracy in thy household.' (P.) Plutarch, *Lycurgus* [xix]. But the argument of Aristotle is not conclusive. Rather is it more likely¹ that, because those ancient fathers of a family were already accustomed to sovereignty, they inclined more to democracy, in order that they too would have the opportunity to express themselves upon matters.

Nor is the question settled by those who argue that a paternal kind of sovereignty was the most ancient among men, which, although mild at its outset, developed into the right of life and death, as families and vices increased; that this sovereignty in families was continued in the first-born, to whom belonged, as though by natural right, the oversight of religion and of civil administration. In this way, they continue, the heads of families gradually developed into petty kings, proof of which contention is to be found in the fact that of old such a multitude of kings was found in Canaan. See *Joshua*, xii; *Judges*, i. 7. But, as a matter of fact, the force of primogeniture was not so strong that it conferred also regal sovereignty over brothers without their consent, and required them to have their families joined with that of their elder brothers. And those oldest men who passed under the name of kings were usually but the principal and eminent magistrates in democratic groups, although that honour was very often accorded to the head of the race, especially when the group was composed of families of the same blood; yet not in such a way that the right of primogeniture and, as it were, of majority was always observed.

5. At this place we must bring up again for examination the opinion of Johannes Friderich Hornius, *De Civitate*, Bk. III, chap. i, where he

¹ [For *verosimile* read *verisimile*.—Tr.]

expresses himself in the following fashion on aristocracies and democracies, which he embraces under the name of free states: 'There is a form of state which avoids the confusion of a promiscuous multitude, and attains some settled order, looking by pacts and conventions to the common safety of all, without subjection and the loss of that liberty which a monarchy destroys.' Here there is almost a mistake for each word: That the order observed in free states is all that avoids the confusion of a promiscuous multitude; that free states are held together by pacts and conventions without sovereignty; that the individual
703 citizens are less strictly subjected to a council of the people or of nobles than to a king in a monarchy; that all the parts of supreme sovereignty are exercised less in the former kinds than in the latter; that a people exercises less right of life and death over individuals than does a king.

There is as little truth in the next statement, namely, that 'certain fathers of a family, while yet scattered about, learned from neighbouring kingdoms the form of a state'. The truth is rather that, in the first union of nations, most of the groups were popular in form; and that, upon observing the inconveniences of this regimen, part of them, of their own accord, some sooner and some later, chose the sovereignty of a single individual, while others became subject to it under compulsion.

His next statement is also futile. 'Just as art attempts to copy nature, but never equals or improves upon it, so in these artificial forms of states there is represented after a fashion the genius of kingdoms, as it turns to the securing of the common benefit; but the true force of sovereignty which surrounds monarchy, being as it is a creation of Almighty God, could not have been produced by men.' We have already discussed the origin of majesty; and why it may not belong as much to a moral compound person as to one man. And surely there is no contradiction in all the nobles being equal, and yet each one of them being under the supreme sovereignty of their entire body. Moreover, even a man of little wit can comprehend the difference between all the people and individuals, between a council of the people, and the members as they scatter to their homes.

His next argument also comes to nothing: 'When sovereignty is assigned to all, then it belongs either to all, or to some. If to all they will have no one subject to them, because sovereignty and obedience cannot reside in the same person. If the individuals are made subject, then all cannot command, for the reason that a multitude must also be subject when made up of individuals that are so, inasmuch as the individuals can contribute to the whole nothing but obedience.' Yet in compound moral bodies something can be attributed to the body which cannot be attributed to all the members, that is, to them taken individually, or to any one of the individuals; and, therefore, the whole is an actual moral person distinct from the individual members, to

which a special will, as well as actions and rights, can be attributed, which do not fall to the individuals.

Those scruples also vanish which are raised about the point that, in popular assemblies, the will of the majority prevails. For it is a moral affection of all large bodies that the consent of the larger part of those who gather in the council should be taken as the will of all, for in no other way can the will of several physical persons unite morally into one will, in case the wills of all¹ the members do not precisely agree. Therefore, the subject of the supreme power in democracies and in aristocracies is by no means obscure or vague, although those individuals whose votes at one time contributed to the majority, may, under other circumstances, be among those who muster the smaller number. For all these considerations do by no means destroy the unity of will which may be attributed to the entire body. If it happen, for instance, that in a senate not enough members agree as are required for a majority, the senate is understood to will nothing, and so nothing new is to be undertaken. And although this may often work some hardship on the state, it does not follow that the senate does not hold the supreme sovereignty.

Furthermore, the following statement is false: 'True sovereignty cannot be attributed to a multitude, since a multitude is not obligated to observe for ever what once pleased them, and the multitude of all members of a state is not obligated.' But just as the sovereignty of a king is not destroyed by the fact that the king may change his will and rescind his former decree, whereby the obligation of the citizens to that decree perishes, so although an entire body can change its own decrees, they are still as much bound by them as by the decree of a king. If this is not so, let it be shown that lawbreakers are not punished as much in free states as in kingdoms. Add Livy, Bk. II, chap. iii. So it is idle to say that, 'If majesty resides without division in several, each of them will necessarily have some portion of it, which portions when all gathered together then make up majesty. And yet each portion will have to be supreme. Therefore, in one state there will be more supreme sovereignties than one, which is absurd.' Yet in moral matters it is not absurd for those particular wills, from the agreement of which there results a will of them all, to lack some faculty which lies in the latter. Therefore, it is a faulty argument to say that majesty is supreme right, and therefore each man holds some part of it, which is itself also supreme, any more than is such a statement as this logical: 'The votes of individual persons considered by themselves and distinctly are without force to make a law; therefore, if a number of their votes combine, they cannot avail to make a law.'

Finally, he adds: 'Since there is no one in a senate of nobles who

¹ [For *singulorum* read *singulorum*.—Tr.]

cannot be brought to punishment by his colleagues, if he offends against the state; therefore, should all the nobles offend against the state, their punishment would have to be taken from their hands by the citizens. And yet were every one of them removed from office and punished, there would be no place for the sovereignty of them all to reside.' A reply to this is easy if what constitutes an offence against the state is properly explained. It is committed in its proper sense by one who perpetrates something which tends to the state's hurt against the commands and laws of him in whom is vested sovereignty. Therefore, the entire number of nobles cannot sin against the commonwealth, unless they either violate the laws, the observance of which is a condition of their having sovereignty conferred upon them, or else adopt a hostile attitude toward all the citizens, in which case they will stand on an equal footing with kings who so offend against their people.

All else which he devises to the prejudice of free commonwealths is manifestly¹ false. 'There is the greatest difference between the sovereignty exercised by monarchs and that to be seen in free states, although their effects may be similar. Inasmuch as monarchs', beside their personal dignity and splendour, which is such as no one in a free state possesses, 'are attended with a majesty which free states lack.' But it is our opinion that God cannot be claimed with greater right to be the author of monarchies than of free states, and that the former are no less produced by pacts than the latter, from which pacts there at once results sovereignty, the immediate cause in both forms of government of the obedience of citizens; that a citizen as such lies under the same obligations in a republic as in a kingdom; that he who lives in a free state is no less strictly obedient and subject than he who lives in a kingdom; and that in both punishment is exacted by equal right. For who would believe without question that 'in a kingdom punishment is exacted by the right over a citizen's life, which is not the case in free states, where offenders against the laws of the state are punished as enemies'?

6. We must now inquire into the constitution of a democracy, and at the same time into the special features that distinguish it from other species of states. Now when a multitude of free men gather into one place to enter into a pact regarding their coming together into one state, such a group already has somewhat the form of a democracy, properly by reason of the fact that each person is at liberty to suggest what in his eyes is for the benefit of their common interests. Yet no member will be bound, against his dissent, by a vote of the majority, to what they may decide, before a democratic form of government shall have been sanctioned by a second pact. Since Hobbes, *De Cive*, chap. vii, § 5, does not distinguish these two pacts, he handles this matter in a somewhat confused fashion. For we have shown above that a man is

¹ [For *manifestissima* read *manifestissimae*.—Tr.]

not at all bound by the votes of the majority, before he has given his agreement to such a form of administering the common interests. Therefore, the following statement of his is false: 'By reason of the fact that they have voluntarily convened, they are understood to be obligated to that which will be decreed by the agreement of the majority.'

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What he goes on to say in the same passage may be more clearly explained in this way. When many men have met together, binding themselves by mutual pacts to combine their strength and resources, either they reach some decision in that gathering about the form of state to be introduced, or they do not. When they have neither reached a decision about the form of the state, nor set a time or place for a second meeting, the assembly is understood to be void, and every man remains as before in his natural liberty. For several men cannot unite into one body unless they have agreed upon a settled manner in which to administer their common interests. But when they stand adjourned with that point still undefined, yet with a time and place set for their further deliberations and decision, only the first rudiments of a state exist, which no one will as yet be able to call a democracy. For it is not yet a democracy when every man has a right to advance his opinion, or when the time and place are appointed for another meeting, inasmuch as this is the settled procedure in the establishments of all societies and associations. But such a gathering finally becomes a democracy when the right to decide upon matters touching the common welfare has been conferred for all time upon a council made up of all the citizens, that is, an assembly.

7. Now the following appear to be the prime necessities of a democracy: First, that a certain place and time be set for the meetings, where they must deliberate and decide upon the affairs of state. For men's private business does not allow them to attend for ever upon that assembly, and, unless there is an agreement upon the place and time, the members of the same body can either meet at different places and times, whereby factions arise, or else not meet at all. And in that case it will not be a people (*δημος*), but a scattered multitude, to which can be attributed neither the action nor the right belonging to one person. Here belongs the statement of Thucydides, Bk. II [xxii], that when Pericles observed that the Athenians were in an ugly mood about the conduct of the war, he never called an assembly of the people, or meeting of the council, lest they should fall into error by deliberating in anger rather than with reason.

Second, the votes of a majority must pass for those of all, unless the unusual should happen, and a great multitude of men should agree on the same matter.

Lastly, since some business of a state is concerned with daily occurrences and minor matters, and some with more unusual under-

takings, and such as have a bearing on the prime concern of the state; and since it is not convenient for a whole people to be in constant session in council to attend to the former concerns, or at such frequent intervals that none of those matters can escape their attention, it is therefore necessary for certain magistrates to be established, as delegates, to carry on the daily business with the authority of the entire people, to examine more fully into matters of importance, to lay before the assembly any affair of serious consequence, and at the same time to execute the decrees of the people, since any large gathering of men is almost entirely unsuited to that duty.

8. An aristocracy is established when a group, which has united by the first of the two pacts into some rudimentary form of a state, comes to the decision to commit the direction of affairs to a council composed of a select number. After these members have been through that gathering designated by their names, or by their position, or some other sign whereby they can be distinguished from the rest, and have also accepted that designation, upon every one submitting himself to their will, they are understood to accept the supreme sovereignty. And in this connexion we must observe that Hobbes, *ibid.*, chap. vii, § 8, is
706 incorrect in seeking the origin of aristocracy in democracy, if his meaning is that all aristocracies were establishments from and changes of perfected democracies. For experience proves, and reason does not deny, that from that first pact, and without the intervening step of a democracy, men were able to pass to aristocracy or monarchy. And we have shown before that Hobbes but toys with his words when he denies that a pact passes between citizens and a senate, because, upon the transfer of sovereignty to the latter, a people, as one person, no longer exists. For in order that a man may be under obligation to another, it is enough if the latter still exists as a physical person, although the moral person which he carried beforehand may have expired. Consider also, that, although a people upon giving up sovereignty does not, indeed, thereafter exist as a perfect person, in comparison with their newly chosen head, it still does not for that reason become a loose multitude, because assuredly in combination with the senate as its head it now constitutes a person.

But the inference which the same writer draws, in the following section (9), is likewise false: That, as in a democracy the people, so in an aristocracy the body of nobles, is free from every obligation. For even should we admit the former contention, for the reason that perhaps that respect between a body and its members may not seem sufficient to warrant a mutual obligation between them, it does not follow therefrom that no mutual obligation exists between a senate and the citizens. Just as there is no logic in the following argument: I am under no obligation while I am myself carrying on my own business; therefore, if

I transfer the supervision of it to another, he also will be under no obligation.

But he is right when he observes, in the next section (10), that an aristocracy has this in common with a democracy, namely, that unless an appointment be made of times and places at which the nobles may gather, there is no longer a council or a single person, but a loose multitude without supreme sovereignty. For since without a meeting of the individuals from the agreement of whose wills the will of the council is understood to result, their will cannot be determined, inasmuch as it is a very great inconvenience to circularize the senators in order to ascertain their votes. In the next place, it is as necessary in an aristocracy as it is in a democracy, that the times of meeting be not too far apart, unless the exercise of the supreme sovereignty, at least in matters of daily concern, be transferred to one or to a few magistrates.

9. Finally, a monarchy is established when the supreme sovereignty is conferred on one man. That this is done by means of an intervening pact has already been sufficiently demonstrated, despite what Hobbes says.

In this connexion we should take note of the pestilent belief of an anonymous Dutch author¹ in his *Bilanx Politica*, which runs as follows: Since every transfer of supreme sovereignty is made for the more convenient avoidance of evils from within and without, it cannot be presumed that a democratic group ever bestowed it upon one man and his descendants for all time. For since a hope of more satisfactory protection would better be based on virtues which were observable in the person selected, and every one knows how changeable and mortal men are, and that in a short time, due to old age, they will either be unfit for rule, or else will have no heir, or one who is not of age; or, if adult offspring survive, it will have no outstanding natural aptitude for sovereignty above that of others, or will show no desire to afford the group adequate protection; therefore, it can in no way be presumed that it was ever the intention of a popular group to take from itself the power to choose a better ruler in place of an incompetent or base one. But that when they had once secured the sovereignty, and had drawn around themselves a great part of the people, and especially soldiers, they were so able to secure themselves and their posterity in their power that they were able to retain the sovereignty, even against the 707 will of their subjects.

To this we reply that, if it occurred to any group to confer sovereignty upon a person, on the condition that whenever the people decided that he was not so successful in procuring the common protection as their democratic government had been he could be removed from his office, there was established not a monarch but an eminent

¹ [As yet unidentified.—Tr.]

magistrate, who depends upon the fickle breath of the people, and therefore such a ruler had never received the supreme sovereignty. Furthermore, since it is well known how injurious to a state are frequent changes of princes, and that in general there is a change more of men than of manners, and what a serious blow commonwealths receive in casting out those who have found opportunity to strengthen their own resources while administering those of the state, it can easily be presumed that a people decided to settle their fate once and for all by establishing a permanent house, since those ills which are likely to rise from such a wavering and uncertain status are more certainly to be feared than any that a degenerate king can cause. Especially since his unreasonable inclinations may be held in check by fundamental laws. Finally, not all the acts which do not turn out precisely in accordance with our expectations may be revoked, since in human undertakings there is always a large element of chance, and there is nothing which does not have some seamy side. Add Grotius, Bk. I, chap. iii, § 9.

A monarchy differs from the two species already presented, in that the latter require appointed times and places for deliberation and decision, that is, for the exercise of sovereignty, while in an absolute monarchy deliberation and decision are possible at every time and place. (Herodian, Bk. I, chap. vi: 'Rome is wherever the Emperor is.') For a people and nobles, the two having no single physical body, need to assemble. But a monarch, who is also one physical person, is ever endowed with a power sufficient to¹ exercise acts of sovereignty. Hobbes also correctly observes that, if a decree has been passed in an assembly of the people, or a council of nobles, contrary to natural law, it does not constitute a sin for that state, that is, for that moral person, but only for those citizens by whose votes the decree is passed. For sin attends the natural and expressed will, not a moral or political one, which is only artificial. Were this not so they also would sin who voted against the decree. See *Luke*, xxiii. 51. But if in a monarchy the ruler has issued some decree opposed to natural laws, he himself sins because in his person a civil will coincides with a natural one.

10. To these regular forms of a state most authors have commonly added some termed 'vicious' or 'corrupt'. Now on this point it is certain that there is as rich a field of corruptions and vices in many commonwealths as in individuals, so that to be afflicted with the very fewest may be considered as almost equivalent to perfection. Moreover, of the corruptions with which states are afflicted, we see some come from the depravity of men, and some from the evil institutions of the state itself. Therefore, some may be called the vices of men, some the vices of status. We shall touch upon a few for the sake of illustration.

In a kingdom it is a vice of men, if he whom chance of birth or the

¹ [For *ab* read *ad*.—Tr.]

unfortunate votes of citizens has called to the throne, is lacking in the arts of ruling, shows little or no care for the commonwealth, and prostitutes it to the ruinous ambition or avarice of depraved public officials; if his savagery or wrath is a source of terror; and if he fails to bear in mind that he is a man and is put over men; if he delights needlessly to expose the state to disaster; if he wastes what is paid in for the necessary expenses of the state, upon his luxury, or in ill-advised bounties (Drepanius, *Panegyricus* [xxvii. 1]: 'The last defence of wicked princes is to plunder some for donations to others'); if he hoards to no purpose what he has extorted from his citizens; if he is arrogant and unjust (that is worth remembering which Philostratus, *On the Life of Apollonius of Tyana*, Bk. III, chap. ix, records of the ancient Indians: 'Heirs to the throne are shown no honour,' adding as the reason [III. xxx]: 'It is seemly that by being despised themselves they should be taught not to despise others'); and if he is guilty of any of the other practices by which a prince comes into disrepute. Claudian, *War with Gildo* [157 ff., 163 ff.], cites some of the particular vices of princes:

Whatsoever his bottomless greed has stolen, a yet more insatiable profligacy squanders. He is the terror of the living, the heir of the dead, the violator of the unwed, and the foul corruptor of the marriage-bed. He is never quiet; when greed is sated lust is rampant; day is a misery to the rich, night to the married. (P.)

Here also belongs the passage of Themistius, *Orations*, x [p. 131a]: 'He is a mutilated king and law-giver, who is skilled in war but unable to keep the peace.'

The following are the vices of men in an aristocracy: If through scheming and low practices dishonest or ignorant men, to the exclusion of their betters, find their way into the senate; if the nobles are torn by factions; if they treat the citizenry like slaves, and study to turn the wealth of the state to the increase of their own fortunes.

The vice of men is seen in a democracy when unfit persons are always noisily and persistently maintaining their own opinions; if unusual virtues and such as would not be too dangerous for a state are held down by envy; if laws are lightly made and unmade with an easy temper, and those which have been passed one moment are later repealed without reason; if low and unfit men are put in charge of public affairs. In Plutarch, *Dion* [xlvi], a 'hunt for mob-favour' is called 'a raging dis-temper, no less than tyranny'. (P.*)

Again, a vice of men, which may be found in any species of state, is when those upon whose shoulders falls the administration of sovereignty are negligent or corrupt in performing their duties, and when the citizens whose sole glory is but obedience, chafe at restraint. Add also Hobbes, *Leviathan*, chap. xxix, towards the end, where he speaks to good purpose about some affections of states.

One may speak of vices of status in general, when the laws and

institutions of a state are not tempered to the character of the people, or to the region in which it is situated; when they lead the citizens to internal disorders and make them incur the just hatred of their neighbours; when they make the same unfit to undertake the duties necessary for the preservation of the state, if, for instance, because of the laws of the state they cannot avoid sinking into effeminate weakness, or being rendered unfit to endure a life of peace; [or if the fundamental laws are so drawn up that the business of the state must necessarily be impeded or rendered difficult];¹ or, finally, when they interfere with the principal tenets of true political theory, in which case they will be all the more dangerous when they assume some religious guise. Of such a nature was the authority of the priests of Meroë to whose will even the life of the kings was subject. See Diodorus Siculus, Bk. III, chap. vi; Strabo, Bk. XVII [ii. 3, p. 823].

11. Now although there is the greatest difference between a healthy and a sickly state, yet the kinds of states should not be multiplied on that account, or one or two vicious ones be opposed like true species to each right form, for such vices change neither the nature of power itself nor its proper subject. And to this extent Hobbes, *De Cive*, chap. vii, § 2, is correct in denying that 'anarchy, oligarchy, and tyranny, as opposed to democracy, aristocracy, and monarchy respectively, are three other species of states'; and in *Leviathan*, Bk. II, chap. xix [chap. ii, § 19], he says, 'I imagine that no one believes that a vicious government constitutes a new and special form of commonwealth.'² But his further statement, in the same connexion, is true only in some cases and not universally: 'Anarchy, oligarchy, and tyranny are three distinct names, invented by such as did not like a government or its heads. For men commonly signify by names not only things, but also their own affections, such as love, hatred, and anger'; and, we might add, how
709 high they rate such things! Just as in other matters it is common enough for one man to love what another absolutely abhors, so the same form of state pleases one person and offends another. And this not merely because some find a greater advantage in one form of state than another, but because of every man's own distinct inclination. And so the statement of Lysias, *Orations*, xxiv [3], cannot be sealed with universal approval: 'It is not by any instinct of nature that a man loves democracy or oligarchy³; but whatever form of government best comports with his own interests, this any man tries to establish'; with which Isocrates, *On Peace* [133], agrees: 'Neither of them is by nature the friend of either oligarchy or democracy, but each party is desirous of

¹ [This clause was added by Barbeyrac from the author's *De Officio Hominis et Civis*, II. viii. 10, in order to fill out the argument, which is manifestly incomplete.—Tr.]

² [Hobbes's own words are: 'And yet I think no man believes that want of government is any new kind of government.' In most other cases our author paraphrases the *Leviathan*.—Tr.]

³ [For *pourorum* read *paucorum*.—Tr.]

introducing that form of government which offers them the best chance of advancement.' (F.) Proud men and such as hate equality in a state, upon seeing all the citizens of a democracy casting their votes with equal right on the affairs of the commonwealth, since the plebs are always more numerous in every state, give it the designation of an *ochlocracy*, as if to call it a condition where the vile rabble controls affairs, and where no prerogative is left to men of parts, such as they think themselves to be. And yet that name, which denotes contempt, may not improperly be given to such a state as was that of the Ephesians, who when banishing Hermodorus said: 'Let there be among our number no man of outstanding worth. If there be one such let him go elsewhere and dwell amongst others,' and who, said Heraclitus, were all worthy of death on that score. Cicero, *Tusculan Disputations*, V; Diogenes Laertius, Bk. IX [2], *Heraclitus* [2]; Strabo, Bk. XIV [p. 441].

Again, whenever a man feels hurt at being shut out of the senate, since he feels that he is in no wise inferior to many senators, he calls them, in contempt and envy, *ὀλίγοι* [the few], as if to say that some few, who are in no respect superior to any one else, exercise sovereignty over their equals or betters. And so such a man commonly voices the complaint of Ajax in Quintus Calaber [Smyrnaeus], Bk. V [478 f.]:

[. . .] The brave no more
Hath his due guerdon, but the baser sort
Are honoured most and loved [. . .] (W.)

So also prouder and more sensitive nations call the kings of peoples who are accustomed to a more strict obedience lords and masters, although it is the same power when a father treats a stubborn child with more and a tractable one with less severity.

The same attitude should be taken on the use of the word 'tyrant', which is ever attended with lasting hatred in the usage of the Greeks, who held almost universally that a state's greatest happiness lay in the freedom of a democracy. Hence we find the statement in Lucian, *Phalaris*, I [vii]: 'Peoples in general, without trying to find out what sort of man the head of the state is, whether just or unjust, simply hate the very name of tyranny.' (H.) Nay, many Greeks consistently designated the rule of a single man by the word *τυραννίς* [tyranny]. Thus Aeschines, *Against Ctesiphon* [6]: 'There are [. . .] three forms of government in the world; tyranny, oligarchy, and democracy.' (A.) Add Cornelius Nepos, *Miltiades*, chap. viii. So also Memnon,¹ chap. v, in Photius, when speaking of the tyrants of Heraclea, says of the fourth in order, Dionysius: 'After he had arrived at a high position of glory, he felt that the title of tyrant was unworthy and assumed in its place that of king'; as though the latter term connoted less hatred and a greater

¹ [For *Mnemon* read *Memnon*.—Tr.]

dignity¹. And yet there is scarcely a person who does not recognize that at times such invidious terms are used not improperly to distinguish the government of base princes and nobles from that of worthy ones, the rule of a turbulent and fickle rabble from that of a dignified citizenry. Nor are such conclusions much at variance with Aristotle, who calls tyranny, oligarchy, and democracy (for he regularly designated the sane commonwealth of the people a πολιτεία [polity]) παρεκβάσεις, or
 710 deviations and degenerate forms of a kingship, a status of nobles, or one of the people, respectively. See *Politics*, Bk. III, chaps. vii, viii. Yet who would hold that a mere παρεκβάσις [deviation] is sufficient to establish a distinct species of state? Although, since the word εἶδος [form] may allow a rather loose interpretation, we feel that a man should not stickle too vigorously on that point. Add also Sallustius the philosopher, *De Diis et Mundo*, chap. xi, and the remarks of Themistius, *Orationes*, xvi, p. 336 ed. Petavii, to the same effect.

12. But when some form of commonwealth is found which cannot be referred to regular and sound forms, and whose difference from such cannot be explained as any mere disease or παρεκβάσις [deviation], students must needs give it a closer study. Most of them feel that the easiest way to resolve the difficulty is to call such states mixed, as if they were compounded of simple forms that have turned in upon themselves and modified their elements. And since many undertake to construct these mixed forms after the manner of Aristotle, I feel it will be worth while for us to examine his own ideas on the matter.

Now, in the first place what is set forth by Aristotle in his *Politics*, Bk. IV, chaps. iii ff., on the different species of democracy and aristocracy, has nothing to do with the ideas of recent writers on mixed² forms. For in this passage he only enumerates certain accidents or qualities to be found in those who are to be admitted to a council of the people or of the nobles, by which there is no variation of any kind in the sovereignty, its parts are not torn asunder, nor is the state divided into two or more bodies; but aristocracies and democracies vary only by some accidents. Thus, although it is called a democracy, when the control of affairs is vested in a council of all the citizens, and the well-being of the state is of as much interest to children and women as to others, yet who will say that a new form of state is established when women, sons of a family, and slaves, are excluded from the public deliberations? And yet we feel that it is sufficient for the establishment of a democracy if those who at the first joined to form that state, and the successors to their position and rights, possess the right of suffrage. And yet it is manifest that states were at first established by fathers of a family, who held under their domestic sovereignty their wives,

¹ [For *cignationis* read *dignationis*.—Tr.]

² [For *mixturam* read *mixturam*.—Tr.]

children, and servants, and who did not think it fit to acknowledge such as equals, or to relinquish all power over them. Therefore, they had to be excluded from the right of suffrage by the fathers of a family.

When a democracy was once established, it lay, of course, within the power of the citizens to receive others into their state with full or limited rights, or not to, and to make such their equals in the conduct of the commonwealth, or to exclude them from it. Hence it may happen that not a few in free states lack the right of suffrage, although the form of the state remains democratic. Yet it is also possible that, if a state which was originally democratic afterwards excludes new-comers from the suffrage and from honours, and acquires large increases, it finally takes on the form of an aristocracy. In the same way we will not allow that there are different species of aristocracies, if in one place virtue is the only requirement for a senator, while in another he must have in addition a certain wealth and rank. Just as there will not be several species of democracies if a man in order to enjoy the right of suffrage must in one place be free born, in another have a certain amount of property, in still another follow some specified calling.

Much less do different species, properly¹ so called, of states emerge from a divergence of the laws about the election of officials, as they vary in different democracies; if, for instance, in one state the way to office lies open to all citizens, in another only to those of a certain degree of wealth. Just as it does not lead to any mixed form of a state or a new species if, for instance, the rich and not the poor may absent themselves from the public assemblies, or *vice versa*.

But, in fact, these matters are all plain enough. What must be our judgement on the mixture in the states of the Spartans and Cretans, as described by Aristotle, will be unfolded in another connexion. The commonwealth of Athens which is described and approved by him in his *Politics*, Bk. II, chap. x, and by Isocrates in his *Areopagiticus*, was in every respect truly democratic. We will set forth in another connexion the views of Polybius, Bk. VI, on the mixture in the Roman republic. 711

13. A number of the more recent writers imagine many kinds of mixed states, and yet in such a way that they in general reject the most of them as unsuitable, but commend especially two kinds. One kind is when the parts of supreme sovereignty are dividedly and independently in the hands of different persons and bodies of the same commonwealth, in such a way that each of them holds that part which they possess in their own right and administer it according to their own judgement, but in respect to the other parts of sovereignty are like subjects. This is much the manner in which, we are told by Appian, *Bellum Libycum* [*Punic Wars*, xvi. 106 f.], the affairs of the kingdom of Numidia were arranged by Scipio after the death of Masinissa, whereby the three legitimate

¹ [For *proprie* read *proprie*.—Tr.]

sons bore the title of king, but the eldest of them, Micipsa, held Cirta, the capital, the second, Gulussa, controlled questions of war and peace, while Manastabal presided over justice. The second is when the supreme sovereignty is without division in the hands of more than one, yet so that neither a large majority can pass any final action or exercise parts of sovereignty against a small minority, nor even all against one. And this may be of two kinds, when either all are equal, or one or another possesses some extraordinary rights, which he can exercise without the approval of the rest. Many ancient authorities are cited, in whose works frequent mention is to be found of mixed states. But on these we have already observed that most of what they say about such states has no connexion at all with the division of supreme sovereignty among different persons or with councils, but that it concerns either the proper fixing of the qualifications of the persons of whom the sovereign council is composed, or the best combination of the institutions of different commonwealths.

Furthermore, it would be my feeling that some examples of such mixtures may be easily explained by drawing a distinction between actual sovereignty and the manner of administration. So that those commonwealths may be said to have some mixture from others, when it appears that their manner of administration was sought from another form; if, for example, in a state where the sovereignty is in the hands of the people, most of the affairs of the state should be carried on by a principal officer or a senate; or if in an aristocracy one magistrate should enjoy unusual authority, or the people should be consulted on many matters, or if in a monarchy difficult matters should be referred to a senate, or to the people. But if this explanation does not square with some cases cited by ancient writers, what follows will clear the matter up.

We have shown before that the essentials of a perfect and regular state require that in it there be such a union as makes everything which works to its administration appear to come, as it were, from one soul. It is, therefore, perfectly clear that by the first mixed form of state there is constituted a body which is held together not by the bond of a single sovereignty but only by a pact, and that it must, therefore, be classed not among regular states but among irregular commonwealths, being weak and extremely open to internal disorders. Regarding the second mixed form of state I feel that we should consider whether those in whom is indivisibly vested the supreme sovereignty constitute a permanent senate, which is to govern the entire state as a single and permanent body. In this case it will be an aristocracy, but one very ill-adapted to transact business, in that one or but a few, by interposing their votes in opposition, can render void the will of all the rest. But if, on the other hand, there belong to those individual members, who enjoy in other respects entire equality, and to them alone entire

parts of the commonwealth, yet no one of them can exercise the functions of supreme sovereignty without the unanimous concurrence of all the rest, it will be a system, in the proper sense of the word, yet such as will likewise be highly unsuited to transact business, because of its great and undue inflexibility. But when one man signally outranks 712 all others in authority and in some matters of the sovereignty, it will be an irregular commonwealth, thrust in, as it were, somewhere between a monarchy struggling up out of a mass of nobles, and a system. And the irregularity will be all the greater when several overtop all the rest.

14. Now just as we envy no man who remains set in his determination to retain the term of mixed commonwealth his praise for constancy, so it appears to us more convenient and clear, and at the same time more suited to the explanation of some phenomena in certain states, if we choose to call those states irregular, in which no one of the threeregular forms is observable, nor any mere shortcoming or *παρέκβασις*¹ [deviation], and which cannot with accuracy be referred to the form of systems. On these in general it should be observed that they vary from a regular state in that not everything appears to proceed from one soul and will, nor is each and every person to be controlled by virtue of sovereignty. And they differ from systems in that they are not, like these, composed of distinct and perfect states. They likewise are foreign to diseases and aberrations, in that a disease always betrays itself by some show of illegitimacy and shame, since it arises from the evil administration of some worthy form, or from ill-conceived laws and institutions. But the irregularity affects intrinsically not the very form alone, but also dares to show itself openly and without shame, as though publicly and, as it were, legitimately sanctioned. And for this reason a disease should have been absent from the intention of those who established the state, and always appears in it as something base, while an irregularity arose from or was confirmed by the will or approbation of those who go to make up a commonwealth. It is just as in one building, the plan of which, indeed, agrees with the rules of architecture but the material of which is faulty, or the tenants negligent, the roof comes apart, the walls threaten to fall, the beams creak, and the foundations settle, while in another the architect himself departs from the common rules and makes a form to suit his fancy, or remedies a threatening defect by some unusual device.

Moreover, some irregularities have appeared at the very formation of the state, while others have crept in with the passage of time and at unguarded moments. It was also possible that, at the time of founding, or when some great change was being made, those concerned with the initial or the second step were unable to introduce a regular form, either through their lack of skill, or because the state of affairs did not

¹ [For *παρέχσις* read *παρέκβασις*.—Tr.]

suffer consideration of a settled and orderly status. Add Hobbes, *Leviathan*, chap. xxix, a little way past the beginning. Sometimes also those who were the chief assistants and leaders in securing the kingdom, bargained for such jurisdictions and privileges for themselves, that they cannot be regarded as true subjects. Often also a state is seized with sickness because of the slothfulness of its governors, or for some other reason, and when this has struck such deep root that it cannot be torn up without entailing the ruin of the state, nothing is left but for that sickness to put off, as it were, its evil force by receiving public sanction, and for what was formerly nothing but usurpation, faction, or contumacy, to pass thereafter as right or privilege.

15. Now of the irregular forms of commonwealths no certain number can be tabulated or species set up, because of the great variety which either actually exists or can be imagined. Therefore, little remains to us but to observe more in detail the nature of irregularity in some famous examples. Such an instance we have endeavoured to set forth in the Roman Republic; another Severinus de Monzambano has undertaken in the case of the German Empire. At this time it may be enough to make some observations on the irregularity which some
713 observe in the case of the ancient Roman Empire, in that at one time it appeared to have two or three bodies, when one of the Augusti held the East, the other the West, or even three Augusti held the Roman world in as many divisions. Sometimes again it appeared to have two or three heads, when two or three Augusti controlled it without division as colleagues.

Now, on the first case, it is to be observed that whenever two emperors held the empire, one the East, and the other the West, so that the state was divided, and each was independent of the other, then there were, as a matter of fact, two distinct kingdoms, which still retained the name 'Roman Empire', because they had both sprung from it. There was, furthermore, a similarity in laws and customs, a relationship between rulers and between peoples, and a mutual league and exchange, which gave somewhat the appearance of union. But how that may be called a form of state, when two or three Augusti held the empire without division, is not so easy to decide. Certainly two rulers cannot constitute an aristocracy. For since they both are vested with equal power (as is understood), they must necessarily be bound to each other by a pact; and there is no way to transact business in case they fail to agree, when there is no one who can add his voice to one side or the other. And although the same inconvenience may appear to attend a college which consists of an equal number of members, yet it will not so often happen that, upon a division of opinion, the votes will be equal; while it is easy among a number for one to be drawn over to the other side. Or when that cannot be done, the next course will be for

that opinion to prevail which favours no innovation but a continuation in the beaten path.

Furthermore, not even when three Augusti held the empire at the same time does it appear that we may properly say that an aristocracy was established. For not even that triumvirate, or three Augusti, organized into such a body or college that a decision could be reached on affairs of state by a majority vote, and the agreement of two could authoritatively require the third to abide by their decision. But if there is a college where the majority cannot carry with it the minority, it appears to be held together by the bond of a mere pact rather than by sovereignty. We will conclude, therefore, that the supreme command lay actually and fully in the hands only of him who took the second to him as a colleague, although in external trappings they appear to have been equal. Julius Capitolinus, *Life of Lucius Verus* [i], says of him that 'he enjoyed not unrestricted power, but a sovereignty on like terms and equal dignity with Marcus'. (M.) Nor was there any need to fear that a man would be so ungrateful as to oppose the will of the one by whom he had been raised to such an eminence. It is a further consideration that usually a son was taken as a partner by his parent, a son-in-law by his father-in-law, or a brother by a brother, so that the subordinate was restrained by the further bond of a relation in blood or marriage from misusing the power given him against the giver. Therefore, that selection of a colleague was not a division of the supreme power, but merely the designation of a general assistant, as it were, or representative as well as successor, who was thereby admitted by the other to a share of the cares of the state, and in association with him administered the affairs of the empire, being also adorned with the insignia of the ruler. The fickleness of the legions also had its influence on this device, since they often saluted their leaders as emperor. Themistius, *Orations*, xvi [vi, p. 76 B], says of Valentinian, who had associated with himself in the sovereignty his brother Valens: 'He who had received the whole and then dispensed it, brother and father at the same time, the former by nature, the latter by his own act, made a gift of equal power. And yet he still holds supreme control, by reason of the obedience of his consort.' Solinus, chap. viii [ii. 14], says of Aeneas: 'Then for three years 714 he ruled with Latinus, associating him in the supreme authority.'

But if this explanation does not satisfy some persons, or cannot be applied to each instance, nothing remains for us but to say that there intervened in that empire at that time an irregularity, in that several men, who were joined either by a pact or a faction, held the throne undivided. And if there arose between them dissension or enmities, then suspicions, mutual plottings, and finally civil wars were unavoidable. Lucan, Bk. I [92 ff.]: 'No faith is there in partners in rule, and all power will be impatient of a sharer.' (R.) Statius, *Thebaid*, Bk. I [130]:

'Such discord rises from divided sway.' (L.) It was clearly such an irregularity at Rome when Romulus and Tatius were co-rulers. See Plutarch, *Romulus*. Add Erycius Puteanus, *Historia Insubrica*, Bk. II, on Pertharitus and Gundebertus who reigned together over the Lombards. Here belongs a passage in Procopius, *Gothic War*, Bk. I [i. 24 f.]:

The Goths [...] and the followers of Odoacer [...] came to an agreement with each other [...] that both Theoderic and Odoacer should reside in Ravenna on terms of complete equality. And for some time they observed the agreement; but afterwards Theoderic caught Odoacer, as they say, plotting against him, and bidding him to a feast with treacherous intent, slew him. (D.)

Much the same is in Euripides, *Andromacha* [471 ff.]:

Never land but hath borne a twofold yoke

Of kings with wearier straining:

There is burden on burden, and feud 'mid her folk. (W.)

Pliny, *Panegyric*: 'How little difference there is between laying down and sharing the sovereignty! Unless the latter be more difficult.' Add Herodian, Bk. IV, chaps. i ff.

In general such divided sovereignty is well described by the remark of Selim, who compared the German Empire to a harp, which after great labour finally is tuned into a harmony that does not endure for long. We do not feel that we need class under an irregularity what Francis Carron recounts of the Dayro in Japan, who was the lawful heir to the throne, but was granted by the actual holder of the sovereignty nothing more than the splendour of majesty and office. Thus, as we are informed by Alexander of Rhodes, *Divers Voyages*, Pt. II, chap. vi, in the kingdom of Tonquin there are two kings with the titles of Bua and Choua, but the former holds the title, while the latter has the actual sovereignty; save that the Bua confers the title of doctor and receives the oath of the citizens, which is renewed each year, spending all the rest of his time in an old palace with nothing to bother him.

16. We speak of systems of states when more than one are so held together by some special and strict bond that they appear to form one body, each of whose members, however, retains supreme sovereignty over its own affairs. From this it appears, first of all, that if some state is composed of several subordinate bodies, it must not for that reason be at once classed among systems, although Hobbes, *Leviathan*, chap. xxii, includes such under that term and compares its parts to the muscles of the physical body. Just as great states, which have taken on additional territories by absorbing other states, and reducing them into one body with themselves, are not for that reason systems. Such an increase we see taking place in two ways. By the first the victor state transfers the citizens of conquered states to its own territory, or gives them the same rights with its own citizens; by the second the conquered states are left their old boundaries, and the sovereignty which was first vested

in them is lost, while their citizens become subjects of the conquering state. In both cases the conquered state exists no longer, but in the former case the conquered are given equal rights with their conquerors, while in the second they are usually required to live in a worse condition, and the state is reduced to the form of a province. Yet at times such subdued provinces are left some of their ancient privileges or laws, however much they differ from those of the conquering state. See Hobbes, *Leviathan*, chap. xxvi. For the unity of a state does not require that all its integral parts have the same positive laws, or that all its 715 citizens enjoy equal rights, but it is enough if all of them acknowledge a single sovereignty. And often it is one of the arts of a conqueror to make no change in the former customs of the conquered, and even to adjust himself to them for a time.

Now on this matter we should examine what is said on the administration of provinces by Hobbes, *Leviathan*, chap. xix:

Whereas heretofore the Roman people governed the land of Judea, for example, by a president; yet was not Judea therefore a democracy; because they were not governed by any assembly into the which any of them had right to enter; nor an aristocracy; because they were not governed by any assembly, into the which any man could enter by their election: but they were governed by one person, which as to the people of Judea, which had no right at all of participating in the government, was a monarch. For though where the people are governed by an assembly, chosen by themselves out of their own number, the government is called a democracy or aristocracy; yet when they are governed by an assembly not of their own choosing, it is a monarchy; not of 'one' man over another man; but of one people over another people.

So, then, Hobbes appears to regard as monarchies even such provinces as are under an aristocracy or democracy. Now although we readily admit that it is more common for provinces to be ruled by one man than by an assembly of all the citizens, as he himself shows at length (*loc. cit.*, chap. xxii), it still appears idle to us to inquire into the form of government in any province. For provinces no longer exist as states and are become but the appendages of other states, having no sovereignty in themselves. And it has no bearing on the question of sovereignty itself whether such a province is ruled by a single governor or by a council, since the former as well as the latter enjoy only a delegated power. So that the sovereignty exercised over the provinces or appendages of states appears to be the same as that of the mistress state, and can only with impropriety be called that of a monarchy or aristocracy, since such distinctions in the forms of a state belong to states properly so called, such as possess in themselves sovereignty over themselves.

17. We apprehend¹ that there are two species of systems properly speaking: one where two or more states have one and the same king; the other where two or more states are joined by a pact into one body.

¹ [For *deprehendimus* read *deprehendimus*.—Tr.]

As to systems of the first kind, it should be observed that it is possible with moral bodies for several to have but one head, and so for one person to be the head of several distinct bodies, which in the case of natural bodies would result in a monstrosity. But since a union of such systems is based solely upon the person of the king, or upon his family, it follows that when this dies out there returns at once to each of the peoples the right to decide as it will on its form of government, nor do they need any longer to be under one head. Nay, even while that head lives, the individual states remain entirely distinct.

Now such systems can arise for various reasons, of which the most common appear to be the marriage of princes and the right of inheritance. For there are states in which the supreme sovereignty falls also upon women of the ruling house, not only when there are no males in the family, but also when there is none of a closer or of the same degree of relationship. Therefore, should a woman, who is the ruler of a kingdom, marry one who is likewise a king, there would be a union of the two kingdoms in their offspring. For in such marriages there is no necessity for a wife subjecting herself along with her kingdom to the sovereignty of her husband. So in case it should happen that in an indivisible kingdom where the line of succession is fixed as simple or
716 direct, one of the more distant heirs of the kingdom should in some way acquire for himself another kingship, and the law of succession, upon lack of nearer heirs, should call him to the throne, he will unite the newly acquired kingdom with that which was his own before. The same thing happens when a people select as their king one who already holds another throne, or whom another succession awaits. So also two or more kingdoms may enter into an agreement to select one ruler by their united suffrage, and yet to remain in other respects separate states, and not even to carry on their affairs of state in a common council. Finally, such a system also arises if a king, constituted by the free will of a people, subjects to himself in war another people, in his own name, at his own risk, and at his own expense, not involving at all the name or resources of the people over whom he reigns. That this can happen despite the remarks to the contrary of Hotoman, *Quaestiones Illustres*, qu. 1, is sufficiently established by Grotius, Bk. I, chap. iii, § 12.

Such systems may be dissolved by the death of the king on whose sole person the union was based, or by the extinction of the royal line, in case the individual kingdoms belong to it by hereditary right. For in this case there returns to each kingdom the separate right to set up a new king over itself, or to introduce whatever form of commonwealth it desires without consulting the others, inasmuch as we assume that those kingdoms were held together by no further bond. Thus should it happen that a king holds one kingdom by hereditary right, but is put over another merely by free election, the consequent union of the

kingdoms will be dissolved at the death of that king, nor will the second kingdom have to accept as its ruler the son of the deceased monarch.

But if the union in question depends upon a treaty between the two states, it is obvious that when that treaty has been violated, at least in its principal heads, the union can be broken off by the injured party. Yet here a careful distinction should be drawn between an obligation binding separate kingdoms to a ruler, and one which binds the states to one another. When a king has once been elected and received a pledge of good faith, it will not be possible to dethrone him for any depraved deeds or such as run contrary to his agreement, so long as he does not show himself an open enemy to his kingdom. Unless it be that a commissory clause was expressly added to the pact between a king and his subjects, to the effect that all their obedience depends upon the fulfilment of each and every section of the pact as a condition. But the mutual obligation which lies between united kingdoms can be broken off on the side of the one which has been injured by a violation of the laws of that union, even though the hurt may be of little consequence, provided the other kingdoms concurred in that injury, or it is undertaken for or turns to their advantage. Consequently, upon the death of a king the injured kingdom will be able to renounce the union, reserving the right of an action against the authors and abettors of the hurt, and a claim to property lost. But if several states are united by the marriages of their rulers, who are hereditary princes in each land, and yet they observe a different order of succession, the union will be dissolved if such a case arises as that the same person is not fitted by the public laws to succeed to the throne of each nation. Let us suppose that two kingdoms are united, in one of which the succession is in line of agnation, in the other of cognation. In this case, upon the death of their common king without a son but with only a daughter, the second kingdom will fall to the daughter, the first to the nearest male relative. But if a union, which was at first occasioned by marriage be later confirmed and ordered to be perpetual, each and every kingdom entering into a treaty with one another, or approving a decree to this effect of their common king, it is understood that some such act disposes of the difference in succession which previously obtained. Thereafter that order of succession will have to be followed which is expressly set forth in the treaty or decree, or which is known to have met the approval of the author of the union, or which is most highly agreeable to reason and the welfare of the kingdoms. But in case one kingdom becomes subject to another as a province, the union resulting from the treaty expires, and its place is taken by a closer coalition into the same state. 717

18. The other kind of a system is that which consists of several states bound to each by a perpetual treaty, and which is usually occasioned by the fact that the individual states wished to preserve

their *αὐτονομία* [autonomy], and yet had not sufficient strength to repel their common enemies. In this treaty there is commonly an agreement that one or other part of the supreme sovereignty should be exercised at the consent of all. For a treaty that gives rise to a system seems to differ from those treaties which are otherwise most commonly drawn up between states, chiefly in this: That in the others each people of the league agrees to certain mutual performances, yet in such a way that they are on no account willing to make the exercise of that part of the sovereignty from which those performances flow dependent upon the consent of their associates, nor to limit in any degree their complete and unlimited power to conduct the affairs of their state. So also simple treaties have usually before their eyes only the particular advantage of the different states, as it happens to coincide, and do not produce any lasting union in matters which concern the chief object of states.

The case is entirely different with the treaties that appear in systems, the purpose of which is that distinct states may intertwine for all time the prime interests of their safety, and on that score make the exercise of certain parts of the supreme sovereignty depend upon the mutual consent of their associates. For there is a great difference between 'I will bring you aid in this war, and we will consider in concert how we shall attack the enemy', and 'No one of us who have entered this society will exercise his right of peace and war, save with the common consent of all'.

We have said that in treaties of this kind the exercise of only certain parts of the supreme sovereignty is made to depend upon the consent of the associated states. For it hardly seems likely that the affairs of several states could be so closely interwoven that it would be to the advantage of one and all of them that no part of the supreme sovereignty be exercised without the consent of all. Or if there were any such, it would have been more to their advantage to unite in one state than to be joined only by a treaty. Therefore, it is convenient that the individual states reserve for themselves liberty in the exercise of those parts of supreme sovereignty, the manner of conducting which is of little or no interest, at least directly, to the rest. The same is true as well of such business as is of daily occurrence, or will not suffer the delay consequent upon a discussion of it with others. But matters upon which the safety of the entire league depends may with entire fairness be considered in common council. Of these war occupies the first place, both defensive and offensive, and that wherewith it is drawn to a close, even peace. To which should be joined taxes, in so far as they minister to war, and treaties with foreign powers looking to the common safety. Here also belongs the consideration that, if any controversy arises between the allies themselves, the others who have no direct interest in

it may at once interpose as mediators, and not allow it to come to open warfare. In Polybius, Bk. IV, chap. xxiv, Philip of Macedon says:

In the case of injuries inflicted by the allies upon each other separately, his intervention ought to be confined to remonstrance by word of mouth or letter; but¹ that it was only injuries affecting the whole body of the allies which demanded joint intervention and redress. (S.)

The other matters which apparently do not demand so much exercise of common counsel, such as commercial treaties, taxes which are required for the needs of the individual states, the appointment of magistrates, laws, the right over citizens of life and death, matters of religion, and the like, can without difficulty be left in the province of the individual states. Although every state will so control them that they will in no way disturb the entire system. From this it is evident that one or another of the allies cannot be prevented by the rest from exercising at their own pleasure those parts of the supreme sovereignty on the conduct of which by common counsel there was no special agreement in the treaty. 718

Yet on the right of life and death some scruple can arise regarding the ruling in *Digest*, XLIX. xv. 7, § 1 [XLIX. xv. 7, § 2]: 'But citizens of states allied to us are put on trial in our courts, and punished when found guilty.' Grotius, Bk. I, chap. iii, § 21, has gone to great trouble to explain this, and yet any one who has examined the passage with much care will readily admit that he makes no progress. For he certainly makes no answer to this question: How can that state maintain its liberty unimpaired whose citizens another state can rightfully call before its tribunal and there inquire into their conduct? Surely it was held that the liberty of the Achaeans had suffered the grossest affront when, by the treachery of Callicrates, the most eminent men of that people were accused of favouring the cause of Perseus against the Romans, and were haled to Rome to plead their cause, the Romans seizing as an occasion a statement of Xenon, who, fully confident in the consciousness of his innocence, had said that if any one wished to accuse him he was ready to stand trial in the common assembly of the Achaeans, or even before the Romans. On this incident we are fully informed by Pausanias, in his sketch of the history of Achaea [VII. x. 9], and it is mentioned also by Polybius in *Selections on Embassies*, cv [XXX. xxxii]. So also the Achaeans appear to have transgressed the laws of a regular state in demanding that those Spartans who had been responsible for the attack upon Las, a village in their territory, be handed over to them for punishment. Livy, Bk. XXXVIII, chap. xxxi. For the cause should first have been discussed in the common council, and after the guilt had been determined, notice should have been served on the Spartans, either to punish the offenders or else to surrender them.

¹ [For *atque* read *at quae*.—Tr.]

In our opinion the clearest reply to the passage in the *Digest* appears to be that, since in the preceding sections it had been set forth what the nature of treaties allows, and what should be done, it was stated in those words what had actually occurred in later times, when the Romans, as their fortune gave them haughtiness, fell into the habit of treating their allies who had of their free will sought their friendship by treaties, in the same way as if they had been subjugated in war. Of this injustice Cicero himself complains in his *On Duties* [II. viii]. Add the example of Decius Magius being put in chains by Hannibal, as recorded by Livy, Bk. XXIII, chaps. vii and x, and how Scipio urges that the Romans should give no audience to informers against Hannibal. *Idem*, Bk. XXXIII, chap. xlvii.

19. Since in such systems certain matters expressed in the treaty should be made the business of all, and since this cannot be done so conveniently sending around letters, it is necessary that a set place and time be appointed for holding assemblies, and that one or more be designated who shall be empowered to summon the confederates, in case something unusual arises that will bear no delay. Although it would be far more convenient if some permanent council, composed of delegates from each of the states, sit in a designated place, with the power to transact affairs of daily occurrence, or of minor importance, in accordance with the nature of their commission, while if anything of serious consequence arise, it can refer this to the individual states and publish as well as prosecute what they have decided. Such a body may also receive reports from the common ministers of the confederates who represent them among other nations, and may also treat with the ambassadors of foreign states, and conclude negotiations with them in the common name of all the confederates. But it may issue no decree exceeding the bounds of its commission, unless the matter has first been brought to the attention of all the states. How much power belongs to such a council of deputies will have to be discovered from
719 the treaty itself, or the commissions of such bodies. Whatever such power may be, it is entirely from another source, and delegated from the confederates, and although the decrees which it issues may bear only its own name, all of their force and authority flows from the confederated states which appointed it. And so those deputies are no more than ministers of the allies, and can no more enjoin anything upon them with authority than an ambassador can give orders to his master.

20. But the question may still be raised as to whether all the allied states, or the majority of them, have power over one, or a small number of their members, in those matters for which the league was formed, and which it was expressly stated in the treaty should be conducted by common counsel, in so far as that a small minority is bound, whether it will or not, to abide by the decision of the majority. This, it

seems to us, must be answered in the negative, if we are concerned with regular systems and those where every state reserves to itself its liberty unimpaired, although there is nothing to prevent such a rule obtaining in an irregular system, and one that approaches more closely to the nature of a state. For the liberty of a state, which is nothing other than the power to decide on its own judgement about matters pertaining to its self-preservation, is unintelligible in case it can be forced by another, acting with authority, to undertake something against its will. Nor is it any objection that it was agreed in the treaty to exercise certain parts of the supreme sovereignty only by common counsel. For it is one thing if I say, 'I will not exercise my right unless you are willing,' and another to say, 'You will have the right to require me to exercise my right, even though I be unwilling.' The first, but not the second, is contained in the treaty of union.

In order to understand this more thoroughly, it should be carefully noted that, when the wills of several men are required to combine into one, this is due either to a mere agreement, or to the fact that one man has submitted his will to the will of another. A union of wills based upon mere agreement does not at all destroy that liberty of which we just spoke. For whether any decision is made beforehand, by common agreement, about matters to be carried on in common, or if the decision must be reached afterwards, the individual members wish to be led to it not by authority but by reason¹ alone. Yet when I have submitted my will to that of another, and have thereby conferred upon him sovereignty over me, I can be obligated even to what perhaps displeases me.

Nor is it of any use for one to harp to us on the 'right of the majority'. See above, Bk. VII, chap. ii, § 15. For, in the first place, the majority draws to itself the minority only in constituted groups, not in those which must yet be constituted. Furthermore, it is an institution and convention of men, not a natural law, that in constituted groups the majority obligates all, though natural reason urges it as a most convenient rule in large groups, and where varied and routine business must be transacted. And yet, in order that this be done, it is necessary for each individual to submit his will to the will of the entire body or of the majority, to the extent that even when they dissent, they must under all conditions follow what the latter determine. And this is unintelligible without postulating the authority of the majority over the minority. Nor, as a matter of fact, does there seem to be any need in the assemblies of confederates of that right of the majority, since they are not usually made up of many peoples, and are met for the prime purpose of the common advantage, which it is presumed no sane man will persistently oppose. Yet if any one, maintaining a perverse stubbornness which refuses to yield to reason, scorns to join with the

¹ [For *rationes* read *rationes*.—Tr.]

salutary counsels of the rest, and sets about to betray in this fashion the common safety or advantage, it will be lawful to employ against him such means as those who live in natural liberty may use against the
 720 violators of pacts, unless it please them better entirely to exclude such an unreasonable person from the league.

Another consideration is that it would often involve great injustice in a system of confederates, for the vote of a majority to bind the rest, when there is a great difference in resources, and so one contributes more to the common safety than another. For despite the fact that those who contribute in proportion to their wealth appear to bear equal burdens, it may frequently happen that one man is readier to expose his own modest fortune to risk than another his, a large one. Thus supposing that one state of a system contributes more to the common defence than all the others together, it would be manifestly unjust for it to be possible for the rest to force such a state to undertake something that would devolve the chief burden upon it. See Grotius, *Apologeticus*, chap. i, towards the end. But yet for the votes of each state to weigh in proportion to its contribution to the society would grant such a powerful state sovereignty over the rest. See Diodorus Siculus, Bk. XV, chap. xxviii.

The conclusion from all this is, that whenever affairs are decided on the principle of a majority of votes, so that the opposition is also obligated, it constitutes a departure from the regular form of systems, and the establishment of an irregular body, or of a single state.

21. Such systems are dissolved when some of the confederates voluntarily leave the league and administer their states to themselves, which usually happens from the consideration that they hope for more advantage from separation than from union, and that they feel their allies to be more of a burden than an assistance. Add Livy, Bk. XXXVIII, chaps. xxxi-xxxii. Internal wars also break them up, unless the agreements of the covenant are again renewed in the peace. When a system has had the worse of a foreign war, it is sometimes one of the stratagems of the victor to dissolve the league, and to command each state to exercise *αὐτονομίαν* [autonomy] in the way that the Romans once did to the Achaeans. Compare Xenophon [*Greek History*], Bk. III, chap. v [IV. viii. 14; V. i. 28], where he discusses the Peace of Antalcidas.

It should furthermore be observed, touching the dissolution of systems by external force, that when one or more of the confederated states has been seized by an enemy, he does not in this way secure any right over the rest, nor must he at once be received into the league by reason of the treaty which joined the rest of them to it. But an entirely new treaty is needed for another state to join a league in the place of a conquered state. Thus we are informed in Diodorus Siculus, Bk. XVI,

chap. lxi, that by a decree of the Amphictyons Philip took over the seat in their council formerly held by Phocis. For although the treaty by which several states are united into a system seems to be a real one, and a state does not cease to exist because it has changed its form, yet such a treaty will be held to have expired when a state has been brought under the yoke by force, or been made an appendage to another's sovereignty. For since a league is entered into by states as such, what ceases to exist as a state drops from it. And even though every precaution be taken in the articles of confederation, that there be no withdrawal from the League¹ because of a change in the form of government, yet it is presumed that such a change be made in a legitimate way, by the voluntary consent of its people. And so there will be no place in the council of the league for either an unjust usurper or an external enemy.

But it is possible for such systems to combine into a finished state, if all the confederates voluntarily submit themselves to the supreme sovereignty of a single council or man, or if one people, excelling the others in strength, reduce them to the state of provinces. This last usually happens when the weaker ones offer some permanent preferment to a stronger and are confederated unequally. See Grotius, Bk. I, chap. iii, § 21, towards the end. Finally, such systems become perfect states if some one man seizes the sovereignty by the favour of the soldiers, or on a wave of popularity, or by the influence of a faction.

22. Lastly, it is customary in this connexion to discuss the comparative excellence of forms of states, and what form should be preferred to another by reason of the fact that it procures more easily and surely the safety of the state, or that the force of sovereignty is less open to abuse. Now on this point so much is patent: That no form of state can be so thoroughly buttressed with laws but that, from the very form of government which is established for the safety of the citizens, some inconveniences can befall them by reason of the slothfulness or the wickedness of the rulers. The reason for this is that, although supreme sovereignty is established to repel the evils which threaten men from their fellows, yet that sovereignty had to be conferred upon men who are themselves not immune to the vices by which men are incited to do each other harm. 'There will be vices so long as there are men.' [Tacitus, *Histories*, IV. lxxiv.] And so we sometimes experience from men the very thing against which they should have defended us. Hence, it also happens that 'for every folly of their princes the Greeks feel the scourge'. [Horace, *Epistles*, I. ii. 14.]

Therefore, as the condition of human affairs does not allow full perfection, so many disagree on what form of state allows one to fear the minimum of evils. Now looking at it in this light the majority record their vote for² a monarchy. See Isocrates, *Nicocles*; Herodotus,

¹ [For *foepere* read *foedera*.—Tr.]

² [For *per* read *pro*.—Tr.]

Bk. III, where the Persian princes after killing the Magi debate on the form of state to be introduced; Euripides, *Suppliants*, lines 405 ff.; Bodin, *On the Republic*, Bk. VI, chap. iv; Arnisaeus, *Relectiones Politicæ*, Bk. II, chap. vii, § 2; and many others. On the other hand, nothing that can be said out of hatred or envy of monarchs seems to have been overlooked by the Dutch author of the *Bilanx Politica*,¹ although many of his arguments can be turned against him by what Hobbes sets forth, *De Givæ*, chap. x; *Leviathan*, xix.

It is not our purpose to discuss the various positions, but we may only observe that there is no such force in their arguments that conclusions drawn from them should necessarily hold everywhere and always. Nor should the deeds of one or more governors lay any necessity upon all others of their type to follow their example. But I should suggest that every good and loyal citizen should meditate upon the remark of Marcellus in Tacitus, *Histories*, Bk. IV [viii]: 'He was not unmindful of the times on which he had fallen, of the form of government established by their ancestors: he admired the past, and accommodated himself to the present system, devoutly wishing for virtuous princes, but willing to acquiesce under any sort.' (O.)

It may not be foreign to our purpose, in this connexion, to show briefly why the ancient Greeks were so hostile to those who had seized a monarchical power in democracies and aristocracies, and why these men undertook to maintain their position by such evil practices as are found described in Aristotle and other writers, which caused a lasting hatred to cling to the word 'tyrant'. Now the Greek states usually held themselves to the limits of a single city; and to such states the most agreeable form is a democracy, or a mildly administered aristocracy, or, finally, a kingdom such as Aristotle calls the 'heroic' type, that is, a principate which relies not so much upon sovereignty as the authority of persuasion and a reputation for outstanding virtue. Furthermore, the Greeks as a whole, because of their proud and restless nature, especially loved that status in which every man could form a part of the commonwealth. Therefore, whoever in such a state had seized the monarchy, a thing hateful to the citizens, and done so against their will, was forced to overawe the city with a fortress, surround himself with a strong body of troops, and these of foreign extraction, since he could not trust his own citizens, or by transferring troops from different places coerce one province by means of another. Then the loyalty of such mercenaries was only to be purchased by high pay, and to meet this expense the citizens had to be reduced to straitened circumstances by taxation, while it was also necessary for them to be disarmed, and to be reduced to a state in which they were unable to carry on war, that 'the heads of the poppies be cut off' [Livy, I, liv and lvi], that public

¹ [See above, note on p. 1032.—Tr.]

meetings be forbidden, and that a secret service be maintained. And so those tyrants were not only unjust but also insane, who aimed at such power as had to be preserved by evil practices which could not make for permanence, and afforded them no opportunity to win the love of their citizens. And it is quite as absurd to establish a monarchy in a state which consists of but a single city as to establish a democracy in a nation that occupies a large territory. But since monarchies of wide extent have no need of such arts for their self-preservation, inasmuch as one province can be balanced off against another, those who suggest the exercise of the arts of tyrants to the monarchs of great states are guilty of no less heinous a sin than those who ceaselessly pour out the odium due those petty tyrants of Greece upon all monarchs. 722

It is patent also from these reflections that monarchs live far more securely in a large state, because refractory citizens have no such easy opportunity to communicate and join with each other, and by contact¹ to infect all other citizens, as they do in a state which consists of a single city, where a few can spread their fury to all in a moment's time, and before their prince is aware of it.

¹ [For *contractu* read *contactu*.—Tr.]

CHAPTER VI

ON THE CHARACTERISTICS OF SUPREME SOVEREIGNTY

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| <ol style="list-style-type: none"> 1. Why the sovereignty in a state is styled 'supreme'. 2. He who holds it is ἀννεύθυνος¹ [not accountable]. 3. And is superior to man-made laws. 4. On the distinction between real and personal majesty. 5. It is shown that kings can be superior to an entire people. 6. Arguments to the contrary are refuted. 7. What is absolute sovereignty? 8. It is not found equally in all forms of commonwealths. | <ol style="list-style-type: none"> 9. The source of limited sovereignties. 10. The pacts by which they exist. 11. The basis upon which the different parts of sovereignty are limited. 12. On the powers of orders. 13. A reply to Hobbes. 14. The number of ways of holding sovereignty. 15. Can there be a temporary supreme sovereignty? 16. On patrimonial kingdoms. 17. On kingdoms established by the free consent of a people. |
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FIRST among the characteristics of sovereignty is that it is *supreme* and is so styled. The chief reason appears to be the fact that no greater power than the following belongs to one man over another: That the latter is obligated to apply his strength and resources to the public good at the pleasure of the former, and is liable to the right of life and death. A further consideration is, that, as no greater liberty, setting aside the sovereignty of God, can be understood as belonging to individual men, than the ability to dispose of their actions, strength, and faculties at their own judgement, so the fullest liberty for any group must be measured by the extent to which it can decide upon such matters as it thinks will make to its advantage and safety, upon its own judgement, the same acting freely and independent of any other authority. From this it also follows that because this sovereignty is supreme, that is, is not dependent upon any superior man upon earth, its acts cannot, for that reason, be made void at the discretion of any other human being's will—for a man's ability to change the decisions of his own will is, in fact, a proof of liberty.

- 723 2. For the same reason also, whoever holds the supreme sovereignty will be ἀννεύθυνος [not accountable], that is, not liable to the giving of reasons for his actions, or to punishment at the hands of men. For both of these limitations presuppose a superior, such as cannot be understood without a contradiction, since there cannot be in the same order of existence a thing superior to what is supreme. Sallust, *Jugurtha* [xxxi]: "To do with impunity what one fancies is to be a king." (R.) Pliny, *Panegyric* [vi. 1]: "The happiest feature of the principate is that it is beyond the reach of compulsion." But we should observe

¹ [For ἀννεύθυνος read ἀννεύθυνος.—Tr.]

that a reason may be rendered in two ways: Either to a superior, who may rescind my acts and punish me in addition, unless I have shown my reason to his satisfaction, or to an equal and one whom I desire merely to approve my acts, to the end that he may regard me as an upright and prudent man. Now supreme sovereignty is not bound to show reason to any man in the first way, although princes who are careful of their reputation often undertake in the second way to show reasons for their management to the eyes of the world, that they may guard their esteem, a conduct, however, which implies no subjection. Thus I am free to do what I please with my own earnings, and yet I am at times willing that my reasons be aired, so that I may not be taken for a dissolute or foolish manager.

Nor can any punishment be meted out to him for whose trial there exists no court or judge that can render and execute a judgement. For the courts which are to be found in states concern only subjects, and obtain all their authority from the supreme sovereignty itself. But if the princes in some nations are willing to appear in one of their own courts on questions of debt and the like, that is not done as if they recognized that court as their superior, and as able to exercise compulsion upon them, but they merely desire clearly to take cognizance of the claim of the other party, which they are ready and willing to meet as their obligation, once it is established. Yet what is here said concerns properly human punishment, which a human judge inflicts as a superior. For the punishment of God is usually visited in different ways upon the violators of natural law, who otherwise need have no fear of the judgements of men. Horace, *Odes*, Bk. III, ode i [6]: 'Over the kings themselves is the rule of Jove.' (B.) The custom of the Egyptians of denying the honour of burial to kings who had governed wickedly in their lifetime can scarcely be taken as a punishment. See Diodorus Siculus, Bk. I, chap. lxxii.

3. The very fact, also, that civil sovereignty is called supreme, argues that it is free from civil laws, or rather is superior to them. To raise any question regarding divine and natural laws would be folly. Plutarch, *Ad Principem Indoctum* [*Ineruditum*, iii, p. 780 c]:

Who, then, shall have the power to govern a prince? The law, without doubt; which, as Pindar saith, is the king of mortal and immortal beings; which is not written without in books, nor engraven on wood or stone, but is a clear reason imprinted on the heart, always residing and watching therein, and never suffering the mind to be without government. (G.)

Seneca, *Thyestes* [612]:

Every power
Is subject to a greater power. (M.)

Now human laws are nothing other than the decisions of the supreme sovereignty on such things as subjects must observe for the

welfare of the state, [for such laws depend upon the supreme sovereignty both for their source and their duration].¹ It is patent that the supreme sovereignty cannot be directly obligated by such as these, for it is supreme. Therefore, no obligation can be laid upon it by a superior man, and no man can obligate himself, by way of a law, that is, acting as his own superior. See Hobbes, *De Cive*, chap. vi, § 14. Although a legislator may sometimes be obligated by his own law in a reflex manner, as it were, on the grounds of natural equity, and public seemliness, so that he himself will also observe what he requires in the acts of citizens, as serving the public good, in order that he may quicken the obedience of subjects, and so that he may not, in forbidding vices in which he himself indulges, appear to envy others their enjoyment of the same. See 1 *Samuel*, xiv. 40. Pliny, *Panegyric* [xlv]:

The life of the princeps is a censorship, and that perpetual. By it we are directed, by it we are guided; nor have we need so much of his commands as of his example, for fear is an untrustworthy guide of rectitude. Men are better instructed by examples, which
724 possess this merit beyond all others, namely, that they show men the possibility of accomplishing what they are ordered to do.

Nor have kings any need to blush at what is told by Athenaeus, Bk. X [x], on the authority of Ctesias, namely, that among the Hindus a king was not allowed to drink to excess, and among the Persians he was allowed to do so only on the day when sacrifices were offered to Mithras. Claudian, *On the Fourth Consulship of Honorius* [296 ff.]:

If thou make any law or establish any custom for the general good, be the first to submit thyself thereto; then does a people show more regard for justice nor refuse submission when it has seen their author obedient to his own laws. The world shapes itself after its ruler's pattern, nor can edicts sway men's minds so much as their monarch's life. (P.)

Livy, Bk. XXVI, chap. xxxvi: 'If you would enjoin any duty on an inferior, and would first submit yourself and those belonging to you to the obligation, you will find everybody else more ready to obey.' (S.) Pliny, *Letters*, Bk. IV, ep. xxii: 'It is in the body politic as in the natural, that disorders are most dangerous that flow from the head.' (B.) Justin, Bk. III, chap. ii, § 8. [Sadi] *A Persian Rosegarden*, chap. i: 'If a king eats one apple from a subject's garden, his slaves will root up the tree. If a king allows the unjust robbery of five eggs, his soldiers will thereupon spit a thousand hens.'

4. To vindicate the supremacy of this sovereignty, especially in monarchies, we must set forth the common distinction of majesty into *real* and *personal*. The application of this distinction to sovereignty we hold to be not only absurd but also baneful, if its sense be that a monarchy offers an opportunity for real and personal majesty at the

¹ [This clause was added by Barbeyrac from the author's *De Officio Hominis et Civis*, II. ix. 5, in order to fill out the otherwise incomplete expression of the thought.—Tr.]

same place and time, and that therefore the ruler of a kingdom may be accorded personal sovereignty, and the people, as distinguished from their prince, real, this being equal or superior to the former, according as real rights are usually considered superior to personal. For that this involves a contradiction, and endows every state, to its certain destruction, with two heads, is clear on the face of it. There is no necessity to create a double majesty, for the reason that at the death of the king, or the extinction of the ruling house, the people regains its right, in so far that it may, as it sees fit, set up another king, or establish another form of state. We could as well conjure up a real sovereignty in a slave, in contradistinction from the personal sovereignty of a master over him, because of the fact that at the death of his master without an heir, the slave becomes free.

Nor is the point before us touched by the allegations of Grotius, Bk. I, chap. iii, § 7, and others, who make two subjects of the supreme power, a *common* and a *proper*, of which the former is the state, the latter a single man, or a council composed of all the citizens or of a few. For the meaning of that distinction is this: If one inquires in a general way where the supreme sovereignty lies, the reply is made that it lies in the state; if one inquires more specifically what¹ person in the state holds the sovereignty, the reply is made, the king, or senate, or assembly. But who would infer from this the existence of two distinct sovereignties, of which the real one is vested in the state, the personal one in the king? It would be just as absurd for a man to try to imagine two distinct sights in a man, one which resides in a man as in a common subject, a second which resides in the eye as in a proper subject.

5. There have been those who have not hesitated to assert that the sovereignty of a king neither can nor should be superior to that of all the people. No little support for this is apparently offered by Aristotle, *Politics*, Bk. III, chap. xii [towards the end], and again in chapter xi [xv], when he says: 'The king must have such force as will be more than a match for one or more individuals, but not so great as that of the people.' (J.)

Grotius, Bk. I, chap. iii, § 8, has taken upon himself to refute such writers. He shows first of all that it was permitted a people to transfer to others sovereignty over themselves fully and without exception, since individuals are allowed to make themselves personal slaves of another. See *Exodus*, xxi. 6; *Leviticus*, xxv. 39; add Selden, Bk. VI, chap. vii; *Digest*, XL. xii. 37; *Code*, VII. xvi. 10; *Digest*, XL. xii. 7, § 3; XL. xii. 33; XL. xiii. 4; *Institutes*, I. iii, § 4, and *Digest*, XXVIII. iii. 6, § 5; Leo, *Novels*, lix. Caesar, *Gallic War*, Bk. VI [xiii. 2], says of the ancient Gauls: 'The more part of the common people, oppressed as they are either by debt, or by the heavy weight of tribute, or by the

¹ [For *quae nam* read *quaenam*.—Tr.]

wrongdoing of the more powerful men, commit themselves in slavery to the nobles, who have, in fact, the same rights over them as masters over slaves.' (E.) Although in other respects it appears unbecoming to compare citizens who live under an absolute monarch, with slaves. Claudian, *On the Consulship of Stilicho*, Bk. III [113 ff.]: 'He errs who thinks that submission to a noble prince is slavery; never does liberty show more fair than beneath a good king.' (P.) A saying on this point of Apollonius of Tyana is found in Philostratus, Bk. V, chap. xii [xxxv]: 'Just as a man who is excellent beyond all others changes a democracy into the appearance of the rule of the one best man, so a monarchy which makes all provision for the common welfare is essentially a democracy.' Add Hobbes, *De Cive*, chap. x, § 8.

In the next place Grotius offers the occasion and reasons on the compulsion of which a people will be able to renounce every right of government and hand it over to another. Most of these are included in the following words of Cicero, *On Duties*, II [vi]:

Now, mankind submit to the command and power of another for several reasons. For they are induced by benevolence or by the greatness of his benefits; or by his transcendent worth, or by the hopes that their submission will turn to their own account, or from the fear of their being forced to submit, or from the hopes of reward, or the power of promises, or, lastly (which is often the case in our government), they are hired by a bribe. (E.)

The following occasions are advanced by Grotius: If it happen that a people be threatened by an enemy¹ with destruction, which can be avoided in no other way than by yielding unconditionally to another's sway. See Livy, Bk. VII, chap. xxxi. If it should be poverty stricken, and have no other way to sustain itself. See *Genesis*, xlvii. 19. If the head of a family with large estates be unwilling to allow any one to live on them without first making such a tenant his subject. Or if a man free many of his slaves, on the provision that they subject themselves to him. Nay more, such a form of government may entirely suit the genius of a people. Nor is it, indeed, always an indication of a weak or abject mind for one to be pleased with an absolute monarchy, as most of those born under a democracy hold, who scorn the Cappadocians because of the fact that they refused their liberty when it was offered them by the Romans. See Strabo, Bk. XII [ii. 11, p. 540]; Justin, Bk. XXXVIII, chap. ii. Euripides, *Helena* [286], voices the opinion of all Greeks:

For midst barbarians slaves are all save one. (W.)

Yet to all peoples in which many men are to be found who are headstrong, ambitious, puffed up, and impatient of equality, the liberty of a democracy is a most dangerous thing, and yet the same men easily put up with a king. For they prefer obeying one man and outranking

¹ [For *abhoste* read *ab hoste*.—Tr.]

the rest to spending their life in the same class with all in the state; and 'they are willing to serve so that they may be able to rule',¹ Ausonius [*Eidyll.* xv. 37 f.]. Nay, the Orient from time immemorial to the present has been so accustomed to kings that Neuhoof, *Legatio*, reports: 'The Chinese were unable even to conceive of the nature of the states of Holland', because they were acquainted with no form of government except a monarchy. Caspar Balbi of Venice, in his *Viaggi*, tells us that when the king of Pegu was told that in Venice sovereignty was vested in a senate, he burst into hearty laughter, as though it were perfectly absurd. On the other hand men cannot easily bear a democracy unless they be of even temperament, calm passions, and willing to be ruled in the same way as their neighbours.

Finally, free states are often reduced by internal disorders to the point that they cannot survive save under the absolute sovereignty of one man; and so 'in the wake of that peace comes a master'. Lucan, Bk. I [670].

6. It is a better course to discuss the reasonings of those who 726 delight to exalt above kings that real, as they imagine it, majesty of the people. They claim that all kings are created by the people, and that it is in accordance with nature for the creator to be superior to his creation. But granted that the consent of the people is concerned in the establishment of all kings, there is still a difference between the ways in which that consent is given. For some people choose a king of their own volition, while the rest are forced by war, or some other necessity, to accept a king whom they would never have desired except for some such chance. And yet it accords with the common use of speech to say that only those men are kings by the constitution of a people, whom it chooses of its own volition. Whoever extort that consent by the violence of war, or some similar means, are not said to be constituted by the people, but to have made a people their subjects.

Furthermore, he who constitutes a person is superior to him only when it always lies within his power to stipulate how long the other should hold the position in which he is placed. But sometimes at the first it is a matter of free choice, whom you may wish to set up, and yet, after the appointment has once been made, it becomes a matter of necessity to bear it.

Others answer in this way. A man constitutes a person either over another person, or over himself. In the former case he is surely superior to the one whom he appoints, for it is supposed that the third person was and remains under the power of the appointer. And for the same reason the appointed must necessarily likewise depend upon his will. For since no one man can serve two masters, not subordinate one to the other, I cannot impose a master on my subject without reserving

¹ [The punctuation should be: *et dominari ut possint, servire volunt.*—Tr.]

power over him, and so he is made but a subordinate master. Thus a free people which sets a general over its troops is and remains the superior of them both. But whoever constitutes one over himself, or confers upon another sovereignty over himself, can no more remain his superior than he can command and obey at the same time.

But they go on to say that, since all government is for the sake of those who obey, not of those who command, that is, since the king exists for the people, not the people for the king, the people are superior to a king; for that, because of which another is created, surely appears worthier than that which is constituted for its sake. Yet not every sovereignty as, for instance, that of a master, is introduced for the sake of those who obey. Although, of course, if a master wishes to gain any profit from his sovereignty, he has to show some care for his slave. Moreover, the question is not, which is of greater value, the person of the king, or the entire people, if one or the other must perish, but whether, in view of the fact that civil sovereignty has been invented for the profit of all, the decision as to how to secure that end resides in those who have subjected their will to the will of a king, or in him to whose judgement and conscience the government has been entrusted.

Some infer, because they read that peoples are punished for the sins of their kings, that peoples were empowered to coerce them when they sinned, which is unintelligible without a power which surpasses the right of kings. For I cannot have imputed to me another's deed to which I have made no contribution. But it is inconceivable how a people could share in the guilt of their king's sin, especially if it was not to their liking, save by virtue of the fact that it failed to punish him. But for our part we hold it certain that the sins of kings do not on their own account entail any guilt upon subjects, unless the latter have positively contributed something to them. Euripides, *Suppliants*, [879-80]:

Seeing the guilt is nowise in the state

That through an evil pilot wins an evil fame. (W.)

But they may not themselves contract any guilt because they failed to forbid or punish such sins, since as inferiors they are neither able
 727 nor bound to forbid or punish the sins of kings. For the obligation to prevent another's misdeeds, like the faculty, springs from power over another, or from sovereignty, which involves the right to direct another's actions. Therefore, the others could not be held for a deed of his before he was crowned, since equals have no authority over one another, nor can they after he has been constituted king, for it is an absurd statement that they, who, before conferring sovereignty upon a man as an equal, had no power either of authority or of violence to prevent his sins, received it after they had given him sovereignty over themselves. Nor can the sins of kings be imputed to subjects by reason

of that pact by which they conferred sovereignty upon a king. For the citizens did not by that pact confer impunity upon the king, but only left him so much as he held before by reason of natural¹ liberty, since on no account could he exercise supreme sovereignty, were he not exempt from human punishment. Grotius, in the passage cited, has made a sufficient answer in the case that comes up in 2 *Samuel*, xxiv. A passage worth mentioning, as bearing on the seventeenth verse of that chapter, is found in Martinius, *Historia Sinica*, Bk. III, chap. i.

The statement made by some, that, as he who gives himself into slavery, retains the right to release himself again from those bonds, so an equal right belongs to a people which has submitted to the yoke of a monarch, would be admitted by no man in his senses, unless it be added that it may be done with the permission of the master or king, who thereby voluntarily yield up the right they had acquired. Add Xenophon, *Training of Cyrus*, Bk. III, at the beginning.

False also is the belief that, when a people whose nature was once suited to bear an absolute sovereignty has, in the course of time, put off its servile nature, it is within its rights in throwing off the sovereignty and regaining its natural liberty. For if such a case arises, it will be incumbent upon the prince prudently to temper his government to the changed character of his people. Silly also is it to say that, since a master who misuses his property can be restrained or deprived of his possessions, so also a prince who makes a wicked use of his power can be reduced to order. Because the reason why the former is possible is that there belongs to the prince a superior right over the property of citizens, it being to the interest of the state that it be not squandered to no purpose. But who would maintain that to subjects belongs some more eminent right above the rights of the prince, that is, that they are masters of their master? To the contrary remarks of princes, some of which are framed in a spirit of boastfulness², the reply may be made, that of course a prince should judge every matter with an eye to the welfare of the people. But this does not lead to the conclusion that citizens can coerce a prince, when they have concluded that he is employing means little suited to that end.

It is an absurd statement, that, since a people has no right to destroy itself, or to vent a savage rage upon its own body, such a right cannot be transferred to a king. For who would ever assign to a king the right to destroy his people? It will soon be shown that absolute sovereignty is not so formidable a thing, and we shall inquire in another connexion what a people may do when a king openly seeks their ruin. It is of no use to cite the cases of consuls, and such other magistrates who are likewise said to be set over a people, and yet have sometimes been reduced to order by the people.

¹ [For *naturali* read *naturali*.—Tr.]

² [For *adjactantiam* read *ad jactantiam*.—Tr.]

The argument advanced from sacred history, to the effect that the Hebrews threw off the yoke of the neighbouring nations, after it seemed to God that they had been sufficiently punished, must be regarded as not bearing upon the case. For they were still in a state of war with those peoples, and had never subjected themselves to the king, as citizens, by pledging their faith, and in that case were able by the right of war to treat their oppressors as enemies; or else they had received in this matter the express command of God, which may not be imitated by others, when it digresses from common right. Add Robert Sanderson, *On the Obligation of Conscience*, Prelection IX, §§ 16 ff.; Prelection X, §§ 13, 16, 22, 23.

728 7. Furthermore, it is clear enough that in some states sovereignty, especially that of kings, is free in the exercise of its acts, while in others it is restricted to a certain manner of procedure. From this arose the division of sovereignty into *absolute* and *limited*. In this connexion we should state, first of all, what the word 'absolute' properly denotes, which is loaded down with great hatred among those who have been reared in free states. Also the word, when taken in a sinister sense, can stir up wicked princes to vex a commonwealth and to practise every kind of knavery, flatterers being ever ready secretly to cast aspersions¹ upon princes, as they find it easy to feed their ambition and other vices by ostentatious repetition of that word. 'You are absolute,' they will say; 'therefore, it is allowable, if you wish it; therefore, waste your citizens and your neighbours with unnecessary wars, that you may be famed as a mighty warrior; therefore, insult and abuse whom you will; therefore, exhaust your citizens with exactions and plunderings, that there may be the means to serve your ambition or luxury.' Of this class was the flattery by Anaxarchus of Alexander, when he was grieving over his murder of Cleitus, as recorded by Plutarch, *Ad Principem Indoctum* [*Ineruditum*, iv, p. 781 B]: 'Justice and right sat as assistants by the throne of Zeus, so that whatsoever was done by a king might be accounted lawful and just.' (G.*) So also that in Sophocles, *Antigone* [506 f.]:

Manifold

A king's prerogatives, and not the least

That all his acts and all his words are law. (S.)

Nay, there exist some who undertake to buttress the absolute right of kings by arguments and statements of such a nature that they appear to measure it only in terms of impunity for crimes, and licence to vex a people. Therefore, to make our meaning clear, we will say at once: Just as it is understood to be the highest and absolute liberty of individual men, when they can decide upon their own affairs and acts

¹ [The phrase is from Plautus, *Cistellaria*, 35, a context that gives the key to this passage which has apparently been misunderstood by Barbeyrac and Kennet.—Tr.]

in accordance with their own wish and judgement and not those of another, while always observing natural law, and that liberty belongs by nature to all men who are not subject to the sovereignty of another man, so when several men have come together into a perfect state, in it, as in a common subject, there must likewise be found the same liberty, or faculty to decide by their own judgement about the means that look to the welfare of the state. And this liberty is attended with absolute sovereignty, or the right to prescribe such means for citizens, and to force them to obedience. Therefore, there exists in every state in the strict sense of the word, an absolute sovereignty, at least in habit and theory, if not always in practice. For it is a contradiction that a man should be obligated to no one, and at the same time not have the right to come to a decision upon his own affairs by his own judgement and choosing. Yet that such absolute sovereignty on its own account involves nothing unjust or intolerable, is easily observable from the end of established states. For surely we do not establish states to the end that we may neglect natural law, and do everything according to our wicked lusts, but that the security and safety of every man may be better guarded by uniting the resources of many, and that therefore there may be opportunity for the safe exercise of natural law.

8. But when supreme sovereignty is considered as it is vested in one man, or in one council composed of a few or of all the citizens, as though in a proper subject, it is not observed to be everywhere so absolute and free, but sometimes to be limited by certain laws. Indeed, in democracies the distinction between absolute and circumscribed sovereignty is apparently not so clearly discoverable. For although in every democracy there must exist certain institutions established by custom, or sanctioned by written laws, namely, when and by whom the people shall be called to assembly, and the public business laid before them, and turned over for execution (for a state cannot be understood without such provisions), yet since that council in which is vested the supreme sovereignty is composed of the entire body of citizens, and so no one outside it secures any right from its decisions, nothing will prevent the same people being able to abrogate and modify them at any time. Add Andrea Maurocenus, *Historia Veneta*, Bk. XIII, p. 517 ff. This is illustrated by the story given in Plutarch, *Solon* [v], that Anacharsis laughed at Solon because he thought that he could curb the injuries and lusts of citizens by writings, which had no more strength than cobwebs. To whom Solon replied that men usually stand by pacts agreed upon, which neither party would profit by violating, and that he would so temper the laws to all citizens, that it would be clear to them, that it was more profitable¹ to cultivate justice than to break the law. But the outcome confirmed the judgement of Anacharsis

¹ [For *antiquis* read *antiquius*.—Tr.]

more than the hope of Solon. And such will be the general fate of laws, unless a people bind itself by an oath to their perpetual observance, as was done at Rome in the matter of never tolerating another king. Although whether such an oath is binding, when no one survives who took it in the first place, is a question which has already been discussed, Bk. IV, chap. ii, § 17.

In this connexion we should note the cavil¹ of Caesar when he carried off the state treasury. This had been² set aside with a curse in the name of the state upon any one who dared use it save for a war against the Gauls. But according to Appian, *Civil Wars*, Bk. II [xli]: 'He claimed that the state had been freed from the obligation of this oath since he had subdued the Gauls, so that there was no longer any danger from them.' Herodotus, Bk. I [xxix], records that Solon bound the Athenians by an oath not to repeal any of his laws for ten years. Others, however, have tried to protect laws of this origin from being changed, by fixing a penalty upon the one who moved their abrogation, although such a penalty can be abrogated no less than the original law. Thus the people of Thasos passed a law: 'Whoever introduces a measure providing for a treaty with the Athenians shall be guilty of death'; Polyænus, *Strategemata*, Bk. II [xxxiii]; the Athenians one to the effect that no one should ever make a motion to recover Salamis; Plutarch, *Solon* [viii]; and Charondas among the Thurians that whoever wished to change a law should come to the assembly with a halter about his neck. Diodorus Siculus, Bk. XII, chap. xvii. In Xenophon, *Anabasis*, Bk. VI [iv. 8], it was decreed: 'Let the man be put to death who speaks of dividing the army.'

But in aristocracies and democracies, where there are some who command, and some who obey, and when, therefore, the latter can secure some right from the promises and pacts of the former, there is clearly to be seen a difference between absolute and limited sovereignty. In such he is absolute who administers sovereignty according to his own judgement, not in accordance with a norm of definite and perpetual statutes, but as the present state of affairs seems to require; and who, therefore, on his own judgement secures the welfare of the common wealth, as the times and conditions may demand. Thus, so far is the word 'absolute' from concealing anything hateful and intolerable for free men, that it lays upon princes who would satisfy the demands of their position and conscience, a necessity for far greater care and circumspection, than it does upon those who must conduct the affairs of state by set rule. Dio Chrysostom, *Orations*, lxii [3]:

A good prince covets nothing, because he feels that he has everything; he refrains also from sensuality, because there is none beyond his power, if he so desire; he is more just also than others, because he displays justice to all men; moreover he takes pleasure in toil,

¹ [For *cavilatio* read *cavillatio*.—Tr.]

² [For *tuerant* read *fuerant*.—Tr.]

because he toils voluntarily; and he loves the laws, because he does not fear them. And in all this his judgement is correct. For who needs more wisdom than the man who is to deliberate upon these themes? Who needs more rigid justice than the man who stands above the laws? Who needs more self-restrained temperance than the man who may do anything? And who needs greater courage than the man who keeps everything safe? (M.)

9. But since the judgement of a single man may be easily misled in seeking out what is for the welfare of the state, and not all are gifted with such soundness of mind that they know in such great liberty how 730 to control their lusts when they battle with reason (Herodian, Bk. I, chap. iv [6]: 'It is hard to lay out and maintain¹ bounds for the passions, when they are served by uncurbed power'), it has appeared advisable to many peoples not to commit in so absolute a fashion such power as this to a single man, whose judgement is not immune to errors, and whose choice easily turns to base desires, but to prescribe for him a definite manner of holding the sovereignty. Especially is this true after it has been observed that certain institutions and a particular manner of conducting affairs are best suited to the genius of a people and the conditions of a state. Nor does such a limitation of sovereignty work² an injury to princes who are raised to their eminence by the will of a people, for if they thought it a hardship to accept a sovereignty which they could not exercise as they pleased, they could have refused it. And their given pledge, by which they are bound when they accept such a sovereignty, in no wise allows them later to undertake to subvert the laws of the state by secret plottings, or deeds of violence, and to make themselves absolute³, for, as we are told by Pliny, *Panegyric* [lxv]: 'No one should guard his oath with greater scruples than he who is most concerned in not forswearing himself.'

Surely it is a trite and banal statement of some men, that, since kings are constituted by God, and He has enjoined upon them the proper conduct of their office, which is impossible without the exercise of supreme sovereignty, the conclusion is that God is held to have contributed to kings a certain measure of power, which neither they themselves should allow to be weakened⁴ or impaired, nor may the people rightfully demand such a thing, or enjoin it upon the king. Is it not as decent, they say, for a husband to agree with his wife to connive at her furtive amours, 'well trained to keep his eyes upon the ceiling, or to snore with wakeful nose over his cups?' [Juvenal, *Satires*, I, 56-7]. Or the bargain might run: '[...] That you were to go your way and I mine.' [Juvenal, *Satires*, VI. 281-2]. But, as we have already fully shown above, that civil sovereignties are derived from God, so it was left to men's free choice, at least to such as received no civil laws from the hand of God, what form of state they might desire to establish

¹ [After *ἔπον* read *ἐνυβείων*.—Tr.]

³ [For *absolutus* read *absolutos*.—Tr.]

² [For *sii* read *fit*.—Tr.]

⁴ [For *delibitur* read *delibeitur*.—Tr.]

over their group. It is a measured saying of Philip Melanchthon, *Epitome Philosophiæ Moralis*: 'We must recognize that there are different forms of kingdoms, and everywhere distinct degrees of liberty. Yet God sets His seal upon all forms of sovereignties which are agreeable to reason and nature.' In the same way, I should think, there can nowhere be found any command of God, to the effect that, when a free people is on the point of acknowledging a king, it should, for example, select not Gaius but Titius, or not set any procedure sanctioned from above, to be used in imposing sovereignty upon all rulers.

Nor can men with such views discover any support in the passage in 1 *Samuel*, viii, where some would find a description of a mere particular case, in which the royal power entailed some injury, and others of a true right, and such as belongs to all kings. But Grotius, Bk. I, chap. iv, § 3, following a middle course, holds that the action of a king is pointed out, but only such as has an effect consequent upon a right, namely, the obligation of non-resistance; or, in other words, although, when a king does such things, he is acting contrary to his duty, still his subjects cannot resist him any more than if he were doing such things with the fullest right. And for that reason it is added that the people beneath those injuries should implore the help of God, because there is no deliverance humanly possible. Therefore, he calls such power 'the right of a king' just as 'a judge is said to render justice (*reddere ius*), even when his decision is unjust'. *Digest*, I. i. 11.

731 But, in my opinion, the real sense of the passage can be arrived at in this manner. Up to that time the Hebrews had lived in a democracy, yet such as often had the appearance of that kingship which Aristotle calls the 'heroic'. A number of Judges, at the call of God, delivered them from the oppression of their enemies, or in times of peace rendered judgements, yet more with the authority of persuasion than any power to command, while their style of living was not better than that of other citizens, since they levied no taxes with which to meet the expense of the same. Add Grotius on *Judges*, i. 1. But the people, wearied with such conditions, desired a king on the model of the other nations, such a one, that is, as would be adorned with outward pomp and idle ceremony, and would maintain a standing army, or at least train the citizenry in the use of arms, so that they could face their enemies at the first onset. See 1 *Samuel*, xiii. 2; xiv. 48, 52. At this stage Samuel pictures to them the right of such a king and the disadvantages attendant upon such a new condition, in order that the people may give the matter due consideration before the final step. You wish, he says, a king with all the royal trappings. And yet he will be surrounded with a numerous retinue, and so 'he will take your sons and appoint them for his chariots and to be his horsemen, and to run before his chariots'. You wish a king who shall be surrounded with a standing army. But

in that case he must 'appoint him captains over thousands and captains over fifties', of your sons, who before were free to give their services to the increase of your own property. The affairs of state will not permit such a king to look after his own fields. Therefore, he will take your sons 'to plow his ground and to reap his harvest, and to make his instruments of war and the instruments of his chariots', that he may equip his army. Since, furthermore, he will need ample service for his court, and it will not accord with the dignity of the wives and daughters of the royal house to have the care of so large an establishment; therefore, 'he will take your daughters to be perfumers, and to be cooks, and to be bakers'. Moreover, there will be need for many public servants to carry on the business of peace and war; therefore, 'he will take your fields, and your vineyards, and your oliveyards, even the best of them, and give them to his servants.' For this use he will require even 'a tenth'. Nor less, when he has need, will he use 'your servants and your asses and put them to his work'. In a word, what he says is this: If you wish to have a king, you will have to support him in a kingly manner, and settle certain revenues upon him for that end; and if you afterwards chafe at this burden you will never be able to deprive him of his sceptre, when once by your election he has secured to the kingdom a right which may not be taken from him against his will.

From this it is manifest that this passage offers no protection to wicked princes, nor dictates any set measure, as it were, of kingly sovereignty, as by a law of God, a measure which can neither be added to nor diminished by agreements of men, but that it is no more than an outline of the burdens and expenses of the royal degree, whether absolute or limited. Therefore, it lies entirely within the will of free peoples, when they grant a king sovereignty, as to whether they wish it to be absolute or restricted by certain laws, provided, of course, such laws have in them nothing impious, and do not obstruct the end of sovereignty itself. For although at the first men enjoyed entire liberty to come together into a civil society, yet they were still subject to natural law, and so were obligated, of course, to draw up only such rules of sovereignty and civil obedience as were agreeable to that law and the lawful end of states.

10. But in order that we may correctly apprehend by what promise of a king (and the same is true of an aristocracy as well) sovereignty is no longer absolute (for it has not such power in every government), we must recognize that when a king accepts a throne he binds himself to administer it justly, by a promise which is either *general* or *special*, and is usually strengthened by an oath.

A general promise can be given either *tacitly* or *expressly*. A tacit promise to govern justly is understood to accompany the very acceptance of that function, even if no express mention be made of it. To

this should be applied the remarks of Grotius on 2 *Kings*, xi. 17: 'The people promised to undertake the care of the king's welfare. This is what Josephus says. For it was not customary among the Hebrews for the king to make any promise to the people.' This means an express promise, and such as was made at the coronation. But the most usual procedure was for the promise to be made expressly, accompanied by an oath and certain formal rites. Nor is it unusual for the duties of the
 732 king to be described in that promise in some general statement, or in an enumeration of the principal parts: for instance, that he undertakes to provide with due diligence for the advancement of the public welfare, that he will protect honest men and restrain scoundrels, that he will administer justice without favour, that he will oppress no one, and the like. Such promises do in no way impair the absoluteness of sovereignty. The king is, of course, thereby obligated to exercise his sovereignty justly, but what method or means he will take to secure that end is left to his judgement and choice.

A special promise, and one in which are expressed the manner and means of administering sovereignty, appears to have a twofold force, for it may bind only the conscience of the prince, while again it may make the obedience of citizens depend upon its fulfilment as upon a condition. It is the former kind of a promise, if the king undertakes, for example, not to appoint to office a certain kind of men, to grant no man special privileges which will involve a burden upon the rest, to pass no new laws, not to impose taxes or custom dues, not to employ foreign mercenaries, and the like, while at the same time no council is set up which the king must consult, in case the condition of the state urges him to depart from such promises (for these are always understood to contain this exception: Provided the public safety, which is the supreme law in laws of this nature, does not require otherwise), and such a council as could of its own right, and not precariously, take cognizance of such matters, and without whose consent citizens are obligated about such matters by the orders of the king. In such a case the administration of sovereignty is restricted according to certain laws, and when the king breaks them without necessity, he is unquestionably guilty of breaking faith. Yet citizens have no power to disobey the orders of the king on that account, or to make his acts void. For if the king says that the safety of the people, or the real welfare of the state, demands that (and such a presumption always attends the acts of a king), the citizens have nothing to reply, since they have not the power to take cognizance as to whether or not the necessity of the state demands such measures.

From all this the further point appears, namely, that a people does not take sufficient precautions for its own safety, if it is willing to accord a king only a limited sovereignty, and yet does not establish

a council without whose consent those acts which have been excepted cannot be exercised, or if the king is not required to call it into assembly, where a debate may be held on the exercise of those acts. This last is better than if the king had to consult a council composed of only a small number of citizens, since it may happen that the personal advantages of those few may not coincide with what is to the public good, and that therefore they may, from private interests, not agree to the salutary proposals of the king.

The sovereignty of a king is more strictly limited, if, at its transfer, an express convention is entered into between king and citizens that he will exercise it in accordance with certain basic laws, and on affairs, over the disposal of which he has not been accorded absolute power, he will consult with an assembly of the people or council of nobles, and that without the consent of one of the last two he will make no decision; and that if he does otherwise, the citizens will not be bound by his commands on such affairs. The people that has set a king over them in this way is not understood to have promised to obey him absolutely and in all things, but in so far as his sovereignty accords with their bargain and the fundamental laws, while whatever acts of his deviate from them, are thereby void and without force to obligate citizens. Nor, on the other hand, is supreme sovereignty crippled by such fundamental laws. For all the acts of sovereignty can be exercised as well in such a monarchy as in an absolute one, save that in the latter the king follows his own judgement, at least in the ultimate decision, while in the former there lies within a council a concomitant cognizance, as it were, on which the force of sovereignty depends, not entirely but as on an absolutely necessary condition. Nor are there two wills in such a state, for whatever the state desires it desires through the will of the king. Although the result of such a restriction is that, except under a certain condition, the king cannot will some things, or else wills them to no effect. 733

And yet in such a monarchy the king does not cease to hold supreme sovereignty, nor is the council superior to him. For the following are faulty conclusions: 'This person cannot do everything as he pleases; therefore, he does not hold supreme sovereignty'; or: 'I am not obligated to obey this person in every respect; therefore, I am his superior or equal'; or: 'I cannot command this man in any way I please; therefore, he can lay positive commands upon me.' Furthermore, these two statements are very different things: 'I am bound to follow what this man decides, because I have obligated myself to it by a pact'; and 'I am bound to follow this man's will, because he can enjoin obedience upon me by virtue of his sovereignty'. Supreme and absolute are in no way one and the same thing. For the former denotes the absence of a superior or equal in the same order, but the latter

the faculty of exercising every right on one's own judgement and choice.

But what if a conditional clause was expressly added, to the effect that, if the ruler did otherwise, he lost his throne? (We say 'expressly', for the force of a conditional law (*lex commissoria*) is not discoverable in such a clause as: 'If he does otherwise, I am not bound.') Yet among the Sabaeans their king was otherwise ἀνυπεύθυνος [not accountable], yet if he set foot outside his palace, he was stoned by the people in obedience to an ancient oracle. See Diodorus Siculus, Bk. III, chap. xlvii; Agatharchides, *De Mari Rubro*, chap. 1. Here may be referred the account of Strabo, Bk. XV [i. 55]: 'If any woman in India has killed a king when he was intoxicated, she is married to his successor by way of reward.' The people of Aragon, after their king had taken an oath to preserve their privileges, used to promise him obedience in this fashion: 'We, who have as much power as you, make you our king and master on this condition, namely, that you maintain our laws and privileges, and not otherwise.' See Hotman, *Franco-Gallia*, chap. xii. Thus the emperor Severus at the opening of his reign not only swore that no senator would be put to death at his orders, but also commanded that a decree be issued to the following effect: 'If the emperor has caused the death of a senator, both he and the man whom he instigated to the crime, together with their children, should be regarded as enemies of the state.' Xiphilinus, *Epitome of Dio's Life of Severus*. And yet not long after, Julius Solon, the very man who wrote that decree at the emperor's orders, was put to death.

Now it appears certain that he to whom a kingdom is committed with such a conditional clause, is not an absolute prince. Yet apparently nothing prevents a prince from holding in this manner a sovereignty that is limited and yet truly monarchical. For although we should grant that a temporary sovereignty cannot be recognized as supreme, yet you would scarcely call that one temporary which depends on a condition which is potential and within the power of the king to perform. Nor is such a king subject to the judgement of the people¹, as though it were empowered to inquire into whether or not he has broken his faith. For beside the fact that such a conditional clause usually includes such matters as are obvious upon the face of them, and so are not open to any uncertain argument, such an inquiry does not have the nature of a judicial investigation whereby the action of a subject is probed and sounded, since it is nothing other than a mere formal declaration, which a man calls to witness that his manifest right is violated by another, a thing which is possible also for an inferior. Compare Boecler on Grotius, Bk. I, chap. iii, § 16.

Grotius in the passage just cited speaks rather obscurely when he

¹ [For *popouli* read *populi*.—Tr.]

says that, by the promises of kings, an obligation lies either *upon the exercise of the act*, or even *upon the faculty itself*; and that an act contrary to promises of the former kind is called unjust but valid, but one against those of the latter kind is even *void*. It is as though he would say: 'Sometimes a king promises that he will make no use of a part of his supreme sovereignty save in a certain manner, and sometimes he entirely renounces a part.' On this point two remarks should 734 be made: In the first place, acts can still be void which are performed contrary to an obligation of the first kind; for instance, if a king should promise that he will not levy new taxes without consulting the representatives of the people, I should judge that any levy which he made on his own decision would be void. The other is, that, by the second kind of a promise, the parts of supreme sovereignty are split up or mutilated.

II. But for the more thorough understanding of the nature of limited monarchies, we should know that the matters which come up in the administration of a state are usually of two kinds. For some can be decided in advance, by reason of the fact that whenever they arise they are of the same nature, while on others a judgement as to whether or not they are to the advantage of the state can be reached only at the time they arise, because it cannot be foreseen what circumstances will attend them. With both of these kinds a people which has decided upon a limited monarchy could take due precautions that no hurt be done the state; in the case of the former kind of business, by passing permanent laws which the king would be required to observe, in the latter kind, by specifying that he consult with the assembly of the people, or the council of nobles. Thus a people which is satisfied of the truth of its religion, and that the manner in which it is organized and conducted is that which is best suited to its genius, could lay down a law for the king, when they crowned him, that he would not on his own authority make any change in matters of the religion of the land. Again, who does not know how often justice is handicapped, when it is meted out, without written laws, on the sole judgement of the sovereign, and by what is equable and right, which, however, is frequently not by reason but by passion or ignorance? See Tacitus, *Annals*, Bk. XIII, chap. iv, § 2. To avoid such an inconvenience a people can obligate a king either to enact equable laws himself, or to observe those already in existence, and order that justice be delivered in accordance with those laws by certain bodies, and that only the most serious cases, or such as are appealed, be laid finally before the ruler. Although, for that matter, it is often the practice of a king to leave invidious cases to the decision of others. Ovid, *Metamorphoses*, Bk. XII [626 ff.]: 'To escape the hateful burden of a choice between them, Tantalides bade the Grecian captains assemble in the midst of the camp, and he referred to all the decision of the strife.' (M.) Furthermore, this is

often a convenient excuse to turn off the persistent intercessions of men of influence on behalf of guilty persons. 'The severity and authority of the laws are stronger than my will and purpose, and the sentences of judges prevail over my judgement', was a common expression of Andronicus Comnenus¹, according to Nicetas Acominatus, *De Imperio Andronici*, Bk. I.

So also, since it is well known that what has been won through the sweat of others is easily squandered by ambition and luxury, some peoples have taken measures against wealth being the means by which kings may give free rein to their vices, by wisely assigning their rulers a certain income, such as they thought sufficient for the ordinary expenses of the state, and designated that, if more was desired, the matter should be laid before the council. Moreover, since some kings are more eager than is just in their desire for glory in warfare, and by rushing into unnecessary wars hazard both their own lives and the existence of the commonwealth, proper caution was displayed by those who, in conferring sovereignty upon their kings, stipulated that they should first consult a council, especially if they planned an offensive war. Franc. Lopez de Gomara, *Historia Indiae Occidentalis*, chap. xcv, writes that the inhabitants of Borneo hated war and war-loving kings, and for that reason regularly station them in front of the first line of battle. To conclude, on these matters and also on others, a people may decide upon what it has observed to be for the benefit of the commonwealth, lest if the king be allowed absolute power over their disposals, he may possibly give too little heed to the public welfare.

From what has been said it is clear in what sense is to be taken the statement of the ancient Greek writers on politics and their followers, namely, that the government of a state should be committed to laws rather than to men. For that can have no other fit meaning than this:

735 Care should be taken that those who rule should govern the commonwealth according to the direction of established laws, rather than by their own private and uncircumscribed² pleasure. For otherwise mere laws are no more suited to govern a state than a mariner's compass without a skipper to direct a ship. It was on this theory that, as is shown in detail by Diodorus Siculus, Bk. I, chap. lxxi, the royal power in Egypt was limited. Add also what is recorded in Pliny, *Natural History*, Bk. VII, chap. xxii, at the end, and Solinus, chap. lxvi, concerning the king of Taprobane. So in Philostratus, *Life of Apollonius*, Bk. III, chap. x [34], it is said: 'The law of the (Hindu) sages did not allow a king to be with them more than one day.' (C.) Even more unusual is what is told by Solinus, chap. xxxv [xxii. 13 f. addit., p. 219 Mommsen], of the king of the Hebrides:

¹ [For *Commenus* read *Comnenus*.—Tr.]

² [For *in circumscripto* read *incircumscripto*.—Tr.]

The king has nothing of his own, but all things are held in common. He is bound to equity by strict laws. And in order that avarice may not turn him from truth, he learns justice by the aid of poverty, in having no single possession of his own. However, he is maintained at the expense of the state. No wife is given him, but he may take for his pleasure, in turn, whomsoever his desire falls upon. In this way he may neither pray for children nor hope for them.

A hard lot was that of the king of the Mossynoeci, who was shut up in a tower on the day he pronounced an unjust sentence and starved to death. Apollonius Rhodius, *Argonautic Expedition*, Bk. III [II. 1026-8].

12. But since in most cases a king who is limited in those acts which a people was unwilling to leave to his absolute sovereignty, has to seek the advice of an assembly of the people, or of representatives of the estates into which it is divided, we should observe further that the power of such a gathering is not everywhere the same. For in some kingdoms the king himself, who is absolute in all other matters, appoints a council or senate, without whose approval he is unwilling for his laws to be valid. Under this head I suppose should be classed the Chinese monarchy as described in Neuhoof, *Generalis Descriptio Sinae*, chap. i. Of course such a senate will have the authority only of a group of advisers, and will criticize the decrees of the king and reject what it deems less advantageous¹ for the commonwealth, not by its own right but only by a power granted it by the king himself, who took this way² to avoid making any decisions through imprudence, or on the urge of flatterers, that would be prejudicial to the state. On this point bears a passage of Plutarch, *Apophthegms* [174 B; 183 F]:

The Egyptian monarchs maintain a certain law of theirs, by which they bind their judges with an oath that they are not to gratify the king himself, if he demands of them an unjust judgement. (And further on he records): Antigonus the Third, (as it is said), wrote to his city-states, that, if he ordered them in writing to do anything illegal, to pay no attention to him, for it meant merely that he had made a mistake through ignorance.

See *Code*, I. ix. 7. This is at times also a way of avoiding importunate demands, in that the prince may make a show of granting what he knows the senate will reject. See *Code*, X. xii. 1; Bodin, *On the Republic*, Bk. III, chap. iv, p. 455; Gramondus, *Historiarum Galliae*, Bk. V, p. 277 ff.; Iohannes Labardaeus, *Historiae de Rebus Gallicis*, Bk. III, pp. 13-133 [132-3], ed. Paris, 1671.

But when the king is bent upon having his will prevail, and feels that the reasons advanced by the senate are of little weight, that body can proceed no further in opposing the king's power. For it is not presumed that the king in appointing a senate of this kind wished entirely to renounce his right of absolute sovereignty, and of his own accord made conditional the obedience which he was otherwise able to require of citizens without recourse. And so the power held by that senate is

¹ [For *ex pedire* read *expedire*.—Tr.]

² [For *mod* read *modo*.—Tr.]

only delegated by the king, and can be limited at his pleasure, although he should not do so save for very grave reasons. And yet this much is possible, when such a senate has once been voluntarily constituted by a king, namely, that his successors on coming to the throne may be bound by an oath not to dissolve it.

736 Yet the sovereignty does not cease to be absolute by the establishment of such a senate, especially when power is still vested in the king to dissolve it. For the nature of absolute sovereignty is not that a king may do whatever he pleases, in blind lust or upon hasty impulse, but that he has the final decision on his own judgement in matters which concern the commonwealth, or a power which is not incompatible with a necessity to heed sound reasons. Therefore, although the advice given a king by such a senate does not obligate him of itself, and by the power residing in it, it nevertheless furnishes the occasion for an obligation, in so far as it calls to his attention the manner in which he can fulfil his duty in the matter at hand. In the same way a doctor cannot of himself lay an obligation upon a patient, and yet after he has shown him what is for his health, the sick man is obligated to follow his counsel in accordance with the law of nature which enjoins upon every person the care of his life and health. Add 1 *Kings*, xii, 7-8. Martinius, *Historia Sinica*, Bk. V, chap. xxxvii, p. 122, writes: 'It is a custom observed almost regularly by Chinese kings of the better sort, when they are admonished by philosophers and worthy men on the avoidance of vices, the pursuit of virtue, or any matter whatsoever, to receive it with bent knee.' Add *Idem*, Bk. VI, chap. i, p. 204 ff.

The same conclusion must be reached about the assemblies of the estates which only serve the end of being a larger council for the king, through which the complaints of the people, which are often unexpressed in a private council, may reach the ears of the king, who is thereupon free to do what seems best to his ends. See Grotius, Bk. I, chap. iii, § 10; and Hobbes, *Leviathan*, chap. xxx, where he is correct in observing, that, if supreme sovereignty should reside in a king, and unless a state has two heads, such a body cannot undertake the conduct of more business than the king lays before it, since such deputies of the people could have been instructed on nothing more than is contained in the letters by which they were summoned. So also the assembly is dissolved, when the king serves notice that, for the present, there is no further business for them. Yet it is not forbidden to give the king advice in the form of petitions.

But a monarchy is actually limited when the citizens have conferred it upon a king, with the condition that in certain spheres of action he confer with a council of the estates, without whose consent no decrees of the king will be valid. Although the king ought still to be empowered to call and dissolve that council, and to present to it

the matters to be discussed in it, unless we wish to leave him the mere name of king, or to form an irregular state. And even if such orders when summoned may on their own initiative offer some suggestions looking to the kingdom's safety, yet their decrees on such matters will secure force only from the king's ratification. Such estates differ from counsellors properly speaking in this, that, although both can treat with the king only through advice and suggestion, he can reject the suggestions of the latter but not those of the former. Nor will a king take it as an affront, if the estates do not accept some of his proposals, for he has promised always to hold before his eyes the welfare of the state, on which the judgement of a number of picked men is presumed to be better than that of one. Therefore, in case the estates happen to differ with him, the king may blame his own imprudence, or base passions, or the unhappy state of the commonwealth. And it is also patent from this, that it is an empty fear when some think that by this arrangement it will lie in the hands of the estates, whether or not the state be safe. For surely we cannot reasonably expect such folly of the king, that he will be unable clearly to set forth to the estates the needs of the commonwealth, or of the estates, so that, when they have observed them, they will persist in betraying their own safety.

But this is certain, that, since they who have conferred a limited sovereignty upon a king are in no way presumed either to have wished to destroy or to dissolve the state, or to draw up their pacts in such a fashion that it is impossible to attain the end of states, agreements of this kind are always to be interpreted in such a way as to contribute to the common safety of all, and on no account to oppose it. And there- 737
fore, in every agreement it should be held that they intended those conditions and agreements never to lead to the commission of anything which would prejudice the common safety of all, and the public welfare, or lead to the overthrow or dissolution of the state. But in the event of such things happening, it would be agreeable, if the matter admits of delay, that such a proposal be made in the gathering of the people or estates; and if this is impossible the king will be empowered carefully to correct pacts which are destined to lead to the destruction of the state. And this applies even to laws of the state of long standing, which sometimes lie dormant at the bidding of the safety of the state, which is the highest law of all. An instance is found in Plutarch, *Agerilau*s [pp. 612-13], when that general commanded that the laws of Lycurgus sleep for one day, so that the soldiers who had fled from the field of Leuctra might return without suffering disgrace. So also the observance of ordinary legal procedure in a state is often not permitted by the times, or by the condition of the offending persons, who, if they were to be tried as criminals, would first have to be vanquished with arms. So we must accept with a grain of salt the statement of

Hobbes, *Leviathan*, chap. xxix, when he calls what is inflicted by public authority, an act against an enemy, not a punishment, unless it is preceded by a public condemnation. That is true enough when no offence preceded. But when an offence has so preceded, the evil inflicted will be a punishment, even though the times have not allowed the guilty person to be condemned by orderly process.

13. Hobbes apparently does not want to recognize any distinction between supreme and absolute sovereignty, but feels that all supreme sovereignty is likewise absolute. In this connexion we should observe, that in all the statements which he couches in too crude a manner, the restriction should be added, 'as becomes the end of states'. So, for instance, when he says in his *De Cive*, chap. v, § 6, that he to whom belongs the right in a state to exact punishments 'rightfully compels all persons to all things which he himself desires'. Just as he himself expresses a limitation (chap. v, § 6), in defining 'all things' as 'what are necessary for peace and defence', and again (chap. v, § 9), as 'for the common peace and defence'. And again (chap. vi, § 13) he says that there is connected with the right of the supreme sovereign so much obedience on the part of citizens 'as is necessarily required for the government of a state'. Thus when he says in the same section: 'Whoever has so subjected his will to the will of a prince that the latter can do whatever he pleases, declare laws, settle disputes, inflict punishments, use the persons and wealth of all at his pleasure, and all these things rightfully, has surely granted him the highest sovereignty which can be granted'; we must bear in mind the intention or thought with which men made up their minds to establish states. Therefore, it is held that no more power was voluntarily bestowed upon that prince than what a man of reason may judge to make to that end; although what may at any particular moment work to that end is a matter for decision, not by those who do the transferring, but by him on whom that power was transferred. Therefore, the supreme sovereign can rightfully force citizens to all things which he judges to be of any advantage to the public good. But to force citizens to such things as are repugnant to the safety of a state, or opposed to natural laws, should be a thing never even contemplated, and if he has undertaken any such enormity, he oversteps without a doubt the limits of his power.

Let us also consider the arguments by which the same author in his *De Cive*, chap. vi, § 17, endeavours to prove that it would be useless to undertake to limit sovereignty. He says: 'That gathering', which prescribed laws upon a future king, 'had an absolute power' at least actually or virtually. 'If that gathering continues or adjourns from time to time to meet at a certain time and place, that power will be continuous', and so the king will not have supreme sovereignty, but will
738 be only a magistrate. (This we concede, if that gathering is able to

assemble by its own right and to pass finally upon any business of the commonwealth, and if the king is responsible to it.) 'But if it once fully dissolves itself, and if the state is not dissolved at the same time, there must be left somewhere a power to punish those who break the laws, which is impossible without absolute power.' But this is false, as is likewise the argument by which he would prove his statement: 'For whoever has so much strength rightfully allotted him that he can restrain any citizen by punishments, has such power that a greater cannot be conferred upon him by citizens.' But whoever has thought upon the end of states, and considered that citizens by submitting their will and strength have not been made into immovable things without nerves of their own, and that they can grant another the use of their strength upon condition, decide whether that condition exists, and, in case it does not, withdraw their strength; such a person will easily perceive the weakness of this argument.

It is likewise clearly untrue that there is not more guarantee against the abuse of sovereignty when limited, than if it be left absolute. For he who has sufficient strength to defend all (a thing which all citizens not downright stupid freely grant their king), has not always sufficient strength to destroy them. The commands of a general, strong enough though they be to incite his soldiers to a vigorous attack upon the enemy, are found nerveless in case he commands them to turn their weapons upon one another. And in general wise princes, although they be absolute, adapt themselves to the genius of their citizens, and often urge with moderation matters that are to their advantage, when they cannot be forced to their duty without that act entailing some peril to the state. But no less prudent are those citizens who, knowing well what would not prove expedient to the state, have, by fundamental laws, put it out of the power of the king to constrain them in such matters.

14. Finally, it is another characteristic of supreme sovereignty, especially as it resides in monarchs, that the manner of holding it be either plenary or more or less limited. For some kings are said to hold their kingdom by way of a patrimony, while others are said to keep it in the way of use only, and with a kind of right of usufruct, and this either for life, or to transmit also to one's descendants under a certain law or condition. In the case of still others a certain period is fixed for their holding the sovereignty, at the end of which they lose it and return to the condition of private citizens. In fact, Hobbes, *De Cive*, chap. vii, § 16; chap. ix, § 11, calls such as have received the sovereignty only for their lifetime, 'temporary' monarchs, and regards them all not as monarchs but only ministers of the state. Yet it is opposed to common usage to call him who loses his sovereignty only at the end of his life, a temporary prince, since the term is properly applied only to those

whose power expires at a distinct and definite point of time, by its own right and not by chance.

15. But scholars are not as yet agreed as to whether there can be a temporary monarch. Grotius, Bk. I, chap. iii, § 11, would pass off the Roman dictator whose sovereignty ended after six months, as a genuine monarch, maintaining that

the dictator during his period of office performed all acts by virtue of the same legal right which a king has who possesses absolute power; and his acts could not be rendered null and void by any one. (And yet) the character of immaterial things is recognized from their effects, and legal powers which have the same effects ought to be designated by the same name.

Yet there is no question but a greater¹ dignity attends a perpetual sovereignty than a temporary one, for men regularly accord those who, they know, will never return to the position of a private citizen, a deeper respect than those whom they will see a little later on their own level. In fact Bodin, *On the Republic*, Bk. I, chap. viii, before his time, and learned men after him, have shown that the dictator was not a monarch but only an extraordinary magistrate. Nor does that axiom of his stand on very firm ground, that 'those faculties are the same which seem to produce the same effects'; for one must also consider whether a man exercises that faculty as his own, or as delegated to him by another. For the same reason Grotius is scarcely correct in the same passage in listing in the class of temporary monarchs those 'who are made regents of a kingdom before a king has attained to his majority, or while the king is prevented from reigning by madness or captivity. Under such conditions regents are not subject to the people, and their power is not revocable before a time fixed by law.' (K.) For these exercise supreme sovereignty not in their own name but in that of another, and so can no more be called monarchs than a guardian can be called the owner of his ward's property. Furthermore, no one acquainted with Roman history would admit that each and all of the parts of supreme sovereignty were at one time so entirely in the hands of a dictator, that for his period of six months he could exercise them as he wished. Nor is it an absurdity for there to be a magistrate from whose decision, at least in certain matters, there could be no appeal. See *Genesis*, xli. 40, 44; *Code*, VII. lxii. 19; I. iv. 8; VII. xlii. i; *Digest*, IV. iv. 18. Add also Livy, Bk. VI, chap. xxxviii; VIII. xxxiii; XXII. xxv; Valerius Maximus, Bk. II, chap. vii, § 8, at the end.

It should be observed, in this connexion, that the power of dictators and such other magistrates who rule for a definite length of time, expires when such time is past, and that by the law of their office they retire to a private station; and so any act of theirs after that time is to be held that of a private citizen, to whom every one may

¹ [For *najor* read *major*.—Tr.]

rightly deny obedience, whatever external signs of power they may still actually retain. Therefore, no new decree of the people is needed to abrogate the sovereignty of such magistrates, but if they refuse to lay down their office, action can be begun against them upon the basis of the old decree. For rights, the validity of which depend upon a certain length of time, expire the very moment it has arrived, but if a legal action is to be instituted where there is a question on the quality of certain performances, there is then need of inquiry and judgement. The reason for this distinction is that no question can arise as to whether a set time has elapsed, while something can be said on both sides of the question, whether or not an action was undertaken rightly. See Livy, Bk. III, chaps. xxxviii ff.

Now some hold it impossible to find an instance of temporary sovereignty, if one is to discuss supreme and not vicarious sovereignty. For the fact recorded by Dio, Bk. LIII, that Augustus wished the imperium granted him for only ten years, and then extended another ten, was but a jest. According to what is given by Curtius, Bk. V, chap. ix [45], Nabarzanes mingled villainy with his jesting:

Resign for a while the government and chief dignity to another, who shall continue king only till the enemy withdraw from Asia; then the conqueror will restore to you the sacred deposit. [. . .] Let us inaugurate Bessus, the satrap of Bactriana, temporary king. At the happy termination of our perplexities, he will transfer to you, his liege sovereign, the chief authority assigned to him on trust. (A.*)

More plausibility can be claimed for an instance of a kingdom in trust, in what is recorded by Diodorus Siculus, Bk. IV, chaps. xxiii, xxxiii. So also we read in Nicephorus Gregoras, Bk. IV, that Michael Palaeologus was obligated by an oath to administer the empire until his legitimate heir and successor had come of age, whereupon he was freely to withdraw in that son's favour alone from the royal throne and from all the insignia of sovereignty; although that oath was never kept. On the pact of Eteocles and Polyneices, that they would reign alternate years, it may perhaps be said that they did this so that they might keep the kingdom undivided, in thus administering it every other year. See Euripides, *Phoenician Maidens*; Statius, *Thebaid*, Bk. I.

16. Upon that manner of holding the throne, whereby monarchies are said to be in the patrimony of their kings, it should be observed, at the outset, that a man's patrimony is not so much what he holds in the way of inheritance from his parents, as what he possesses in plenary dominion, no matter how he obtained it. Furthermore, as dominion is properly understood to have to do with things, so they are also said to be in a patrimony because they have no inherent right to prevent their owner being able at his pleasure not only to use but to misuse them. At a later time slaves began to be classed as things belonging to a patrimony, since their masters came to assert such a claim over them that

they were understood to live or die not so much to their own gain or loss as to that of their masters. And to such things as these were the patrimonies of the father of a family confined at the beginning. For although the right to control wives and children belonged to them alone, yet since that right also concerned the safety of the latter, the heads of families did not include them in their patrimony, or wish them to be included among their wealth. See *Digest*, L. xvii. 126, § 1, with the comments of Jacques Godefroy; *Digest*, IX. ii. 33. So also the learning and skill of free men are not properly listed among their goods, no matter how great a source of profit they may be. Philo Judaeus, *On Noah's Planting* [xvii]:

Paintings are said to be the inheritance of painters, and, in short, any art is said to be the inheritance of the artist, not looked at as an earthly possession, but as a heavenly prize; for none of such things is the property of any master, but still they are an advantage to those who possess them. (Y.)

Yet for many men such possessions take the place of a patrimony. Ovid, *Metamorphoses*, Bk. III [588]: 'His craft was all his wealth.' (M.)

But when later the ambition of rulers began to list among their chief possessions sovereignty over men, and many had grown accustomed to misusing the property of their subjects to the satisfaction of their lusts, those kingdoms were included in a patrimony, of the alienation of which at their pleasure rulers had received the power to dispose, because this was understood to be a part of the highest force of dominion. And other kings who were not conceded so great a power over their kingdoms were commonly said to hold them as a personal possession, and by a kind of right of usufruct. The origin of this distinction seems to be traceable in the main to different ways of acquiring a kingdom. For although the consent of the subjects is required for the lawful crowning of all kings, yet there are certainly different ways in which that consent is secured. Thus in some instances a king favours his subjects by being willing to gather them into his kingdom, while in others a king is greatly indebted to his subjects for their elevating him to the throne. Again, those who gave cause for the undertaking of a just war against them, could, upon being defeated, lose by right of war their lives, or personal liberty, and all their possessions. Surely whatever condition they are left in may well be regarded as an act of generosity on the part of the victor. If the king leaves to the vanquished personal liberty and private ownership of property, he is at least understood to claim in a full and irrevocable manner sovereignty over them for himself and his family. If a question arises, it is presumed that a prince did the same thing when he took under his protection those who were threatened with destruction. What is urged against patrimonial kingdoms by Francis Hotman, *Quaestiones Illustres*, I, is met by Grotius, Bk. I, chap. iii, § 12. The effect following upon this manner of holding

sovereignty is seen clearest in the fact, that not only is the condition of subjects fixed at the will of kings, but also that a king can transfer his right over such a kingdom to whomsoever he pleases, and so establish a manner of succession at his pleasure.

17. Now when a king is named by a people on their own volition, each person is presumed in that act¹ to have reserved for himself all of his rights which are consistent with the nature of a state. And so the condition in which the citizens in such kingdoms live, depends not so much on the choice of the king as on that of the citizens themselves, who, however, had of necessity to give up of their natural liberty so much as the form of the commonwealth which they were to introduce regularly demands. Furthermore, since most men are usually moved to the voluntary bestowal of a kingdom by some special consideration which is not found in every ruler, and since whoever voluntarily subjects himself to the sovereignty of a man, is willing to be under this person, indeed, but not necessarily under another, it is regularly understood of such a kingdom that the question to whom it shall fall at the death of the elected king, depends upon the will of the people. And if in such a case the people does not desire to select each successive king by a special election, it will still be empowered to decide upon the order of succession and the power of the king will have no force in opposing the will of the people. It is primarily on this consideration that such kings are said by some writers to hold their kingdoms by a right of usufruct, because they can institute no change in the intrinsic structure of the state, nor take any part in the transfer of it to another, on their own initiative, against the wishes of the people. Compare *Digest*, VII. i. 13, § 8; VII. i. 15, § 1; *Code*, III. xxxiii. 9. 741

Yet I should be unwilling to carry any further the comparison between a king who is crowned by the will of a people, and a man who enjoys only the usufruct of a thing. And so I could on no account give my approval to the following statement of Hobbes, *De Cive*, chap. vii, § 16:

If we grant that the *people* departed not from the election of a *temporary monarch* (that is, one on whom sovereignty has been conferred only for his lifetime), before they decreed a certain time and place of meeting after his death; then the monarch being dead, the authority is confirmed in the people, not by any new acts of the subjects, but by virtue of the former right. For all the supreme command, as *dominion*, was in the people; but the use and exercise of it was only in the temporary monarch, as in one that takes the benefit, but hath not the right.

Indeed, this statement, if taken in such an unmeasured form, we hold to be highly prejudicial to all monarchs who are set up by the free will of a people, and who are bound by certain 'fundamental laws', as they are called. Especially, since, if he who is crowned only for his lifetime can be called a temporary monarch, they also can deserve this

¹ [For *ubi* read *ibi*.—*Tr.*]

name who have received a sovereignty which is to continue only in their family. And since Hobbes does not state how far he will carry this comparison of a king with a usufructuary, it will be easy to entangle him in dangerous conclusions. For since dominion is in itself a nobler right than temporary usufruct, one could easily conclude that a people is superior to a king, and can degrade him, if he has not administered the kingdom according to its wishes.

For the same reason we must also reject his view in *Leviathan*, chap. xix, that kings who have been elected do not possess supreme power. And his other opinion, that, whoever has the power to appoint the successor upon the death of a king, also holds the supreme power during his lifetime, since a man cannot give another what he himself does not already have. For as to the force itself of sovereignty over subjects, it is a matter of little moment what is agreed upon in any kingdom in case of an interregnum. Even when that has been provided for, citizens can still render the strictest obedience and can, with nothing to hinder, be excluded from every power in the state; nor will they be permitted to consider a new form of state or a successor during the lifetime of their king. It does not follow, because an elected king is unable to name his successor, that he holds only the usufruct and not the dominion, as it were, of sovereignty, and that he is but the administrator of another's property. For it is not necessary, in order that the power to look out for my welfare and to direct my actions as I choose (which power was for a time in the hands of another) may return to me, that the sovereignty be, as it were, so torn asunder that its *κτῆσις* [possession] lies with one, while only its *χρῆσις* [use] is transferred to another. When he to whom belonged even absolute sovereignty over
742 another, perishes, natural liberty is, as it were, born again of its own nature. Who, for example, would attribute to a father only *χρῆσις* [use] of paternal sovereignty, because at his death his children become their own masters (*sui iuris*), or allow a master but the *χρῆσις* [use] of his master's sovereignty, because when he dies without any heir his slave regains his liberty?

CHAPTER VII

ON THE WAYS OF ACQUIRING SOVEREIGNTY, ESPECIALLY MONARCHICAL SOVEREIGNTY

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| <ol style="list-style-type: none">1. The way of acquiring sovereignty in a democracy is uniform;2. But it varies in an aristocracy and in a monarchy.3. How far sovereignty may be seized by just force;4. How far by unjust force.5. How a person may be freed from another's sovereignty.6. The different kinds of election.7. The definition of an interregnum¹,8. And of interreges². | <ol style="list-style-type: none">9. An examination of the position of Hobbes.10. What if a posthumous successor is 'expected'?11. On succession in a patrimonial kingdom;12. And in kingdoms established by the will of a people; and if it be a simple hereditary succession,13. Or lineal,14. Or by transverse degrees.15. On the judge of disputes about successions in kingdoms. |
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SINCE in our discussion of how a man acquires sovereignty, it is regularly presumed that he who is said to acquire a kingdom is different from those over whom it is acquired, it is obvious that this question has little to do with democracies, since in them those who command are distinguished from those who obey, not in a physical but only in a moral respect. For even though it may sometimes happen that a democracy is established by revolution and the overthrow of the nobles or of the king, yet since the sovereign and the subject in it are always the same, in no sense will it be said that a people acquired sovereignty in a violent fashion, or that it constituted sovereignty over itself by such violence as belongs to subjects. And so in democracies, which differ in this respect from monarchies, the way of holding sovereignty is always uniform. And yet democracies, like other states, may receive their increases by the violence of war.

2. But in aristocracies a distinction is observable in the way of acquiring sovereignty not only in the fact that in some cases it has been delivered to nobles by the voluntary consent of a people, and in some has been secured by force, but also because to fill the places made vacant by death in that council, election is used in some places, while in others birth alone elevates a man to membership. In monarchies this distinction manifests itself far more clearly. For although all monarchs have need of the consent of a people if their sovereignty is to be made legitimate, still this consent is secured in different ways, and those who gain their sceptres by the free consent of a people, owe this elevation either to election or to succession.

3. Now a violent way of acquiring sovereignty is usually called

¹ [For *inter regnum* read *interregnum*.—Tr.]

² [For *inter reges* read *interreges*.—Tr.]

seizure. On this we should observe that it differs from that seizure whereby we make things that have no master our own by merely laying
 743 hands upon them. For since no right inheres in such things to prevent any man being able to claim them for his own (unless some civil law interfere), no special title is needed to secure dominion over them, but mere physical apprehension with the intention to keep them for one's own is enough. But since men are by nature all equal, and so no one is subject to another's sovereignty, it follows that mere force and seizure are not sufficient to constitute legitimate sovereignty over men, but that there is need of some other additional title. Therefore, when Grotius, Bk. II, chap. iii, § 4, lays it down that, 'Of things, which properly belong to no one, two are capable of seizure, sovereignty and dominion, in so far as the latter is distinguished from the former', the word 'sovereignty' should not be taken in its proper sense, and as that which is exercised over men, but of sovereignty over territories, the effect of which is that no one should settle in them against our will, unless he is willing to become our subject. For otherwise a man is not included in those things which belong to no one, but he who is not another's is his own. Xenophon, *Training of Cyrus*, Bk. IV [iii. 10], says: 'No one is so devoted to us as we are to ourselves.' Therefore, Grotius, Bk. II, chap. ix, § 1, is correct in saying that, 'If a man dies without any heir his servants become free and the peoples subject to him become their own masters (*sui iuris*)', because these two classes are not by their own nature subject to seizure. Yet I should have preferred that he had omitted that limitation, 'unless they renounce their liberty of their own accord'. For what man will we find who would hold his liberty derelict, that is, who, although unwilling to go without a master, feels that it is immaterial whether he be the slave of one man any more than of another? We conclude, then, that only such seizure may constitute sovereignty as presupposes a just cause for attack, and is strengthened by the consent of subjects and a subsequent pact. The rule of the Incas of Peru is justly to be commended. It was to advance their sovereignty by degrees and without violence, winning new subjects preferably by the clemency of their sway. Garcilaso de la Vega, *Comentarios Reales*, Bk. II, chap. xix. And, indeed, if there is no pact, a state of war continues, and no obligation, trust, and hence even no sovereignty is intelligible.

In this connexion we should examine the view of J. F. Hornius, *De Civitate*, Bk. II, chap. ix, § 2, who writes as follows: 'If a man conquers in war one who has attacked him unjustly and deserves his fate for other injuries, he has a perpetual and lawful power over his foe, and need not wait for his consent.' And yet how can one change from a state of war to one of peace without an intervening pact? How will faith and obedience be due to a man who has not bargained for them?

The only advantage the victors obtain by a just war is that they do not have to elicit the consent of the conquered by flattery or entreaties, but can extort¹ it by the threat of extreme penalties. And so Hornius achieves nothing in asserting: 'If the consent of the vanquished were necessary, a lawful victor could never secure sovereignty by seizure, because seizure would have no efficacy if the vanquished should not consent.' And yet since this seizure presupposes a victor of superior strength, and hence able to threaten the vanquished with some evil, that very seizure will have the effect that the vanquished cannot refuse the victor their consent. For although there is no one who would not prefer victory to defeat, yet every sane man will prefer to get off with a lesser evil, when he sees himself overcome²; nor will he hold his consent to his victor's sovereignty a thing to his own hurt, since he can thereby escape death.

4. But what if a man has seized sovereignty by unjust force? Now, without doubt, to avoid a greater evil, whatever be the source of the threat, a democratic people³, or the majority of them, may renounce their liberty, and agree to the sovereignty of one man or of a council. So also all men confess that a people subject to a king can submit to another in order to avoid destruction, and after no further defence is to be found 744 in their sovereign. But it is a question of greater compass, how, in view of the fact that an unjust fear renders void a pact, and that whoever causes another's loss by injuring him is obligated to make restitution, the consent of subjects, when wrung from them by fear of a greater evil, can confer lawful sovereignty upon their attackers, to such a degree that the latter can find peace of conscience in a consent secured in this way. For such statements as the following of Hornius are arrant nonsense: 'Since an attacker did not take the sovereignty, which he accepted with the consent of a people, from the people, but received it of God over the people, it follows that if it were to be returned, it must be returned to God, not to the people.' But since Hornius himself grants a people the power to designate the subject upon whom God may pour forth majesty from heaven, it will be enough if the oppressor return that power to the people. For if a people has recovered the faculty to choose any man king whom it pleases, it will, I imagine, decide that it is of little interest to them whether the assailant keeps that majesty as his own, or resigns it to God.

Therefore, I should feel that we must first inquire as to whether the assailant has forcibly turned a democracy into a monarchy, or has ejected a monarch and put himself in his place. In the latter case the obligation to restore the throne does not expire until either the king and his⁴ heirs, for whom there had been acquired a right to the kingdom,

¹ [For *extroqueri* read *extorqueri*.—Tr.]

³ [For *populus* read *populus*.—Tr.]

² [For *succumbre* read *succumbere*.—Tr.]

⁴ [For *ipsius que* read *ipsiusque*.—Tr.]

are dead, or the king himself renounces his kingdom and leaves it derelict. And it is presumed that he has done the latter when he makes no attempt over a long period to recover it. See Justin, Bk. XL, chap. ii. But in the meantime, even while the conscience of the assailant is still unsettled, their given¹ word is fully binding on the subjects, after their consent has been given, provided they gave their pledge only after they had done for their former monarch whatever could have been expected of them. Regarding the former case, the most reasonable thing apparently to be said is, that, since a people² can be as happy in a monarchy as a democracy, it is easy for them to swallow their desire³ for the liberty of a free state, if their new king governs the commonwealth well. And this also can be presumed if they bear it for a moderate period as a matter of course, which, furthermore, is understood to wipe out the taint attaching to the way in which the kingdom was acquired. No attention need be paid to a few grumblers, who are not lacking in every form of state, even when the citizens have established it of their own accord. But if a new monarch, after altering a state in a violent manner, abuses and mistreats his citizens, I should scarcely feel that the citizens are under any intrinsic obligation to him. For I doubt if we should take at its face value, without further proof, the assertion of J. F. Hornius, *De Civitate*, Bk. II, chap. ix, § 4, that 'the manner in which sovereignty has been secured has nothing to do with its nature, since it everywhere and always demands a corresponding obedience'. For surely if a man has not only seized sovereignty by force or fraud, but even in addition to cruelly oppressing the citizens centres all his thoughts upon open violence, his fault is not removed by the passage of time, which is otherwise judged sufficient to remove every scruple; since in this case continued possession denotes nothing more than injury continued over an extremely long⁴ period. See Justin, Bk. III, chap. v; compare Grotius, Bk. II, chap. iv, § 14; Bk. I, chap. iv, § 19.

5. In this connexion the further question may be asked, namely, how and when a state, upon having got rid of a monarch, may be established⁵ in the liberty of a democracy. Here it appears that we must pass distinct judgements in different cases. I. If a city or district has for any reason whatsoever cast off the sovereignty to which it was formerly subject, seized its liberty, and begun to conduct itself as a distinct commonwealth, so soon as it shall then have come to an amicable understanding with its former lord, and been recognized as a free commonwealth, it holds its liberty in plenary right, and for its
745 confirmation has no need to wait upon the delay of usucapion⁶.

II. If any one has been deprived of his sovereignty for just reasons,

¹ [For *datae* read *data*.—Tr.]

³ [For *desiderim* read *desiderium*.—Tr.]

⁵ [For *confermentur* read *confermetur*.—Tr.]

² [For *populos* read *populus*.—Tr.]

⁴ [For *logissimum* read *longissimum*.—Tr.]

⁶ [For *nsucapionis* read *usucapionis*.—Tr.]

the liberty is sound and legal so soon as it has been asserted. Nor is there any need for a continued¹ possession of it, or for its being recognized by its former master as lawful², except in so far as this last acknowledgement may entirely preclude unjust disputes which he might later raise. See Baudius, *De Induciis Belli Belgici*, Bk. III, p. 178.

III. When a rebellion has arisen for unjust reasons, the liberty remains unlawful so long as the former lord is engaged in reducing the rebels to obedience, or has at least kept his right over them intact by protests, until it may be concluded, from his continued silence, that he treats his right as derelict.

IV. In case a region or city, when threatened by enemies, seeks aid from its king in vain because of his lack of power, so that it is forced to find safety in its own resources and counsel, we feel that the right of the former lord expires, when it has managed its affairs separately for a considerable time, and has had no further business with its former lord. For this shows a manifest dereliction on his part, it being understood that even if sometimes such necessity lies upon a king or a commonwealth that they are forced to leave a city or region without help, and thrown upon its own resources (see Livy, Bk. III, chap. vi; Bk. XXIII, chap. xxi), when that necessity has been removed, they should at once³ return to the exercise of the former sovereignty. Surely a man can no longer⁴ pose as my prince, who, when he may do so easily enough, takes no interest for a long time in fulfilling toward me the duties of his position. See Livy, Bk. XXXV, chap. xvi.

6. Sovereignty is established by *election* when a people to be constituted or already constituted, of its own accord designates a certain man as in their judgement capable of sovereignty. When he has been notified of the decision of the people or of their representatives, and when he has acquiesced in it, the people promise obedience and confer sovereignty upon him.

This election is commonly divided into *free* or *restricted*. It is the former when any one at all and without exception can be designated, who already naturally is, or, it is hoped, soon will be, fitted for sovereignty. It is the latter when a man only of a certain nation, or family, or endowed with a certain quality can rightly be designated. Yet if we consider the right of election, as it is understood to be inherent in a people fundamentally, every election is in itself free. For even if the decision has once been made, whereby a certain group of men is excluded from sovereignty, nothing prevents that decision from being changed. But if a people has conferred upon a few representatives the right to elect, in most cases they bind them by express rules as to the requisites which should be observed in designating a prince. In some places election is

¹ [For *dinturna* read *diuturna*.—Tr.]

³ [For *potinus* read *protinus*.—Tr.]

² [For *ligitima* read *legitima*.—Tr.]

⁴ [For *aplius* read *amplius*.—Tr.]

found mixed, as it were, with succession, when a kingdom regularly passes to the sons of the deceased ruler, while the consent of the people or nobles is given at the outset of the reign. This consent does not appear to be a mere ceremony of inauguration, or offering of homage, but to have the force of a negative vote. It is as if a people had conferred the sovereignty on the head of a reigning house, with the condition that it should also be transmitted to his offspring, provided they are not unfit for the throne. Therefore, in such kingdoms the people or nobles assemble, not so much to elect a king, as to declare that they find nothing in a son to prevent his being able to succeed his father.

7. Now election may take place either in a state just rising, or in one of long standing. In the former case, after the first pact and a decree on the form of commonwealth to be introduced, the next step is the election, either by all the citizens or their representatives. When
746 the election is over and its decision accepted, upon the conclusion of a pact between the man elected king and the people, a complete monarchical state comes into being. But it may happen, in a monarchical state already established, that the monarch dies without his successor being appointed, in which case things are said to return to an *interregnum*.

It is an easy matter to understand what form should be assigned a state during an *interregnum*, if one considers the bonds which hold together a complete state. That is, since the intrinsic completeness of a state and supreme sovereignty arise through the latter pact entered into between king and citizens, it follows that, with the passing of the proper subject of sovereignty, the kingdom slips back into an incomplete form, so that it holds together only by that original pact of states, whereby each individual is understood to have agreed with every other to the establishment of a single group. Although no little firmness for the binding together of citizens during an *interregnum* is added to that pact by the thought of a common fatherland, and the indefinite relationship that arises therefrom, and the further fact that the fortunes of the majority of them are connected with that spot and cannot easily be removed elsewhere¹. Lysias, *Orations*, xxx [xxxi. 6]:

Those who are native born citizens, but feel as though the whole world, wherever they can themselves prosper, is their fatherland, these clearly are the men who would be ready to abandon the common interest of the state and seek their own private profit, and this because they regard not the state but their property as their fatherland.

So also Livy, Bk. II, chap. i, correctly observes: 'The pledges of wife and children and love of the very place and soil (an affection of slow growth) firmly unite the aspirations of citizens.' (F.*) Antiphon, *Orations*, xvi [v. 76]: 'He could not readily² leave the city; too powerful for that were the pledges which were held there—his children and his

¹ [For *aliorum* read *aliorum*.—Tr.]

1569.71

² [For *καλῶς*, which has no authority, read *εὐπρόως*.—Tr.]

property.' Thus in Plutarch, *Marius*, [ix], 'it is said that the Romans chose their soldiery according to their wealth, each soldier being supposed¹ to put his substance in pledge to the state.' (P.) This is the reason why a state that falls into an interregnum still holds together more firmly than an army which has lost its general, especially if the latter be composed of mercenaries, the most of whom 'have no fatherland or else another'. And so in order to preserve all these things that have been mentioned, and to see that they have a safe abiding place, citizens of means are the more eager to live at peace in such a period, and set about with greater zeal to put into operation a form of government.

Now although in general we can with Livy, Bk. I, chap. xvii, call a kingdom during the period of interregnum a 'state without government, and, as it were, an army without a general', yet since states in the process of formation, before sovereignty has been vested in a certain man or council, have the form of democracies (see Hobbes, *De Cive*, chap. vii, § 5, at the beginning), and since, furthermore, it is natural that at the death of him to whom all have committed the care of themselves, they should themselves look out for their own interests, it follows that any interregnum has regularly the appearance and nature of a temporary democracy, in so far, at least, that for a time the administration of common affairs must be decided upon, and a new king crowned with the consent of all, unless they prefer to introduce another form of state. Yet an interregnum is not a complete democracy, since a decree has not yet been sanctioned that the control of the state shall be vested for all time in a popular assembly, and because the laws and public institutions are still adapted to a monarchical regimen. Although the further possibility may arise, that, when a kingdom consists of important and integral parts, such as different peoples, provinces, and large cities, an interregnum may cause it to assume the appearance of a system.

It is patent from what has been said, in what sense must be taken the statement of Grotius, Bk. I, chap. iii, § 7, and others, that, 'at the death of a king without a successor the sovereignty reverts to the people'. That is, although during an interregnum the sovereignty is not vested in the people, because it has not yet by common decree been conferred 747 for all time upon a council, yet a people will be able during that period to exercise by themselves, or through certain delegates, all the acts of supreme sovereignty that they think will make for its preservation. For those writers are in some error who hold that upon the extinction² of the royal house there reverts to the people, not the power of governing, but only that of electing and designating another king. As if upon an interregnum a people had no choice but to create a king! And as if thereupon the sovereignty could not be conferred upon the nobles, or a permanent democracy be established!

¹ [For δοκῶντες read δοκῶντος.—Tr.]

² [For *extincta* read *extinctio*.—Tr.]

8. But their peace has been best secured by such states as have appointed in advance, in order to avoid the disadvantages usually consequent upon an interregnum, the persons in whom shall be vested the administration of the commonwealth while the throne lies vacant. Such persons, whether they be known as interreges, or by some other designation, are temporary, or, if I may use the term, provisional magistrates, who exercise by the authority of the people the acts of supreme sovereignty, at least such as are necessary to hold together the group for the time being, but are required to give to the people an account of their deeds, which also sometimes the new king requires, as in the name of the people. The power of such ceases immediately upon the creation of a new king, or when another form of state has been decided upon.

But when there is in a kingdom a standing senate, yet such as does not hold the sovereignty during the lifetime of a king, the supreme power does not at the death of the king fall to it of its own right. Although it is very convenient for it to become for a time the acting head of the state in the event of an interregnum, just as it was previously summoned by the king as a minister to share in his cares. But whatever power such a senate has exercised during an interregnum, is understood to have been conferred on it by the entire people. For if it had obtained before, as a magistrate, any power from the king, that is lost when he dies without a successor (see Connestagio, *De Unione Lusitaniae*, Bk. III, p. 116), and, if it is allowed to continue its former function, that is no longer a concession from the dead king but from the people. Add Bodin, *On the Republic*, Bk. III, chap. ii, p. 417. Therefore, a senate of this kind, serving the function of an interrex, can on no score hold power longer than the body of citizens wishes, much less lay claim to a lasting sovereignty or establish an aristocracy on its own authority. For it is a prerogative of the citizens as a whole to decide on the form of the commonwealth, and that as it may please them, unless they happen to be bound by an oath. See Livy, Bk. I, chap. xvii, and Dionysius of Halicarnassus, Bk. II, where he records that, when the frequent changes in interreges became distasteful to the Roman people, and because they felt that they had a hundred kings in place of one, the senate referred the matter to the pleasure of the people to consider the form of the commonwealth, namely, whether they preferred to entrust its care to kings, or to annual magistrates. Although the people returned the choice in the matter to the judgement of the senate. Add also the account of the interregnum in Poland after the death of Sigismund; in Paulus Piasecius, under the year A.D. 1632.

9. In order to illustrate these points, it may be worth while to have observed what is set forth by Hobbes, *De Cive*, chap. vii, §§ 15-16, where he imagines the following situation:

Suppose now the *people* had delivered up its power to some one man for term of life

only; which being done, let us suppose in the first place, that every man departeth from the council without making any order at all concerning the place, where after his death they should meet again to make a new election. In this case [. . .] the *people* ceaseth to be a *person*, and is become a dissolute multitude, every one whereof hath a natural right to meet with whom he lists at divers times, and in what places shall best please him.

Therefore, he says, such a monarch is bound by the law of gratitude to take precautions that the state does not fall to pieces after his death, and this he can do, according as it shall appear to the advantage of the state, either by setting a time and place where the citizens who will may meet, or else by naming a successor. Here Hobbes falls into an error in 748 holding that, 'if upon being assembled they depart without setting a place and time for another meeting, they disband into a dissolute multitude', if this be understood of such as have constituted a complete state by the election of a king, and not of such as are still engaged in constituting a state. For it is obvious that those who gather to form a state and depart without setting a future time of meeting, are dissolved with the task unfinished, and so remain each of them in their former status. But those who have once gathered into a complete state, and subjected themselves to a king, cannot be presumed, after having once found an abiding place for their fortunes, to have been so foolish as to have wished that their newly established state shall be extinguished upon the death of their king, and that they depart into a natural status and anarchy, which will imperil their present safety. Therefore, when sovereignty has not been conferred upon a king with the right of inheritance, or with the power to decide upon his successor as he sees fit, it is understood that at least they have tacitly agreed to meet immediately upon the death of the king, and in that place where they were otherwise accustomed to hold their assemblies, or where the king had fixed his residence. Nor is it likely that there will be wanting in any people prominent citizens who may for such a period restrain the remainder by their authority, and force them to gather at the earliest opportunity to consult upon the commonwealth.

It is patent also, from what has been said, how far we can accept the statement of Hobbes, *Leviathan*, chap. xxi, that 'When a monarch relinquishes and renounces a kingdom for himself and his sons, the subjects revert to absolute and natural liberty'. For this is by no means true in the sense that they relapse into a loose multitude, but that they recover the absolute right to dispose anew of their status.

10. There arises also another form of interregnum in hereditary kingdoms, when a king dies leaving his wife with child, or under a fair presumption of being so. Nearly all nations are agreed that a right can be conferred upon such as are still in the womb, and that they are therefore capable of holding a right to κτήσις [possession], if not to use.

(Therefore, when Hormisdates died, leaving his wife with child, the Persians placed a diadem upon her womb, since they preferred to believe that it was a male child, proclaimed the unborn babe king, and even gave him a name, and he became Sapor, so renowned for his deeds. Agathias, Bk. IV [x].) Now when there exists a proper subject for the supreme sovereignty there is no actual interregnum. And therefore, neither the minority of a king, nor his captivity, constitutes an interregnum in the strict sense of the word, although captive princes have often been treated by their relatives as dead, when the government should really have been administered in their name, until they had either returned to their realms or died in captivity. See Justin, Bk. XXXVI, chap. i; Trebellius Pollio, *Gallienus*. Here belongs the following account in Dio Cassius, Bk. XXXVI [liii]:

Tigranes had his treasures deposited in forts—in the district of Sophene. [...] When Pompey demanded it of the guards they replied that the command must be given them from Tigranes. After Tigranes had reluctantly ordered them to open the forts, the keepers objected that he issued the command not of his own free will, but under compulsion. But soon thereafter, when Tigranes had been put in chains on that account, they opened the forts.¹

So also when Demetrius was held prisoner by Seleucus, he commanded his son, and generals and friends, who were in Athens and Corinth, to place no confidence in his letters or seal, but to keep the cities and the remnants of his kingdom for Antigonus, as if he himself were dead. Plutarch, *Demetrius* [p. 914 D].

Yet until the royal child is born, there can be no certainty whether it will come into the world alive or dead, and whether, in kingdoms where women are excluded from the throne, it will be a boy or a girl. And until there is certainty on these matters, a people never acquires
 749 such rights as they secure in a clear interregnum, but the state will have to be administered just as it regularly is during a king's minority². See de Serres, *Inventaire Général de l'Histoire de France*, on Philip of Valois, at the beginning of the chapter.

II. When the right to a kingdom is once acquired by or conferred upon a person by *succession*, it is continued in his posterity. This succession is constituted at the pleasure either of the king or of the people. There also belongs to kings who hold a kingdom in their patrimony, the right to dispose of the succession as they choose, and when they have once expressly declared their will concerning the succession, it must be as closely adhered to as the last will and testament of the father of a family. In this case he will also be able to divide such a kingdom in equal shares among his children, and even without distinction of sex, and also to give it to a natural son, in case he has no legitimate issue. It was on this basis, according to Guicciardini, Bk. V,

¹ [No more than a paraphrase of Dio.—Tr.] ² [For *minnorenmitatem* read *minorenmitatem*.—Tr.]

that Alphonso of Aragon conferred upon his natural son Ferdinand the kingdom of Naples which he had won in war, although others maintained that it belonged to Aragon since that state had borne the expense and labour of its acquisition. Nay, he may leave it to an adopted son, and even to one who was in no way related to him. Add Justin, Bk. XLI, chap. v, n. 10.

But when such a king has made no provision about his successor, the question must then be considered, who is called to the succession by natural order. For if the king in his lifetime has declared his will neither by testament nor in any other way, it is nevertheless presumed that he did not want the state at his death to return to anarchy, which would entail the ruin of his citizens, whom considerations of humanity would not suffer to leave to such a miserable fate. And especially is this true, since, had that been his intention, he could easily have served notice of it, so that the citizens could have had time to prepare for such a situation. And it is as fair to presume of kings as of other men that they are unwilling to see the possessions which they have gained perish, or to leave them upon their death lying exposed for any to seize, but that they would have them fall to those whom they held dearest in their lifetime. Therefore, under such circumstances the same order will be preserved in the successions of patrimonial kingdoms as in other inheritances of private citizens, save in so far as the nature and safety of kingdoms may justify some departure. For although a father may have an equal affection for all his children, he will still, if he be wise, know how to restrain and guide it, so that the patrimony with which the safety of the family is usually connected be not rendered less stable; and it will be presumed that he wished this when he has made no declaration to the contrary.

From these conditions it follows that such a king wishes the monarchical form of government continued after his death, since he himself commended it by his example, and left behind him no stricture upon it either in deed or in word. And then since all men are naturally inclined to prefer to favour those from whom honour and glory redound rather to themselves than to others, and since these fall to every man after death more through the agency of his children than of any other men, it is held that a father wishes well to his children above all others. For if he does not wish this he should have expressly signified it, since it is never believed that such madness has seized upon a man that he would deprive his children of so distinguished an advantage, and leave it open to all as a source of quarrels. And Hobbes, *De Cive*, chap. ix, § 15, is mistaken in classing among the signs whereby a father shows his unwillingness to pass the kingdom on to his sons, that of 'long custom' after several successions, since, as he says, whoever maintains silence about his successor is understood to acquiesce in the custom of the

kingdom, inasmuch as that custom, whether originating with the founder of the house, or with one of his descendants, has passed into the force of a fundamental law. But we are here concerned with the
750 order of succession, when the king has made no disposition, and there exists no law or custom of the kingdom.

It is another fair presumption, that such a king not only wished that the kingdom retain its regular form, that is, that the parts of the supreme sovereignty be not distributed among several brothers, or among those related to the king in the same degree, nor that such administer it as a body, with undivided and equal power, but also was unwilling that the kingdom be divided into several parts, and that there be henceforth several distinct kingdoms in place of one. For both of these courses would involve the greatest harm to the kingdom, and the break-up of the royal family itself.

A presumption closely related to the foregoing is, that even in these kingdoms, despite the prerogative of age, male heirs, when there are several children, are preferred above female, because the male sex is regularly more suited for command, and a government of women is usually attended by certain disadvantages, which will be all the greater if brothers must be excluded from their father's throne by such female rulers.

A further rule is, that among several children of the same sex, the eldest shall succeed to the throne, and this not merely because he is held to excel the younger in age as well as in prudence, but also because brothers are otherwise equal in their relationship to their father, and if the kingdom were to be conferred upon the most worthy of them, they could not avoid becoming entangled in fatal quarrels. An excellent example of such a thing can be found in the confusion which not so long ago reigned in the kingdom of the Great Mogul, as it was so excellently described by Bernier. The best way to avoid this is to commit the decision to the chance of birth, which is followed regularly by the consent of practically all nations, as a rule suggested by nature herself. Add Xenophon, *Training of Cyrus*, Bk. VIII [vii, §§ 9-11], in the last speech of Cyrus. Yet under this procedure it would be necessary for the eldest brother to provide that the other brothers have an honourable means of support; but that he should pay them as much as would have been their portion if the kingdom had been divided, is neither necessary, nor in fact possible. For let us suppose that there are four brothers. Where will the eldest secure as much money as is equivalent to three-quarters of his kingdom? Add Boecler on Grotius, Bk. II, chap. vii, § 13.

But if in such monarchies the king be without offspring, his brothers or sisters will succeed, and upon lack of such the nearest relative of the deceased, the prerogative of sex and age being always

observed. Nay, the kingdom may finally pass even to the relatives of the last owner, although they may be in no way related to the founder of the line, not only when the deceased had so desired it, but also if such be the established custom of succession among the citizens of the kingdom in matters of inheritance. For it will be presumed that, if the king made no express disposition at variance with the practice of the state, he wished it observed in his own patrimony. But the statement added by Hobbes, *De Cive*, chap. ix, § 19, is not so clear. 'The manner of succession to sovereignty', he says, 'is the same as that to right of succession. For it will be held that although the eldest son die before his father, he has transferred his right of succession, unless his father rule otherwise, to his children; and therefore the nephews and nieces will take precedence in succession to their uncles on their mother's' (he should have said 'father's') 'side'. We do, indeed, confess that this right to represent and take a father's place has much in its favour, lest the children suffer some loss in being so inopportunately deprived of their father. And yet since a son during the lifetime of his father has but a hope of securing his property but no plenary right to it, and it does not appear so necessary that a hope, which is not yet quickened, as it were, into a right, should descend to children like a right, nephews will scarcely by the bare law of nature take precedence over their father's brothers, unless they can base their claim upon the law or custom of the kingdom. Add Bodin, *On the Republic*, Bk. VI, chap. v, p. 1144 ff.

12. But in kingdoms which were from the first constituted by the free will of a people, the order of succession will depend originally upon the will of that people, and if it has expressly conferred upon its king not only the sovereignty but also the right to name his successor (which is not usually done very rashly), he shall succeed whom the king has named. But if the people itself ruled upon the succession, it wished it to proceed either like other inheritances, so far as such rules can be successfully applied to a kingdom, or laid down some special regulation for it to follow. 751

Now the safety of a state usually requires that the simple hereditary succession to thrones depart from successions of private inheritances in the following respects. I. A kingdom is not divided between several brothers or heirs who are in the same degree distant from the deceased, because such a rule makes for the highest safety of the realm and the concord of the citizens. See Justin, Bk. XXI, chaps. i, ii.

II. Succession is confined to those who are descended from the first king, and there should be no passage to a lateral degree, and much less to connexions by marriage. For a people declared its desire to bestow the kingdom upon that particular king and his posterity, and on the failure of that line the right returns to the people to decide again upon the kingdom. Add Boecler on Grotius, Bk. II, chap. vii, § 15.

III. Only those shall succeed who are begotten in accordance with the laws of the country. On this basis natural, that is, bastard sons are excluded, although their father may have loved them as much as his legitimate offspring. For at least among the more advanced nations those children are open to scorn, whose mother their father did not dignify by lawful marriage, and treated more as the object of his wandering lust than as a helpmate for his life. And, indeed, there can be no absolute certainty as to the fathers of such natural sons, because of the lack of any marriage pledge and of continued association. But it is of the highest expediency in kingdoms that the person of the king be worthy of respect, and at the same time be the least possible subject for disputes. Add the interesting example of this point in Martinus, *Historia Sinica*, Bk. VI, chap. i, p. 202. Livy, Bk. XXXIX, chap. liii: 'Although Demetrius was younger than Perseus, he was born of a lawful wife, the latter of a mistress; the latter, as though begotten of a common body, carried no mark to show an unquestioned father, while the former was the very image of Philip.' (M.) Add also what is told of Ferdinand, king of Naples, by Giovanni Pontano, *Neapolitan History*, Bk. II. Under this head falls the custom of some nations for the queen to be delivered in an open chamber, that none may regard the birth as fictitious and the child not hers. Thus Constance gave birth to Frederick II, after she was fifty years of age, in a pavilion erected in the public square, and in the presence of many gentlemen and ladies of the nobility. Pandolfo Collenuccio, *History of the Kingdom of Naples*, Bk. IV. Also adopted sons are excluded not alone because the nobility of truly royal birth adds to the veneration of kings, and a livelier hope is conceived of them that they will be endowed with the virtues of those from whose blood they are sprung, but also because the people conferred the kingdom upon the natural line of a king, and in the event of its dying out wished the power to return to them of deciding upon the form of government which should follow. And this power could be evaded forever if it were allowed that adoption granted any right to a kingdom.

IV. Males of a like degree in fact, or inheriting through a deceased father of like degree, shall be preferred to females, although the latter have the advantage of age. Compare Boecler on Grotius, Bk. II, chap. vii, § 17.

V. Among males, and, when they are wanting, among females, the eldest in the same degree shall be preferred. In Livy, Bk. XL, chap. xi, Perseus urges against his younger brother Demetrius: 'He hastily overleaps the order of age, of nature, of the Macedonian custom, and of the law of nations.' (M.) Add Boecler on Grotius, Bk. II, chap. vii, § 18.

VI. Finally, such kingdoms differ from the common form of inheritances in this, that although they pass to another only upon the death of the former possessor, and are not passed by the latter to the

former as though from hand to hand, yet they pass to another from the former owner acting as an occasion, and do not pass like other inheritances by the right, will, and free grant of the former owner. For succession in these kingdoms does not depend upon the choice of the last possessor, but is continued in accordance with the constitution of the people in the royal line. Therefore, it is also not necessary for a successor, even though of the nearest degree, to take over the obligations 752 or burdens which lie upon the private patrimony of the deceased prince, but, if he think best, he may take the kingdom and refuse to inherit the private estate, since the kingdom is a noble possession of itself and an inheritance separated from a prince's private estate. For it is held that it was the people's wish to turn over a kingdom with the fullest possible right, and that it has no interest in what may happen to a king's private affairs. Nay, it would constitute a burden as well for the people, if his successor were required to pay the private debts of the king, for they would finally have to be met by the state treasury, if the private estate was not solvent.

Now, in brief, the people chose the order of succession described above for the following reasons: That the successor should always be known, and in order to avoid the disadvantages of elections; that at the same time reverence might be paid the king because of the splendour of his birth; that there might be hope of outstanding virtue by reason of his descent and rearing; and that the holder of a throne might care the more for it and defend it with greater zeal, if he knew that he would leave it to those for whom he holds the strongest natural affection. It is an unusual custom which is described by Procopius, *Persian War*, Bk. I, chap. xi: 'It is illegal for the Persians to make king a one-eyed man, or a person who is maimed in any other respect.'

13. But since it can frequently be the case in successions of persons far removed from the founder of the line, that it would not be altogether clear what succession is to be preferred to another, if simply the one who happens to be nearest of blood to the deceased king should be the one to be called to the throne, especially since the favour of succeeding by right of one's parents ceases in the more remote degrees, many nations, in order to avoid controversies of this nature, have adopted a succession which is called *lineal*. Its nature is this: All who are descended from the founder of the dynasty are understood to constitute perpendicular lines, of which each is nearer to the throne according as each one in the same degree enjoys the two prerogatives of sex and age. Nor does the claim to the throne pass to another line until all members of the former are dead. Therefore, those who will come to the succession on this plan have no need to count how many degrees they are removed from the late king, nor to appeal to the right of representation; but as each one is born, so the law confers upon him a perfect

right to the throne as held in his order, which right each man passes to his children in equal order, even if he himself did not hold the throne. Therefore, by this plan those first called are always the children of the last holder, yet so that account is taken of the dead, if they are survived by descendants of any degree whatsoever; and if the line of the deceased be the nearer, his descendants exclude all others, provided, however, that in like degree of the same line the prerogatives of sex and age are always observed. (For surely no examples are to be found anywhere of the mere prerogative of age surpassing that of sex.) If there were no children to the last possessor, the succession passes in ascent from him (for it does not return to the founder of the dynasty and commence again with him) to the nearest line and so on, the two prerogatives of sex and age being maintained in the equal degree of the same line.

Now the most common species of lineal succession are two, the one *cognate* and the other *agnate*. The former is also called 'Castilian', because it is followed in that kingdom, and its distinguishing feature is this: In the same degree of the same line males are always preferred to females who may be older, and yet there is no passage from one line to another for mere reasons of sex. Therefore, females are not excluded
 753 but only placed after males in the same line, and the succession even returns to them, if there are no males of either prior right or equal right, or heirs descended from males. The result of this is that the daughter of a son is preferred to the son of a daughter, and the daughter of a brother to the son of a sister.

Agnate succession differs from this, in that females and their offspring are forever excluded from succession. The reason for this is to prevent a kingdom from passing to foreigners by their marriage with the women of a dynasty, and the ancient royal house from being degraded through reception by marriage into the royal family. The name given to this is the 'French succession', since it is the accepted rule in that kingdom. Some variation is made in this, when, upon the failure of all males in the royal house, the throne finally falls to females. See Guicciardini, *History*, Bk. XII, p. 367.

Now since lineal succession is a perfectly clear matter, it might be well, whenever a controversy arises, to inquire first of all into what species of succession is customary in that kingdom. This was a matter for long discussion in the last century in the case of the kingdom of Portugal, since Raynutius of Parma maintained that it was lineal, and all other writers that it was simple and hereditary. See Connestagio, *De Unione Lusitaniae*, Bk. III.

14. Another way of succession can be constituted, whereby he who is nearest to the founder of the royal line is called to the throne. By this method all the sons in order of age succeed to the king, after them his nephews in order of age, with regard also to the age of their fathers,

upon their death the grand-nephews, and so on. Such a method of succession, according to Livy, Bk. XXIX, chap. xxix, used to be followed in Numidia, and a similar one is also observed in the kingdom of Siam, as we are informed by Iodocus Schouten, *Descriptio Regni Siam* [vol. I of the French translation]. We are informed of the custom in Fez and Morocco by Thuanus, Bk. LXV, on the year 1578, and Connestagio, *De Unione Lusitaniae*, Bk. I, who, however, appears to suggest that it was a special agreement between the brothers. Garcilaso de la Vega, Bk. IV, chap. x, records that this was the method of succession among the Peruvians only among the petty kings called Curacae. Add Grotius, Bk. II, chap. vii, § 24. Among many peoples of India, and in particular along the entire coast of Malabar, this is the common manner of succession, so that a father is not succeeded by his son but by his sister's son, because they believe that they are far more certain of the royal blood flowing in the latter than the former. See among others Petrus de Valle, *Viaggi*, Pt. III, ep. vi, and Jeronimo Osorio, *passim*; add Philip Balde, *Description of the Island of Ceylon, Malabar and Coromandel*, chap. xvii, p. 102. Although among the natives of Hispaniola the sons of free sisters succeed for the same reason only upon failure of the direct line, as we are informed by Francisco Lopez de Gomara, *Historia Indiae Occidentalis*, chap. xxviii, while the same writer (chap. xii) says that even in private succession nephews by one's sister are preferred to own children, save in the family of the Incas, where the son succeeds his father. Franc. Creuxius, *Historia Canadensis*, Bk. I, writes that it is also the custom among the Canadians for the sons of sisters to be preferred to those of wives in the inheritance of property and dignities. Strabo, Bk. XVI [iv. 3], describes a strange manner of succession among the Chatramotitae, a nation of Arabia:

A son does not succeed his father on the throne, but the first son to be born to a great nobleman after a man has been made king. For as soon as a new king mounts the throne, all the pregnant wives of the great nobles are recorded, and watchers appointed to observe which one is the first to give birth, and it is her son who is selected by law and educated in a princely fashion so as to succeed to the kingdom.

15. The question arises in this connexion as to who is competent to render the decision, if a dispute arises between two or more in a kingdom, especially if it be not patrimonial, for the law of nature would not permit them immediately to take up arms over a cause which is not yet clear. In this case it is certain, at the outset, that the nature of such controversies does not allow them to be decided by the method of jurisdiction or through sovereignty, and that they must, therefore, be settled in the manner in use among such as live in natural liberty and are subject to the jurisdiction of no man. In this sense is to be taken the position of Grotius, Bk. II, chap. vii, § 27. 754

Now those persons are said to live in a state of nature who neither

are subject to one another, nor recognize a common lord. And although those who are disputing among themselves may be under the sovereignty of one man while they are thus disputing, the nature of this cause is such as not to admit a sentence from a superior as such. No one outside the nation over whose sovereignty the dispute rages can act as judge. Nor will the king himself be a competent judge, if the controversy began to stir during his lifetime, since it is presupposed in such kingdoms that the people had never submitted to the king the method of succeeding to the sovereignty; although there are not wanting examples of kings who, out of confidence in their authority and merits, have assumed to themselves a broader authority in such cases than the nature of free kingdoms otherwise permits. So when a dispute arose between the sons of Darius, according to Herodotus, Bk. VII [ii, iii], the father took the decision into his own hands, although Justin, Bk. II, chap. x, relates that it was referred by the brothers to Artaphernes, who acted as a domestic judge. Likewise their father settled a quarrel between Arsicas and Cyrus. Plutarch, *Artaxerxes* [ii]; add 1 *Kings*, i. 5 ff.; Justin, Bk. XVI, chaps. ii, vii. And it can be affirmed that not even a people is empowered to settle such controversies as with sovereignty, although not for the reason given by Grotius, *loc. cit.*, because, namely, a people has transferred all jurisdiction from itself to the king and the royal family, and so while the latter endures has none of it vested in itself. For the cause concerned in succession does not belong to the person in whom that jurisdiction lies, which was conferred by the people upon a king, and when such a controversy is raised during an interregnum, surely the people cannot be denied at least temporary jurisdiction. The true reason is to be sought in the nature of those controversies. For the effect of the exercise of judicial power over subjects is this: That they are fully obligated to acquiesce in the sentence delivered, and that they can be constrained by authority if they are unwilling to do so; this because it is a part of civil subjection to await from the sovereign power the decision of controversies which arise between them and their fellow citizens.

And yet, if we consider all possible cases of such disputes over succession, it will be clear that none of them is so framed that it can be decided by any authority residing in a people, as the disputes of citizens are settled by a common judge. For if the right of a king who already holds a throne by the will of the people is challenged by another member of the royal house, on the ground that the throne belongs to him, because he is of nearer degree, the claimant will certainly be unable to recognize the people as judge, since it must necessarily defend its decision whereby it has already recognized the present king as its lawful sovereign, while he who is at the head of the state will under no circumstances submit himself to the judgement of those who agreed to

be his subjects. Much less will a people be held a competent judge, if there comes forward as the heir of a kingdom a man whom it refuses to recognize. But if two candidates offer themselves for a vacant throne, quarrelling over which has the better right, and the people be ready to recognize as their sovereign the one who proves that he deserves the throne above the other, there is no need of a judgement in the proper sense of the term, such as settles the cases of subjects within states. For either the controversy is only over the question by what grade each is separated from the throne ¹, or else the question is, which grade is to be preferred. In the former case it will be a question of fact ², for the contenders to give clear proof of their descent, and he will be successful whose lineage appears to the people to be the clearer. Yet in this case the judgement of the people does but give added force to his actual success, and their decision will not be delivered as though in a court of 755 law by a judge over those who are subject to him, but after the manner of mere approbation, just as a debtor stands ready to pay and only desires to see the bill of his creditor.

But if the question be as to which degree or line is to be preferred, the declared will of the people will end the dispute, since every one is presumed to know what he wishes to do, and the people as now constituted is understood to be the same as that which originally settled the order of succession. Thus the controversy between Edward, King of England, and Philip of Valois, as well as the earlier one between Joan, daughter of Louis Hutin, and her uncle, Philippe le Long, was argued in the assembly of the French Estates. See those who have written on the history of France, and Polydorus Virgilius, *Historia Anglica*, Bk. XIX, at the beginning. Thus we read in Juan Mariana, *History of Spain*, Bk. XX, chaps. ii and iii, that nine special judges pronounced judgement upon the succession to the throne of Aragon. In Dionysius of Halicarnassus, Bk. I [lxx], the people decided by vote the rivalry between Sylvius and Iulus, the son of Ascanius, for the succession, moved chiefly by this one reason: 'That Sylvius' mother was sole heiress of the kingdom.' Although such a declaration has no more the nature of a judicial opinion than if a person who makes a grant clears up some obscure or ambiguous phrases of his own making.

When one of the candidates complains that the favour of the people inclines more to his opponent than to himself, the best course would be to refer the matter to arbitrators, who favour neither party and have no interest in which of them secures the throne. See Connestagio, *De Unione Lusitaniae*, Bks. III and V. For the more common controversies on this matter see Grotius, Bk. II, chap. vii, 28 ff.; Arnisaeus, *Relectiones Politicae*, Bk. II, chap. ii, §§ 10 ff., and other writers.

¹ [For *solido* read *solio*.—Tr.]

² [For *fati* read *facti*.—Tr.]

CHAPTER VIII

ON THE SANCTITY OF SUPREME SOVEREIGNTY IN STATES

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| <ol style="list-style-type: none"> 1. The lawful commands of the supreme sovereignty should not be resisted. 2. Whether a citizen can suffer an injury from a state. 3. Citizens often complain unjustly of civil sovereignty. 4. In how many ways can the head of a state injure a citizen? 5. Whether the extravagant injuries of a prince can be resisted. | <ol style="list-style-type: none"> 6. Citizens may not lawfully use force against a man merely because he is called a tyrant. 7. The opinion of Grotius. 8. Only actual kings are sacrosanct. 9. When is an invader to be considered a lawful prince? 10. The extent to which the commands of an invader obligate citizens whose king is still living but has been driven from his realm. |
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Just as supreme civil sovereignty is established for the preservation of mankind, and in order to put an end to the infinite miseries of a state of nature, so it is to mankind's greatest interest that it be held sacrosanct and inviolable by all its members. Add Diodorus Siculus, Bk. I, chap. xc. And surely no sane man will at all doubt that it is wrong to resist rulers so long as they stay within the limits of their power. For it is patent from the end and genius of sovereignty that there should necessarily be joined to it the obligation of non-resistance, that is, of immediate obedience in doing or not doing what it commands. The most important question is, then, whether, in case a supreme sovereign lays an unlawful command upon a subject, or threatens him with any injury, his person is at that time so sacrosanct that the subject can in no way repel that injury by force.

2. The position of Hobbes, *De Cive*, chap. viii, § 7, is that 'a state can not do an injury to a citizen, just as a master can not do an injury to his slave'. His argument is, that there intervenes no pact between a state and a citizen (in his opinion every injury is but a violation of a pact), and that the will of a citizen is subject to the will of a state in such a way that whatever is done by a state is understood to be done with the citizen's consent; and of course it is a maxim that no injury is done him who is willing to receive it.

But we have already shown that an injury does not consist in the mere violation of pacts, and, furthermore, that there is a pact between a monarch and citizens. And when citizens subject their will to a state, that act must be interpreted and limited by the end of a state. And so the case really comes back to this: All citizens have subjected their will to the will of the state in matters which make for its preservation, and no injury is done a citizen if he does not fancy some act of the state

which falls under that head. And yet, since commands can be laid upon citizens or things done to them by the sovereign power, whereby violence is done a right secured to them by a special pact or the common law of humanity, there seems to be no reason why a citizen may not receive an injury from a state.

3. But we must be careful to observe that turbulent or querulous citizens commonly represent many deeds of princes as injuries, which are far from being such. That is, whatever does not fit in with their fancy is damned as an oppression. Even Jupiter does not suit everybody, whether he sends fair weather or foul. [Theognis, 25 f.] And yet just as the variety of man's humours and the ill-advised desires of many make it impossible for the administration of a commonwealth to suit all citizens equally well, so, if a man would take everything which does not strike his fancy as an injury, he is either seeking the overthrow of the state, or else wishes himself to rule. And certainly not a few find the sole cause for their complaints in the fact that they are not the ones who are ruling. Of this number was Avidius Cassius, who, in Vulcatius Gallicanus's life of him, chap. i, boasted that he took up arms against M. Antoninus 'because he did not like the latter's rule and could not bear the title of *Imperator*'. The same pretext was used against Septimius Severus by Pescennius Niger (in Aelius Spartianus) and by Clodius Albinus (in Julius Capitolinus). Many find a cause for their complaints against a prince in his use of unfit ministers, but when one seeks out the true origin of their discontent, it is found to be the fact that they themselves are not holding the same position. The common people often feel indignation at the burden of taxes, even when no more are demanded than the present requirements of the state, or its probable necessities in the future, appear to warrant. The reply that should be made to them is pointed out by Hobbes, *De Cive*, chap. xii, § 9. No one will be able rightfully to complain that the penalties set forth in the laws are severely enforced, except a man who would demand licence for his crimes. And, after all, if any man feels that all such burdens which the business of the state requires are intolerable, he is able to take up his residence elsewhere, while if this recourse does not please him, he may blame the common condition of mortals, to whom is granted no felicity unalloyed. For a man to hold that for these reasons he may throw off by force the lawful sovereignty of the state, would be the same as if he undertook to increase his fortunes by rapine, because it appears too great a hardship to maintain himself by his own labour.

4. Although all this is true enough, there is still no question but that an injury can be done a citizen by a state and its head, since there exists between them a community of natural law, at least, which is sufficient to make one of them capable of being injured by the other. Now it appears that a prince may do an injury to his subjects in two

ways: If in his relations with them he violates the duty either of a *prince* or of a *man*, or, in other words, if he treats them either not as citizens or not as men.

The duty of a prince concerns his subjects either as a whole or individually. He owes them as a whole his care for the safety of the whole state, and this, if he is absolute, according to his own judgement, if he is limited by certain laws, according as they define the manner of his government. Therefore, a prince does an injury to the citizenry as a whole if he abandons all care of the commonwealth and makes no effort to carry on the affairs of state even with the aid of ministers. Such would be the case if he neither undertakes to defend the state against foreign foes, nor guards its domestic peace by enforcing its laws, while despite such neglectful conduct he continues to enjoy his dignity and the imperial allowance, and measures the fortune of his position only by his luxury and the licence of his desires. For when along with the care of his kingdom he lays aside the royal position and income, he will certainly be held to have resigned his sovereignty, which privilege is allowed him unless he happen to have brought the commonwealth into grave difficulties by his evil counsel, and then wish like a deserter to leave it to its fate. And it is unlawful, without a doubt, to be recreant to his every duty and still to be desirous of enjoying their emoluments. And it is an even greater injury, if a prince studies with hostile intent directly to subvert the safety of the entire state, and puts on the guise of an enemy, which can certainly not be consistent with that of a prince. Although such a case can never happen when a prince is in his senses. For what sane man would want to destroy all that he has? Or who is there for a prince to rule over if he treats his citizens as enemies? Unless it be that he rules over two peoples at the same time, so that he may build up the one state at the expense of the other. And yet there is an instance of such insanity given us in John Moquet, *Itinerarium*, Bk. IV, in the case of a certain king of Pegu, who in the last century, as they said, was seized with such a hatred of his citizens, by the arts of medicine men, that the whim seized him utterly to destroy them, and to this end he forbade them upon pain of death to till their fields for a period of three years, as a result of which such a famine arose that the people of Pegu fell to killing one another for food. So also a prince does an injury if he subverts basic laws, or undertakes to change the manner of holding the sovereignty, against the will of the people and upon the urge of no necessity. So also if he destroys the patrimony of the state, if he mulcts the citizens of their fortunes by laying heavier taxes than the state needs, spends them to no purpose, gives them to a foreigner, and the like. To all this you may apply the lines of Antipater in the *Anthology* [IX. lxxii]: "He keeps off the wolves," you say. What's the difference, if the sheep must die either from the wolves or the shepherd?"

The prince owes his citizens as individuals to allow them the enjoyment of the right each holds in common with the rest, to defend them, and to administer justice, in so far as he can do all this without prejudice to the state. If a prince does not do this for each of his citizens, when the condition of the commonwealth permits him, he is guilty of an injury. See Justin, Bk. IX, chap. vi, towards the end, although the act of Pausanias should by no means be approved of. Thus we are told by Xiphilinus, *Epitome of Dio* [on the year 118], and Zonaras, Bk. II, that when the emperor Hadrian once told an old woman that he had no time to hear her, she turned upon him with the angry response: 'Then don't pretend to govern.'

The duty which a prince as a man owes his individual subjects, he can violate in different ways: If, without cause, he disgraces an honourable man; if he denies that he owes a promised reward or a debt, or if he refuses to fulfil other promises; if he is unwilling to atone for some loss done them in passion¹; if he assaults the virtue of honourable virgins; if he pollutes the beds of others in adultery; if he hurts their bodies; seizes or destroys their property; and, finally, if he takes the life of an 758 innocent person by open violence or by suborning false accusers, or by inducing judges to render an unjust decision either by intimidation or promise of reward, and the like. Ammianus Marcellinus, Bk. XXVI, chap. xiii [x. 10]:

For amid arms and trumpets the equality of every one's chance makes danger seem lighter; and often the might of martial valour obtains what it aims at; or else a sudden death, if it befalls a man, is attended by no ignominy, but brings an end to life and to suffering at the same time. When, however, laws and statutes are put forth as pretexts for wicked counsels, and judges, affecting² the equity of Cato or Cassius, sit on the bench, though in fact everything is done at the discretion of over-arrogant power, on the whim of which every man's life or death depends, the mischief is fatal and incurable. (Y.)

5. But it is more difficult to settle the question whether citizens are obligated to bear any of these injuries without complaint, or are able in some cases to use force in warding them off. Our feeling on this matter is as follows: Since such is the condition of human life that it cannot do without some inconveniences, and since there can hardly be found a man on earth whose manners are so regulated that he can satisfy every one to a nicety, it would be foolish as well as impudent to wish to rise in revolt against a prince for merely any kind of grievance, especially since we ourselves are not always so exact in meeting our full duty toward him, and since the laws commonly overlook the lesser shortcomings of private citizens. How much more fair would it be, therefore, to overlook the slight shortcomings of a prince, in whose care lie the tranquillity of citizens and the security of their fortunes and life. And added weight is given this consideration by the fact that experience

¹ [For *perpetulantiam* read *per petulantiam*.—Tr.]

² [For *per lit* read *perlit*.—Tr.]

is witness to the great slaughter of citizens and mighty shock to the state with which the overthrow even of the worst princes has been attended. Therefore, the lesser injuries of princes should be overlooked out of consideration for the nobility of their position and their other benefits, and, indeed, for the sake of our fellow-citizens, and of the entire state. See Justin, Bk. XV, chap. iii, n. 9 ff. Tacitus, *Annals*, Bk. XII [xi]: 'They ought to put up with kings as they were: no good could come of constant changes.' (R.) And in the same author (*Histories*, Bk. IV [lxxiv]) Cerialis uses these arguments to the rebellious Treveri:

In the same manner as you submit to excessive rains, and barren seasons, and all the other calamities of nature, so also put up with the avarice and prodigality of princes. As long as human nature remains there will be faults. But even these are not unvaried; but are compensated by the occasional display of better qualities. (O.)

Plato, *Epistles*, vii [p. 331 c d]:

'The same policy should also be a rule of life for the wise man in dealing with his city. If he thinks that the constitution of his city is imperfect, he should say so, unless such action will either be useless or will lead to his own death; but he must not apply force to his fatherland by revolutionary methods. When it is impossible to make the constitution perfect except by sentencing men to exile and death, he must refrain from action and pray for the best for himself and for his city. (P.)

This passage is reproduced by Cicero, *Letters to Friends*, Bk. I, ep. ix. Nay, a man gives heed to his own interests when he only murmurs to himself about the injuries of his betters, rather than courts greater evils by ill-timed complaints. Under this head fall the sayings quoted by Grotius, Bk. I, chap. iv, § 4. Aeschylus, *Prometheus Bound* [324-6]: 'Therefore [. . .] kick not against the pricks, seeing that a harsh ruler now holds sway who is accountable to none.' (S.) Moreover Sacred Scripture and sane reason persuade one to bear with patience the ill-humour of parents and lords. Pliny, *Letters*, Bk. III, ep. xiv: 'It is malice and not reflection that arms such ruffians against their masters.' (B.)

But this also is certain: that even when a prince with hostile intent threatens a most frightful injury, to leave the country, or protect oneself by flight, or seek protection in another state is better [than to take up arms against a harsh lord, it is true, and yet the lord of one's fatherland].¹ But what if a prince undertakes with hostile intent to slay an innocent citizen, and there is left him no place to flee to? Many writers simply cannot conceive how the same person can sustain at the same time toward a citizen the person of a prince and of an enemy, and with what face he who burns to sacrifice to his passion an innocent citizen, as if he were a poor beast, can require that he himself be sacro-

¹ [These words were added by Barbeyrac from the *De Officio Hominis et Civis*, II. ix. 4, in order to complete the meaning.—Tr.]

sanct. Nay rather, they suggest that if he who owes another protection, 759 assume a hostile attitude toward him for no reason at all, or an unjust one, the former does at the same time release the other from the obligation of a client, at least to the extent that the latter can make use of force to protect himself against the former's downright injuries. And this defence wins all the more favour the greater the number is of those whom the prince would destroy by his injury.

But since there are scarcely to be found any instances of princes who have undertaken to kill innocent citizens with an open profession of mere wantonness, a greater difficulty arises over what is permissible when a prince undertakes to vent his rage under a plea of right, on the excuse, for instance, that his citizens have failed to obey some unjust command. On this point we take it as established that, since every power is understood to be conferred upon any person without prejudice to the rights of a superior, so also upon the establishment of a supreme civil power citizens were neither able nor willing to renounce God's sovereignty over them, and are, therefore, not bound by any commands of the civil sovereignty, which are confessedly and openly repugnant to a command of God. What a citizen should do under such circumstances, if he is threatened with violence because of his profession of the Christian faith, it is not ours to define, since every man can learn out of the writings from which that faith is derived how important it is that one neither act nor appear to act contrary to his faith. See *Matthew*, x. 32. That when threatened with death a man may without sin undertake some course of action repugnant in itself to the law of nature, we shall show later. But if the execution of the act is such that I cannot undertake it without bringing sin upon my head, or that the performance of it is adjudged to be worse than death itself; and no reason is shown or even seen to be probable, either from consideration of some misdeed of mine, or of the public good, why such a necessity should be laid upon me to do something which could as well be done by another, or else should not be done at all, it is surely obvious that what is involved is that I, an innocent person, am to perish because of the mere whim of the prince, or his enmity toward me. In assuming by this act the role of an enemy instead of a prince, he is understood to have released the citizen also from the obligation by which the latter was held bound to him. Yet in such a case there should be resort to flight, so far as possible, and the protection sought of some third person who lies under no obligation to that prince. Nay, if flight be not possible, a man should be killed rather than kill, not so much on account of the person of the prince, as for the sake of the whole commonwealth, which is usually threatened with grave tumults under such circumstances. But when the head of a state undertakes to punish a citizen for some misdeed, although the latter is not obligated to draw the punish-

ment upon himself of his own accord either by surrendering himself or by voluntarily appearing, yet the reason why he may not defend himself by force is, because the sovereign is using his own right, and on that score it would certainly be an injury to offer him violence under any pretence whatsoever.

The further point should be observed, that, even if it be granted that sometimes it is not wrong for some one citizen to defend his safety by force against the most open injuries of a superior, yet it will not be allowable for the rest of the citizens on that account to drop their obedience and protect the innocent person by force. For in addition to the considerations that they are not permitted to inquire into the acts of the prince which he exercises by virtue of his judicial power, and that guilty men often plead their innocence in order to stir up hatred against the prince, an injury done to one citizen in no wise releases all the rest from their obligation towards their prince. The reason for this is that each citizen bargains originally on his own behalf for the prince's care and protection, and does not lay down as a condition of his subjection, that he will treat each and every other citizen justly. Nor is the fear that the prince's injustice will move on to himself sufficient to put an end to his obligation, since that is uncertain, and since there could have been special reasons for hatred in the case of the wronged citizen, which are not discoverable in another. And so long as the obligation of a
760 citizen toward a prince remains in force, it will not be lawful for the former under any pretext to oppose the latter with violence.

6. Now just as there are not a few who feel that what we have mentioned does not at all detract from the sanctity of a prince, so those are surely not to be borne with who state in a general and ill-considered fashion that, when a king has degenerated into a tyrant, he can be stripped of his sovereignty and punished by the people. For because such obscurity usually surrounds civil acts that the common sort cannot recognize their equity or necessity, or often will not, because of the confusion of their passions, and since it is also to the best interests of a state that the reasons for its counsels remain unknown to many, it would be a matter of great difficulty exactly to point out the actions for the performance of which a man may rightly deserve the name of tyrant, against whom any violence offered by a citizen is lawful. Compare Boecler on Grotius, Bk. I, chap. iv, § 14. Because of this it would be entirely possible for the hatred of that name to be poured out even upon a good prince by such as have no liking either for him or the present state of affairs, inasmuch as men have long become accustomed to designate by words not only things but also their own likes and dislikes. Certainly that private vices and a little too lax administration of the commonwealth do not constitute a tyrant, is generally held by all. Are the taxes too heavy? But a subject who is not admitted to the

counsels is in no position to judge whether the necessity of the commonwealth demands them. Are punishments too severe? But if they are set in accordance with the laws and in proportion to the offence, no one can rightfully complain, even if clemency might better have been shown. Is the case one at which the common sort take the greatest offence, namely, that some great men are cut down, although innocent, because of private hatreds or suspicions? Yet if misdemeanours or plottings against the position of the prince are even imperfectly charged against them, or if the ordinary process of judicial procedure is observed, how can the rest be entirely certain about the facts, even if those who are done away with and a few others are convinced of their innocence? This is especially true because there is always a presumption of justice on the part of the prince. Promises are not kept or former privileges done away with. Yet if an absolute prince claims an offence, or necessity, or an outstanding advantage to the state, he will be held to have acted within his rights, while his subjects lack the faculty of judging clearly on such matters. And all privileges carry this exception: provided the safety or the necessity of the commonwealth forbid their observance.

No small part of the arguments marshalled in favour of the opposite view fall of their own weight, if it is observed that these two statements are by no means the same: A people has the power to use force against its kings and bring them to terms, if they have not ruled in accordance with its desires; and, There belongs to a people or to individuals, in the face of danger, and when the prince has become an enemy, the right to defend their safety against him. For the reasons which prove the latter do in no way likewise carry the former, although the two are confused by many. Thus, when the statement is made, that, although a people has accepted slavery, it has still not lost all its right to win its way to liberty and security, this can be taken only in the sense that a people can defend itself against the extreme and unjust violence of its prince, which defence, when successful, carries in its train liberty as well, since a lord in becoming an enemy appears himself to free a subject from obligation to him, so that the latter is under no obligation to put himself under the yoke again, even though the former wish to change his decision. But except for this case, a people which has consented to slavery, or rather has subjected itself to the absolute sovereignty of a single man, has no more right to regain that liberty by violence than I have to take from another by force a thing which was already given him by virtue of a pact. For this civil servitude of which we are speaking is not so foreign to nature as some fancy, so that, when a man has at one time felt it necessary to agree to it, so as to avoid a greater evil, he can later cast it off, when the opportunity arises, on the plea that nature gives him the right. And although this status may be opposed to the genius of a certain people, either at the outset or after it has developed, yet it may

not for that reason alone any more snatch by force from the prince the right which he has acquired, than a seller can take from a buyer an article which he has acquired by a bargain, even though the seller may realize later that the bargain was not to his advantage.

7. What we have said does not differ greatly from the position of Grotius, Bk. I, chap. iv, § 7. He is right in suggesting, among other things, that it can be decided, first, from the nature of supreme sovereignty, and then, from the presumed will of those who were the first to unite to form a state, whether an extreme injury by a supreme sovereign can be repelled with violence. For surely it is by no means repugnant to the nature of supreme sovereignty that it should direct the acts of all citizens to the public safety, and that it should hold the severest punishment before him who flaunts its decrees, without also having the power to slay any one at its pleasure, and allow him no degree of resistance. Nor is there any natural connexion between the absolute power to secure a man's safety, and the absolute power to slay him at pleasure. And it cannot be shown that such a power in a sovereign, or that such an obligation in citizens, can contribute to the peace and security of a state. In this connexion it is clear how wrongly certain writers argue, when they say: Because supreme sovereignty can be accountable only to God, it is perfectly obvious that it was the intention of men when they gathered into a state, to leave to themselves no right as opposed to the supreme power. As though he who defends his life against a violent assailant does by that act summon him to a judicial action! Compare Boecler on this passage of Grotius. So also the scruples of those men amount to nothing, who will not grant the liberty of offering resistance to the brutal savagery of those in power, because 'there cannot be imagined a legitimate call of subjects to take up arms against a supreme magistrate, inasmuch as there belongs to no man jurisdiction over such a magistrate'. As though the right of defence were an effect of jurisdiction! or as though there were required in addition to the necessity of self-preservation a special call in him who would ward off from his head unjust violence, any more than in him who would keep off hunger and thirst by meat and drink! Compare Ziegler on this passage of Grotius.

But Grotius is right in saying, that if those, who at the outset gave rise to supreme sovereignty by gathering into states, had been questioned as to whether they wished to lay upon all the burden that they shall choose to die, rather than under any circumstances to repel with arms the unjust violence of superiors, they would never have replied that they wanted anything of the sort. For that would have been a greater hardship than what they were trying to avoid in the establishment of a state. For although they were beforehand exposed to injuries at the hands of many, they were still able to strike back, but by these terms they would

have bound themselves to suffer without opposition any and every injury from the hands of him whom they had themselves armed with their own strength. Surely, they would say, a struggle is a less evil than certain death.

8. Now that sanctity which we have thus far been building up is an attribute only of real sovereigns. Therefore, it is not enjoyed by such as bear the name of king but are in fact subject to the power of a people, as were the kings of ancient Sparta, and many in other countries who rely more upon the authority of persuasion than the power of command. Such a ruler was that Mezentius in Vergil, *Æneid*, Bk. IX [VIII. 495], against whom 'Etruria rose in frenzy just: by instant war¹ the king for punishment they ask'. (B.) Such also are those who have relinquished their sovereignty or left their kingdom entirely derelict, against whom a man may use any defence he would against private citizens, in case they undertake to inflict grave injuries upon others. 762 Although in the case of Semiramis, who persuaded her husband to yield her the sovereignty for five days and then slew him, the folly of her husband is clearly no less than the wickedness of his queen. Diodorus Siculus, Bk. II, chap. xviii.

Yet it sometimes happens that to those princes who have either voluntarily left their kingdom, or lost it for some reason or other, there are still left by their fellows the formal respect usually accorded kings, and the external trappings. And just as this privilege is to be looked upon as the mere imagery and ornaments of royal power, so it must, unless confirmed by some convention, be held to depend solely upon the humanity of the rest. An example of this can be found in the case of the Dairo of Japan. Thus in Labardæus, *Historiæ de Rebus Gallicis*, Bk. X, p. 684, we have the account that since Sedan and its territories were subject neither to the Emperor, nor to the King of France, nor to any of their feudal lords, its lords were true princes. But after Frederick Maurice, Duke of Bouillon, had yielded the city and its territories to Louis XIII of France, and received in exchange other lands subject to the King of France, he asked that it be assured him and his descendants that they retain the marks of their former position; although this is to be held as a mere shadow, and not such actual independent dignity as accompanies² supreme sovereignty, since its effect means no more than a certain rank and other distinctions among the famous families of France. A proof of this lies in the fact that in ceding it the Duke of Bouillon asked that such position be 'assured' him, for whoever actually hold the dignity of a prince have no need of such assurance.

So also a king returns to the state of a private citizen if his kingdom be forfeited, either for some malfeasance against him whose fief it is, or because of a condition attached to the transfer of the sovereignty, to the effect that, if the king did this thing or that, his subjects were at

¹ [For *moris* read *maris*.—Tr.]

² [For *commisatur* read *comitatur*.—Tr.]

once released from every bond of obedience. So also when in the transfer¹ of the kingdom it was expressly agreed that the king could be resisted if he did a certain thing, that agreement can be maintained. Moreover, if a king, who has been set up by a people, wishes to alienate his kingdom or to change the form of his possession of it, it is clear that he can in no way effect anything, and that the citizens will be able to oppose² him by force, if he should use violence in putting through his designs. Add Boecler on Grotius, Bk. I, chap. iv, § 10.

9. A further difficult question arises as to what may or may not be done against unlawful invaders of sovereignty, and that not after they have secured a true right of sovereignty by long possession or a subsequent pact, but while the cause of their possession is still unjust, and they apparently base their claim on force alone. Here we must, first of all, inquire as to whether the commands of such invaders have an obligatory force while they are in possession of the sovereignty. On this point we must recall, from what has already been said, that no obligation to obedience arises unless another has a lawful power over me. For some extrinsic necessity to perform something can be laid upon a man by mere violence, but not an obligation, since that is an intrinsic bond, so constraining the mind, that, if a man does not perform something, he is guilty of sin. Therefore, if a stronger threatens the use of force, a person is constrained, in order to avoid a greater evil, to do what he is not bound to do, and what his soul abhors; and if he can find a way out, he is not chargeable with a fault in case he throws off that unjust necessity.

But what if a man invades sovereignty by violence or evil devices at the outset, and yet later wishes to appear to hold it rightfully, and bears himself not like an enemy but a true prince, despite the fact that he still depends for his safety upon arms? On this point it seems to us, in general, highly probable that he who actually holds the supreme sovereignty should, despite the fact that he seized it by base methods, be held for the time by the citizens as a lawful prince, so long as there is none who can lay a better claim to the sovereignty. For it is reasonable
763 that the power of any possessor should be binding, provided he rule like a lawful prince, inasmuch as it is to the interest of all citizens for the state to be under the oversight of one man, rather than to be involved in constant turmoil with no certain head. Therefore, since citizens are understood to have given their consent, at least tacitly, to the sovereignty of such invaders, they will be fully obligated to accord them obedience. The words of Aristophanes, *The Frogs* [1431 f.], may be applied to this case:

'Twere best to rear no lion's whelp in the state;
But having reared, 'tis best to humour him. (R.)

¹ [For *id delatone* read *in delatione*.—Tr.]

² [For *oppini* read *opponi*.—Tr.]

Thus it is well known by what means the first Caesars attained the throne; and yet Paul in *Romans*, xiii [1 ff.], attributes ἐξουσία [authority]¹ to them, and holds that they should be obeyed 'for conscience sake'. And our Saviour orders us to 'render unto Caesar the things which be Caesar's' [*Luke*, xx. 25], for there was no individual citizen who could at that time claim the sovereignty as due him by a better right, and the Roman Senate and People had lost their ancient right, although that was due rather to fear or weakness than to approval of the new master. Here belongs a remarkable law of Henry VII of England: 'Let no one who took the side of the king then actually reigning, ever be proceeded against or condemned for that act as a crime, either by process of law or act of Parliament.' The grounds for such a law have been weighed by Bacon of Verulam, *History of Henry VII*, p. 242. In Nicetas Choniates, Irene says: 'Look not for an Emperor who is absent, nor drive out an Emperor who is present' [p. 9A]. So also, when, in a hereditary kingdom, the right of two or more candidates is in question, while the controversy still rages and is in process of being settled either by friendly parleys or by an appeal to arms, the safest course is to obey him who is in possession. An illustration of this is the defence of Cassius Clemens, who had taken the side of Niger against Severus: 'I recognized neither you nor Niger. Although I was caught on the other side it was my purpose, not to overthrow you, but to vanquish Julian. Since, now, both you and I had the same end in view, I was guilty of no wrong -- not even in my not coming over to you afterward. For neither would you have wanted any of your friends to pass over to Niger.' Xiphilinus, *Epitome of Dio* [LXXIV. ix. 1 ff., on the year 194], and Zonaras, Bk. II. These conclusions are all the more to the point with respect to foreigners, who have no concern in examining the title whereby a man secures sovereignty, but merely follow along with the possession, especially when the usurper of the sovereignty can rely upon great resources.

10. But when a man seizes the sovereignty by driving out the lawful prince, and acts the king, although he is in fact a usurper of another's right, what should a good citizen do under such circumstances, who apparently still owes fealty to his lawful prince so long as he still lives? Here our decision must be that the matter may come to such a pass that it is not only lawful but also obligatory to obey as one's sovereign him who has possession, no matter how secured, of the kingdom, it being understood that the lawful lord is reduced to such a state that he can no longer fulfil any of his duties as a prince toward his subjects. For although the other's commands lack the force to obligate, because they lack lawful power, it is still the part of a prudent man to take counsel for himself and his affairs, and to watch out for the future, as well as cautiously to weigh his present condition, lest he

¹ [Preferable to the word 'power' used in the standard English versions.—Tr.]

rashly imperil his life and fortune. And this is what would happen should he by his vain refusal draw down the wrath of the possessor upon his head, and that all to no avail, either for the state or for the banished king. This is what some writers would gather from *Romans* [xiii. 5], where the Apostle says that obedience should be rendered οὐ μόνον διὰ τὴν ὀργήν [not only for wrath], as though he said that a man has little wit who would by his stubbornness provoke without necessity the wrath of him who is armed with a sword. Therefore, one should for his own safety render obedience to ταῖς οὐσαῖς ἐξουσίαις (the authorities that be [v. 1]), that is, those that are in possession. Moreover, since one's country
764 cannot do without some sort of sovereignty, and the possessor is after a manner guarding the public safety, a good citizen, and one who loves his country, should not furnish the cause for still further turmoil by useless stubbornness, when the state of affairs at the time demands such care.

But the most difficult point is, how citizens can be obligated at the same time both to the banished lawful prince and to the possessor who has both forced them to swear fealty to him, and is at the time fulfilling the duties of a king. For how can a man at one time be loyal to two, who are bent upon mutual destruction? Nor does it appear that a pact and pledged faith given by citizens to an invader can destroy the right and claim of a lawful king, no more than the right of a landlord is destroyed by the pact of a tenant of his, which he makes with a highwayman, to avoid depredations upon the former's estate. This is the opinion of Grotius, Bk. I, chap. iv, § 15:

Now while a usurper is in possession, the acts of government which he performs may have a binding force, arising not from a right possessed by him, for no such right exists, but from the fact that the one to whom the sovereignty actually belongs [...] would prefer that measures promulgated by him should meanwhile have the force of law, in order to avoid the utter confusion which would result from the subversion of laws and suppression of the courts. (K.)

Add *Idem*, Bk. II, chap. vi, § 5. And surely it should always be presumed that every prince is humane enough to prefer that his citizens be preserved by any means whatsoever, rather than have them perish to no avail in uselessly struggling¹ against fate and showing him an ill-timed and ineffectual devotion. Compare 2 *Samuel*, xv. 25-6; 1 *Kings*, iii. 26. Thus in Livy, Bk. XXIII, chap. xx, when the Romans were asked for aid by the Petelini:

They were compelled to confess that they had no longer any protection for their distant allies, and bade them return home, and, having done everything which could be expected from faithful allies, as to what remained to take measures for their own security in the present state of fortune. (S.)

Add also the speech of King Ferdinand when he fled from Naples, in Guicciardini, Bk. I, towards the end.

¹ [For *oblactantur* read *obluctantur*.—Tr.]

Therefore it scarcely appears that anything more reasonable can be said on the point just raised than this: If a lawful prince is put into such a position that he, for his part, cannot furnish his citizens with the defence which he owes them, nor have they on their part sufficient strength to resist the invader without its meaning their immediate destruction, it is presumed that the banished prince has for a season remitted to his citizens their obligation towards him, until such a time as fortune opens to him again a way to his kingdom, this remission being so much as is necessary for their preservation and the avoidance of perils. And for such a period only does the faith which they pledged the invader appear to bind them, so that it is, as it were, temporary, expiring when the banished king is enabled to regain his kingdom, and such as is maintained not so much by the intrinsic demand of conscience as by present fear. Add Grotius, Bk. III, chap. vii, § 6, where I do not see, if we grant with him an external right and dominion, why some external obligation, which does not affect the conscience, may not also be allowed. See *2 Kings*, xi. 2; [2] *Chronicles*, xxiii, on which story Hobbes, *Leviathan*, chap. xlv, observes correctly enough that Athalia had been dethroned not by a right which the priest had as such, but by the right of her son the king. As to what should be one's opinion about laws which permit or offer rewards for the slaying of a tyrant, see Boecler on Grotius, Bk. I, chap. iv, § 17.

On the whole there scarcely appears to exist a case where a private man can on his own authority rightly oppose even an unjust possessor of sovereignty, especially since experience testifies that by such undertakings invaders are the more incited to oppress a people. See Justin, Bk. XVI, chap. v, towards the end.

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| <ol style="list-style-type: none"> 1. 'The source for the knowledge of the duty of supreme sovereigns. 2. 'That duty must be carefully learned by them. 3. 'The safety of the people is the supreme law. 4. Citizens are to be trained in good behaviour. 5. Fit laws should be enacted, 6. And enforced. 7. Punishments should be meted out with justice and reason. | <ol style="list-style-type: none"> 8. Citizens should be prevented from injuring one another. 9. 'The services should be secured of competent and honest ministers. 10. Taxes should be collected and spent with honesty. 11. 'The resources of citizens are to be increased. 12. Factions should be prevented. 13. Forces should be held in readiness against the attacks of foreigners. |
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It remains for us to look at the duty of supreme sovereigns. This deserves to be done with all the greater care the more evils there are that result to men, if that duty be not conscientiously performed; and also because it properly belongs to our study to set forth that which passes beyond the purlieu of civil laws. But since this subject is treated by many other writers, it will be enough for us to present only a summary of the principal heads. By what rules this duty is fulfilled can be easily gathered from a consideration of the end and nature of states, as well as of the parts of supreme sovereignty.

2. Now it is necessary, first of all, that sovereigns themselves acquire with diligence all that pertains to the full knowledge of their duty, since no one can exercise in a praiseworthy manner what he does not thoroughly understand. See 1 *Kings*, iii. 9. Vergil, *Aeneid*, Bk. VI [852-3]: 'To rule the subject nations with imperial sway, be that your care, O Roman; these shall be your arts—to impose the ways of peace [. . .]' (B.) Isocrates, *To Nicocles* [10 f.]: 'For it has been demonstrated that their kingdoms will be such as they have made their undertakings; so that no athlete is so bound to exercise his body as kings are to cultivate their minds.' (F.) Moreover, the words of Persius, *Satires*, iii [71 f.], apply to all men and especially to kings: 'Learn [. . .] what part God has ordered you to play and at what point of the human commonwealth you have been stationed.' (R.) Add Philippe de Comines, Bk. I, p. 342, and Bk. III, p. 388; Charron, *De la Sagesse*, Bk. III, chap. ii; Bacon, *Essays*, chap. xix. That the matters which must be learned if a state is to be governed, are not so thoroughly well known, can be gathered from the remarks of Hobbes, *De Cive*, chap. x, § 10. Isocrates, *To Nicocles* [6], says that the office of a king 'is of all human responsibilities the greatest, and requires the greatest forethought [. . .] and cannot, like that of

a priest, be discharged by any man'. (F.*) Also Xenophon, *Training of Cyrus*, Bk. I [i. 3], rightly pronounces: 'To man, such is his nature, it is easier to rule every other sort of creature than to rule man.' (W.) Add the remarks of Socrates in his dialogue with Glaucon. Xenophon, *Memorabilia of Socrates*, Bk. III. Yet many will hold that the Italian proverb applies here: 'It takes very little brains to govern the 'whole world'; and the other saying: 'The world never realizes how scanty is the wisdom with which it is governed.'²

A result of this is that a prince should eschew those studies which contribute nothing to this end, since the science of government is so 766 difficult that it requires all of a man's ability, however gifted he be, who should forget in some way himself and live for the people. All the more should princes put aside pleasures, delights, and trifling diversions, in so far as they interfere with that end, while for the same reason they should make friends of wise men and such as are skilled in human affairs, and hold at a distance flatterers, useless fellows, and all who have learned nothing but folly. Isocrates, *To Nicocles* [27 and 29]: 'Make friends, not of all who desire it, but of those who are worthy of your character, and not of those with whom you will most agreeably spend your leisure, but of those with whose help you will best order the state. [. . .] Accustom yourself to take pleasure in society whereby you will be both improved yourself, and will appear better in the eyes of others.' (F.) Add Diodorus Siculus, Bk. I, chap. lxxi. The same writer (XII. xii) recounts that Charondas instituted an 'action for bad company',³ and a heavy fine was imposed upon those who were guilty of that offence. Although it were to be wished that the saying of Carneades, in Plutarch, *How to Tell a Flatterer* [xvi, p. 58 f], were not so often found true: 'Young princes and noblemen never arrived to a tolerable perfection in anything they learned, except riding [. . .] because a horse knows not how to flatter.'⁴ (G.*)

[Now that a prince may know how properly to apply the rules of prudent government, he should be thoroughly acquainted with the constitution of his state and the character of the people subject to him. He must, furthermore, study those virtues which are of greatest service in the administration of so great a charge, and order his conduct in a way consonant with the dignity of so lofty a position.]⁵

3. The general rule for the conduct of supreme sovereigns is: 'Let the safety of the people be the supreme law' [Cicero, *On Laws*, III. iii]. Plato, *On the Republic*, Bk. I [p. 342 E]:

¹ [For *L* read *il*.—*Tr.*]

² Often ascribed to Oxenstiern. See P. Bellaza, *Atene e Roma*, XXII (1919), 152-5.—*Tr.*]

³ [The 'evil communications' of St. Paul, 1 *Corinthians*, xv. 33, (quoting Menander.—*Tr.*)]

⁴ [Markedly condensed.—*Tr.*]

⁵ [The whole of this paragraph was added by Barbeyrac from the *De Officio Hominis et Civis*, II. xi. 2, in order to complete the expression of the thought.—*Tr.*]

There is no one in any rule who, in as far as he is a ruler, considers or enjoins that which is for his own interest, but always that which is for the interest of his subject [. . .] and that alone he considers in everything which he says or does. (J.)

For sovereignty is conferred upon them with the intention that through it there may be secured the end for which states are established. Therefore, they should hold that nothing redounds to their private advantage which does not also minister to that of the state. Socrates in Xenophon, *Memorabilia of Socrates*, Bk. I [ii. 32]:

Doesn't it seem strange to you that a herdsman who lets his cattle decrease and go to the bad should not admit that he is a poor cowherd; but stranger still that a statesman when he causes the citizens to decrease and go to the bad should feel no shame¹ nor think himself a poor statesman? (M.)

4. It is necessary for the internal peace of states that the wills of the citizens be restrained and guided in such a way as will minister to the safety of the state. Therefore, it is incumbent upon supreme sovereigns not only to prescribe laws suited to that end, but also so to buttress² up public discipline that citizens will live in accordance with the commands of the laws³, not so much out of fear of punishment, as through a natural habit; for mere penalties engender not so much what is the real purpose of reason and discipline, that is, an interest in right conduct, as a precaution that one be not apprehended in some misconduct. Aristotle, *Politics*, Bk. V, chap. ix: '[. . .] That which contributes most to the permanence of constitutions is the adaptation of education to the form of government.' (J.) Horace, *Odes*, Bk. III, ode xxiv [35-6]: 'Of what avail are empty laws, if we lack principle?', (B.) Isocrates, *Arcopagiticus* [39 ff.], thus describes the ancient Athenians:

They considered that those were in error who imagined that a community, in which the laws were framed with the greatest exactness, produced the best men. [. . .] They, on the contrary, knew that virtue is not promoted by the laws, but by the habits of daily life, and that most people turn out men of like character to those in whose midst they have severally been brought up. For where there is a number of laws drawn up with great exactitude, it is a proof that the city is badly administered; for the inhabitants are compelled to frame laws in great numbers as a barrier against offences. Those, however, who are rightly governed should not cover the walls of the porticoes with copies of the laws, but preserve justice in their hearts; for it is not by decrees but by manners that cities are well governed, and, while those who have been badly brought up will venture to transgress laws drawn up even with the greatest exactitude, those who have been well educated will be ready to abide by laws framed in the simplest terms. (F.)

767 To obtain this end the Christian faith, in states where it is professed, exerts the greatest single influence, in so far as it is pure, purged of the false inventions of men, and disseminated through the preaching and practice of pious and prudent ministers; for in addition to its teachings

¹ [For *embiscat* read *erubescat*.—Tr.]

² [For *legem* read *legum*.—Tr.]

² [For *sancite* read *sancire*.—Tr.]

that lead to eternal salvation, it contains the most perfect moral precepts which dispose the minds of men in a special way to lead a good civil life, and yet cannot be so conveniently set forth in civil laws. For this reason in all Christian states with which we are acquainted, that part of natural law which exhorts to its observance is left to the exercise of the clergy, while the dogmatic part belongs properly to those who are especially given to that discipline. Add Grotius, *De Jure [Imperio] Summarum Potestatum circa Sacra*, chap. i, n. 13.

For this end public schools are of great service, provided they do not teach empty nonsense and the sophistries of idle men, the relics of a reign of darkness (see Hobbes, *Leviathan*, chap. xlv; Lucretius, Bk. VI, lines 973 ff.), but solid learning and letters, the use of which permeates every phase of natural and civil life. Among the latter the most important is the branch which imparts sound doctrines regarding the right of supreme sovereigns, and its corresponding obligation on the part of citizens. See Hobbes, *Leviathan*, chap. xxx. There is also an excellent discussion on the subject matter in which youth is to be instructed, in the speech of Maecenas¹ to Augustus, as recorded in Dio Cassius, Bk. LII. Add the arguments set forth in Connestagio, *De Unione Lusitaniae*, Bk. VIII, in connexion with the suppression of the University of Coimbra. Not beside the point also are the comments in Gramondus, *Historiarum Galliae*, Bk. III, about the number of schools.

But the greatest force is contributed to public discipline by the example of the sovereigns. Isocrates, *To Nicocles* [31]: 'The character of a whole state takes the likeness of its rulers.' (F.) Spartianus says, about the marriage of Caracalla with his mother-in-law, Julia [*Caracalla*, x]: 'He contracted a marriage, which, were he in truth aware that he made the laws, it were his sole duty to forbid.' (M.) To see, then, that all these forces are properly disposed in a state, is the task of supreme sovereigns.

5. It helps toward the same end to have a system of clear² and simple laws about the matters with which citizens are most frequently concerned. Isocrates, *To Nicocles* [17]: 'Seek for laws which are as a whole just and expedient with each other, and which, besides this, cause as few disputes as possible, and make the means of settling them as short as possible.' (F.) The same writer in his *Panathenaic Oration* [§ 144], gives the following marks of good laws: That they be 'few in number, but sufficient, and easy to learn for those who are to use them; in the second place, just, practical, and consistent with one another, and more concerned with public enterprises than private business'. Lycurgus, *Against Leocrates*³ [102]: 'Because of their conciseness the laws do not instruct' (as is regularly done in the actual study of law), 'but only set

¹ [For *Maecenatus* read *Maecenas*.—Tr.]

³ [For *Leo. orat* read *Leocrat*.—Tr.]

² [For *per spicuas* read *perspicuas*.—Tr.]

forth what must be done.' Quintilian, *Declamations*, cclxiv: 'What is the difference¹ between having no laws and laws which you can't understand?' In general no more should be stipulated by civil laws than is conducive to the good of citizens and the state. For since men, in their deliberations on what they should or should not do, are commonly guided more by natural reason than by the knowledge of laws, when there are too many laws for the memory easily to carry, and they forbid things which reason does not of itself prohibit, the result must be that subjects through ignorance, and without any evil intent, run afoul of laws as of so many snares. In this way sovereigns create for citizens a superfluous inconvenience which is opposed to the design of states. Hobbes, *De Cive*, chap. xiii, § 15; *Leviathan*, chap. xxx. The course, also, of justice should be so regulated that a man may be able to secure
 768 what is his right in a brief process, and with a minimum of expense. There is a Persian proverb: 'Better a temporary injustice than slow justice.'

6. But since it is useless to pass laws if the supreme sovereigns allow them to be violated with impunity, therefore it is the task of the sovereigns to secure the execution of them, and to exact penalties in accordance with the circumstances of every act, and the intention and evil purpose of the offenders. In the prosecution of this they should so proceed that the severity² of the laws would be meted out not alone upon citizens of little means, but also upon the rich and powerful, whose wealth or position should never give them licence to insult the more humble with impunity, especially since the greatest peril commonly overhangs a state when the mass of its citizens are stirred³ to fury by severe oppression. Add Hobbes, *Leviathan*, chap. xxx. Nor should indulgence be shown without sufficient cause, since to treat unequally those who, in everything else, have equal merits is both unjust and a potent cause to incite the minds of citizens. Pindar, *Olympian Odes*, xiii [6 ff.]: 'Within her walls dwelleth Law, [...] the firm-set foundation of cities, Justice and Peace that is fostered beside her, those guardians of wealth for man, the golden daughters of Themis, who excelleth in counsel.' (S.)

7. And as nothing should be sanctioned by penalties which does not make for the advantage of the state, so penalties should also be so tempered and conformed as to fit that end, so that from them the citizens may not receive more punishment than the commonwealth receives in the way of advantage. In general, if penalties are to meet their purpose, it is obvious that they should be applied to such a degree that the bitterness which comes from them may suffice to outweigh the profit and pleasure which can follow upon a deed that is forbidden by the laws. Add Hobbes, *Leviathan*, chap. xxx.

¹ [For *inter est* read *interest*.—Tr.] ² [For *se veritas* read *severitas*.—Tr.] ³ [For *datae* read *data*.—Tr.]

8. To continue, since men have come together into a state to the end that they might gain security against the injuries of others, it is the task of supreme sovereigns to prevent citizens from offering injury to one another, and this with a severity proportionate to the greater ease with which their constant proximity gives them opportunity for doing mischief. Nor should differences in ranks and dignities be so influential that the more powerful can insult the less fortunate at their pleasure. Isocrates, *To Nicocles* [16]: 'You will be a good popular leader if you neither permit the multitude to commit outrages nor allow them to suffer them, but contrive that, while the best men take the honours, the rest shall suffer no wrong.' (F.) Xiphilinus, *Epitome of Dio, Life of Galba* [LXIV. ii. 2]: 'Although private citizens do enough in doing no injury themselves, it is the duty of a ruler to see that others besides himself do none.' It is also opposed to the purpose of supreme sovereignty to allow citizens by private violence to take revenge for injuries which they think they have received.

9. Furthermore, although one prince is not sufficient to conduct in person all the business of a larger state, so that he must call upon ministers to share his tasks, yet just as those borrow all their authority from the supreme sovereign, so the responsibility for their good or evil deeds rests ultimately upon him. Isocrates, *To Nicocles* [27]: 'In the choice of men to be set over affairs which you do not personally transact, remember that you yourself will be held responsible for whatever they do.' (F.) *Idem, To Demonicus* [37]: 'If you are set in authority, do not use an inferior agent to conduct your administration; for wherever he goes wrong, people will lay the blame on you.' (F.) Themistius, *Orations*, xvii [viii, p. 117B]: 'When Satibarzanes once asked Artaphernes for the governorship of a certain province, for which he was most ill-suited, and three thousand darics, the latter gave him the money, but did not grant him the governorship. "For," he said, "in giving you the money I will be none the poorer, but in turning over a province to an unworthy person I would become a less just man."' Euripides, *Rhesus* [626]: 'Best set each man where best his help avails.' (W.) Libanius, 769 *Legatio¹ ad Julianum* [xv]: 'You may expect your chariot to be driven according to the skill of the driver to whom you entrust your steeds.' Martial, *Epigrams*, Bk. VIII, cp. xv: 'It is a prince's greatest virtue to know his own subjects.' For this reason, and because the affairs of state are conducted well or ill according to the character of the ministers in whose hands they lie (add Xenophon, *Training of Cyrus*, Bk. VIII, after the beginning), supreme sovereigns are obligated to select, in order to carry on the affairs of state, honest and qualified men, and to inquire at times into the conduct of their office. Lucian, *De Mercede Conductis* [xxix]: 'The king has many eyes and ears, which not only see the truth

¹ [For *Legatis* read *Legations*.—Tr.]

but always add something more for good measure, so that they may not be considered heavy-lidded¹. (H.) And they must reward or punish them after the manner in which their reports show that they have conducted affairs, in order that the rest may know that public business is to be handled with no less fidelity and diligence than private. That no opportunity may be offered for favour or prejudice, the Chinese² regularly adopt the precaution of allowing no magistrate to serve in the place of his birth, because there are almost always people to be found there whom we particularly love or hate. So also since depraved men are enticed to the commission of crimes by the hope of impunity, which is most readily accorded them when the judges are open to corruption, it falls to the lot of supreme sovereigns to deal severely with such judges as abettors of crimes, by whom the security of citizens is lost (see Diodorus Siculus, Bk. I, chaps. lxxv–lxxvi), and overrule their unjust decisions. For the custom which is said to prevail among the people of Aragon appears unjust, namely, to punish the judges for an unjust sentence, and yet allow the sentence to stand. And even though the performance of the ordinary affairs of state is to be entrusted to ministers, the supreme sovereigns will never refuse to grant a willing ear to the complaints and desires of citizens.

The two questions, namely, what qualifications supreme sovereigns should regard in those persons of whose counsels they wish to avail themselves in the conduct of public affairs, and how their opinions may be canvassed most conveniently, Hobbes treats in his *Leviathan*, chaps. xxv and xxx; and in the matter of the second question there is a notable example in Davila, *De Bello Civili Galliae*, Bk. XIV, p. 969, where the Pope consulted his advisors about the absolution of King Henry, not as a body but individually. Isocrates, *To Nicocles* [53], calls a good counsellor 'the most useful and princely of all possessions'. (F.) Neuhoof, in his *Descriptio Generalis Sinae*, chap. i, gives some very remarkable customs observed by the Chinese with regard to their magistrates. Nor should we pass³ over the admonitions of King James I of England, *Donum Regium*, Bk. II, that a prince should choose ministers entirely on his own judgement, not at the suggestion of others, and from every class of his people, since he is the father of all. In the same connexion he also advances reasons why men of limited means should be put in charge of the state treasury. Add also Libanius, *Orations*, v, *De Assessoribus*.

10. Since citizens are required to bear taxes and other burdens on no other score than because they are necessary to meet the expenses of the state in peace and in war, the duty of supreme sovereigns in connexion with them will be not to exact more than the necessities or the

¹ [For *domitare* read *dormitare*.—Tr.]

³ [For *hadenda* read *habenda*.—Tr.]

² [For *Chienses* read *Chinenses*.—Tr.]

real advantages of the commonwealth require. See Cominaeus, Bk. X, towards the end. Grotius on *Luke*, iii. 13: 'It is the duty of princes' to accommodate the public burdens to the public necessities, so that the latter may sustain themselves by the public income in accordance with their dignity, and not to seek to measure them by their luxury and lust and that of the servants of the court, for such cravings know no measure.' Add also Thomas More, *Utopia*, Bk. I. Libanius, *Orations*, iii [lix. 15]: 'The dwellings of the wealthy make safe treasuries.' Furthermore, they should see that such revenues are justly proportioned, and that no citizens 770 be granted exemptions with the result that the rest are defrauded and overburdened. Add Hobbes, *De Cive*, chap. xiii [xxiii], § 10. So also they should be collected with the least possible expense, and in such a way that no large amount may stick to the fingers of the collectors, lest the experience of the treasury be similar to that of jars and buckets which are drawn up full in order to put out a fire, but, in passing from hand to hand and being shaken down a long line, are scarcely half full by the time they reach the place where the water is to be poured on the fire. Nor should we pass over the answer made by the orator Hybreas to Mark Antony the Triumvir, when he ordered the taxes of Asia to be doubled, namely, that he should also order two summers and two autumns in the same year [Plutarch, *Antony*, p. 926 B]. Then what has been collected should be spent on the state and not dissipated on luxuries, largesses, vain parade, or empty trappings. Drepanius, *Panegyric* [xxvii. 1]: 'The final line of defence of wicked princes is to take from some in order to give to others.' Add Michel Montaigne, *Essais*, Bk. III, chap. vi, p. 175.

Finally, a prince should see to it that disbursements be measured by the income, and when that is not sufficient, the balance should be made up by economy and a reduction in the expenses. For splendour is fraught with ruin when it exceeds the income. Nay, he lives brilliantly enough who owes no man. Add Machiavelli, *Il Principe*, chap. xvi. Pliny, *Panegyric* [xli]: 'Let a ruler practice himself to take everything into reckoning in his administration; let him go out and come in as though he were to give an account for it; let him make a report on his expenses. This will mean that he will not spend what he is ashamed to report.' There is in Connestagio, *De Unione Lusitaniae*, Bk. I [p. 25], a notable passage on the bad financial policy of Portugal. Nor will any man be moved by the remark of Cicero, *For King Deiotarus* [ix]: 'To be called a thrifty man confers no great honour on a king.' This Hobbes, *Leviathan*, chap. xi, explains in the following way: 'Thrift, although a virtue in a private man, lessens the ability of those who must perform such tasks as demand the united strength of many men. For it weakens their efforts, which should be incited and maintained by the hope of reward.' Yet without thrift the source of rewards easily dries up,

* [For *Principium* read *Principum*.—Tr.]

although a king should not practise it for its own sake, and in order merely to store up wealth, but so that he may gather and preserve resources for the proper conduct of affairs.

11. Now, of course, supreme sovereigns are not required to support their subjects, save that charity recommends that they take special care of those who cannot maintain themselves by reason of some unmerited calamity; and, indeed, the Incas¹ of Peru used to find a special gratification in enjoying among their other titles that of 'Lovers of the Poor', as we are informed by Garcilaso de la Vega, *Comentarios Reales*, Bk. II, chap. xiv, who adds in another place (Bk. IV, chap. vii), that the fields of widows enjoyed more privileges than those of the Inca¹ himself. Yet because not only the revenues necessary for the preservation of a state must be collected from the wealth of its citizens, but also the vigour of a state lies in the strength and resources of the same, and because 'it is vexatious to a lord to be served by poverty' [Lucan, III. 152], princes will have to provide to the best of their ability that the private fortunes of their citizens flourish. Isocrates, *To Nicocles* [21]: 'Devote attention to the private means of your citizens, and remember that those who are extravagant are spending from *your* treasures, and that those who are industrious are increasing *your* resources; for all the private property of those who dwell in the state belongs to those sovereigns who reign well.' (F.) It makes for this end when citizens are encouraged to gather the richest possible harvest from field and water, to give every attention to the resources which lie at hand, and not to purchase the labour of others for what they can conveniently perform themselves. In this connexion it is of very great importance in maritime countries to foster commerce and navigation. An illustration of this are the efforts of Sesostris, as
771 described by Diodorus Siculus, Bk. I, chap. lvii, whereby he made Egypt capable of commerce and the exchange of products. Add also the rules laid down by Hobbes, *Leviathan*, chap. xxx, for observance in the case of trading companies.

And yet not only should laziness be proscribed, but citizens should also be recalled to frugality by sumptuary laws, which forbid superfluous expenses, and especially those which cause the wealth of citizens to pass out of the country. It is a saying of Maecenas in Dio Cassius, Bk. LII [xxxv]: 'Great wealth is gathered not so much by acquiring a great deal as by not spending a great deal.' (F.) Although in such matters the example of the supreme sovereigns is of greater efficacy than any laws. Tacitus, *Annals*, Bk. III [iv]:

But a great promoter of economy was Vespasian, who was himself a man of the olden type, both in his person and manner of life; thenceforth a feeling of deference toward the Emperor, and the desire to follow his example, proved more powerful for good than all the penalties and terrors of the law. (R.)

¹ [For *Uncas* read *Yncas*.—Tr.]

Add also what Bernier says, at the end of his description of the kingdom of the Mogul, on the causes which reduce the amount of gold in that kingdom. Yet if there be any country which abounds in population and resources, it is advantageous to allow the consumption of things that are not necessities, and, indeed, are practically luxuries, in order that the workers may find means to support themselves, and there be no surplus of idle money; provided undue luxury be not increased, and commodities be not wasted which could be exported with profit.

12. Moreover, since the internal health and stability of states comes from the union of citizens, and since the stronger this unity is the greater the efficacy with which the power of sovereignty makes itself felt throughout the entire body of the state, it is incumbent upon supreme sovereigns to see to it that there arise in the state no factions from which it is an easy step to uprisings and civil war, which is as much worse than a united war against foreign foes as war itself is worse than peace. Herodotus, Bk. VIII [iii]. Add Evagrius, *Historia Ecclesiastica*, Bk. IV, chap. xxxi, on the favour shown by Justinian to the Blues and its evil results; as well as Procopius, *Secret History*; *Idem*, *Persian War*, Bk. I, chap. xxiv; also Bacon, *Essays*, chaps. xv and xlix. Nor¹ should they allow certain citizens to bind one another by special pacts (see Diodorus Siculus, Bk. I, chap. xxi), or permit all or some of them, under any excuse, whether sacred or secular, to depend more upon another man, either within or without the state, than upon their lawful prince, or to feel that a better defence is to be found in someone else than in their sovereign. Because they should take care that there are none to whom can be applied the lines of Seneca, *Oedipus* [542-3]:

There stands a mighty tree
And with its heavy shade it overwhelms
The lesser trees. (M.)

See *Genesis*, xxvi. 16; Bacon, *Essays*, chap. xxxv. Add Hobbes, *De Cive*, chap. xiii, §§ 12-13; Cominaeus, Bk. X, p. 682.

13. Finally, since the relation in which states stand to one another is a peace none too stable, it is the part of supreme sovereigns to see to it that the valour and the skill in arms of the citizens is fostered, and that everything required to repel invasion stands in readiness, such as forts, arms, and troops. 'In readiness,' I repeat, for in the words of Plautus, *The Haunted House*,² Act I, Scene i [379 f.]: 'Oh, it's an awful business—waiting till thirst has you by the throat before you dig your well.' (N.) But one should not be the aggressor, even when there is just cause for war, unless there is a very fair occasion, and the condition of the state easily allows it. Also to this end the plans and undertakings of neighbouring

¹ [For *Nevequidam* read *Neve quidam*.—Tr.]

² [For *Mostillar* read *Mostellar*.—Tr.]

nations should be carefully ascertained and observed (an end which is served to-day by permanent representatives at their courts; see Marselaer, *Legatus*, Bk. II, chap. xi), while friendships should be assiduously cultivated and prudent alliances contracted. Add Hobbes, *De Cive*, chap. xiii, §§ 7-8; Bacon, *Essays*, chap. xxix.

SAMUEL PUFENDORF

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ON

THE LAW OF NATURE AND NATIONS

BOOK VIII

CHAPTER I

ON THE RIGHT TO DIRECT THE ACTIONS OF CITIZENS

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| <ol style="list-style-type: none">1. On the nature of civil laws in general.2. Whether a civil law can be repugnant to a natural law.3. Whether it can define crimes as it pleases.4. Whether the Ten Commandments are civil laws.5. Whether there was anything just before there were civil laws. | <ol style="list-style-type: none">6. Whether a man can ever carry out the evil command of a superior without sin.7. It is not right to commit a crime at the command of a superior.8. Whether it is right for a citizen to serve in an unjust war at the command of his sovereign. |
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Now that we have unfolded the matters which concern in general the nature of supreme sovereignty, we must here set forth the most important questions which are raised in connexion with each of its parts. And since we put first the power to direct the actions of citizens, from which power civil laws proceed, therefore, to what we have set forth above about laws in general, we must now add what in a peculiar manner pertains to civil laws, and the commands of supreme sovereigns.

Now a law is called civil, either with respect to its *authority*, or in respect to its *origin*. In the former sense all laws can be called civil in accordance with which decisions are rendered in a civil court, whatever be their ultimate origin. Compare Grotius, *De Imperio Summarum Potestatum circa Sacra*, chap. iii, n. 3, 4 and 11; chap. iv, n. 1. Although, indeed, natural and divine laws obligate all men for whom they are promulgated, and a penalty awaits their transgressors, to be meted out before the divine tribunal. But their ability to have the full force of law in a civil court arises from civil sovereignty, whose task it is to define what crimes are to find their punishment in a civil court, and what are to be left to the vengeance of God, as well as what natural obligation gives rise to an action in a civil court, and what obligation does not do so, but depends solely upon the honour and probity of men. Therefore, no man is called to account, or assessed a penalty, in the proper sense of the word, in states, for the violation of natural laws, which are not accorded the authority of civil laws. For such sins are usually attended by those evils which are commonly called natural penalties. Although in all states the force of civil law is accorded those precepts of nature, the observance of which is absolutely necessary for the continuance of internal peace. But to some that force is attributed neither expressly nor in the practice of a court, both because there
773 would be too much uncertainty in deciding what should be said to be in violation of them, and in order to prevent the machinery of justice from creaking beneath an enormous number of disputes, and, finally, to

leave to worthy men unimpaired the means to merit high praise, which comes from having lived a life of rectitude out of mere reverence for God, not from fear of human punishment. And this merit and praise completely vanish when it cannot be told whether a man has acted through dread of punishment or love of virtue. Here belong the words of Seneca, *On Anger*, Bk. II, chap. xxvii: 'What a stinted innocence it is, merely to be innocent by the letter of the law. How much further do the rules of duty extend than those of the law! how many things which are not to be found in the statute book are demanded by filial feeling, kindness, generosity, equity, and honour!' (S.)

A law is civil with respect to its *origin*, which arises purely in the will of the supreme civil power, and is concerned with such matters as are left indifferent¹ by the law of nature and of God, and yet work to some special advantage to the state. Yet these laws no less than other laws must be observed by citizens, since it is obviously more conducive to social life that the decision of sovereigns prevail in matters indifferent, and the decision of their sovereign be held for the best by his subjects, than that there remain between them on that point endless disputes, from which the undoubted evils of wars and bloodshed are only to be expected. Cicero, *On Invention*, Bk. I [xxxviii]:

It is desirable [. . .] to refer all laws to the advantage of the republic, and to interpret them with reference to the general advantage, and not after the strict wording according to which they are drawn up. [. . .] For no one wishes to preserve the laws for the sake of the laws, but for the sake of the republic. (Y.*)

Thus Philo Judaeus, *On Joseph* [vi], calls the 'constitutions of different states' on matters which appear to make for the common benefit of individual states, the 'appendages of natural law'.

Now although the sum total of these laws commonly passes under the name of civil law, it should be observed that not all the contents of the bodies or codes of civil law are laws in the proper sense of the term, but that besides the commands which the supreme sovereignty enjoins upon citizens for the special good of the state, much else is found inserted which concerns the discipline of natural law. The larger part, however, belongs to the discipline of civil law, and can be reduced to two main heads. For either certain formulae or certain methods are prescribed, which should be observed in matters whereby a right is conferred upon another or an obligation arises for a person, so that they may obtain validity in a civil court, or the method is detailed in accordance with which a man should go about to secure his right in a court. And so if you would reclaim for natural law all that the interpreters of civil law have so far included in a general way, the civil law would be condensed into a fairly small compass. Not to mention the fact that, in the absence of civil law, recourse should always be had to

* [For *indifferentia* read *indifferencia*.—Tr.]

natural reason, and so in all states what is wanting in civil laws is supplied by the law of nature. In which respect Hobbes, *De Cive*, chap. xiv, § 14, calls natural law 'unwritten civil law'. So also the orators speak of there being an action 'of unwritten crime', on which Quintilian, *Declamations*¹, cclii, has this to say:

Our ancestors, as it would appear, were most particular about this law; because they knew that no one could exercise such prudence nor such unshakably certain foresight, that precautions should cover every device which the ingenuity of wicked men might ever contrive. Therefore, they enclosed every form of malice within this law, as by a line of circumvallation, so that anything which had eluded the defence afforded by other laws, might still be walled about.

2. Yet Hobbes, *De Cive*, chap. xiv, § 10, denies in a most paradoxical fashion that it is possible

for any civil law whatsoever, which tends not to a reproach of the Deity [...] to be against the law of nature. (And this in the main by the following argument, that) They who are going to form a state obligate themselves by a pact to obey the commands of him who holds the supreme sovereignty, that is, the civil laws; and the law of nature commands the observance of that agreement.² Seeing therefore our obligation to observe those laws is more ancient than the promulgation of the laws themselves [...] by the virtue of the natural law which forbids breach of covenant, the law of nature commands us to keep all the civil law. For where we are tied to obedience before we know what will be commanded us, there we are universally tied to obey in all things.

But it should be presupposed in this matter that men, when preparing to come together into a state, already at that time had a knowledge of natural law; that one of the chief objects which they had in view in the establishment of states was the ability to secure the safe exercise of natural laws, whereby the peace of mankind is sustained; and that, finally, there is nothing in natural laws which is repugnant to the nature and end of states, but that, on the contrary, they are in friendly agreement with their design. Therefore, those who in uniting to form a state bound themselves by a pact to obey the civil laws, must certainly be understood to have presupposed that they would establish nothing by civil laws which was contrary to natural law, and that the particular advantage of states, which is the source and cause of civil laws, would not be repugnant to their common end. Therefore, a civil law could, of course, be passed which is opposed to natural law; yet none but an insane man, and one who had in mind the destruction of the state, would wish to pass legislation of that kind. And so on this principle it was proper to hold Stratocles insane, when, according to Plutarch *Demetrius* [xxiv], he proposed a law in Athens that 'Whatsoever King Demetrius should ordain in future, this should be held righteous towards the gods and just towards men'. (P.) And Parysatis was guilty of base flattery in persuading Artaxerxes that he might scorn the laws of the Greeks and marry his daughter, adding: 'He was divinely appointed

¹ [For *declamat* read *declamat*.—Tr.]

² [This sentence is not in Hobbes at that point.—Tr.]

as a law to the Persians, and the supreme arbiter of good and evil.' (P.) Plutarch, *Artaxerxes* [xxiii. 3].

3. The same author [Hobbes] in his *De Cive*, chap. vi, § 16 and chap. xiv, §§ 9-10, undertakes further to defend his own position, as follows:

Theft, murder, adultery, and all injuries, are forbid by the law of nature; but what is to be called *theft*, (what *murder*), what *adultery*, what *injury* in a citizen, that is not to be determined by the natural, but by the civil law? For not every taking away of the thing which another possesseth, but only another man's goods, is theft; but what is ours, and what another's, is a question belonging to the civil law. In like manner, not every killing of a man is murder, but only that which the civil law forbids; neither is all encounter with women adultery, but only that which the civil law prohibits. Lastly, all breach of promise is an injury, where the promise itself is lawful; but where there is no right to make any compact, there can be no conveyance of it, and therefore there can no injury follow. Now what we may contract for, and what not, depends wholly upon the civil laws.¹

To this we can reply, that we who venerate Sacred Scripture can know about many crimes, from the laws which God gave the Jews, and from other revelations, how God, the author of natural law, would have them defined, so that even though a state may actually clear some acts from the designation of crime, they are none the less opposed to divine law. Especially since no sufficient reason can be pointed out why God should in His law give for those acts such definitions as would not hold good among other nations as well. Thus the Spartans used to allow an impotent old man the right to call upon some vigorous young man, so as to secure offspring by his wife, with the result that at Sparta such a husband was not branded as a pimp, nor were the wife and youth guilty of the crime of adultery, because the civil laws of that city had not included under adultery such relations with the wife of another at the husband's authorization. And yet, since it appears from the divine laws that by the law on adultery any intercourse is forbidden with a woman who is already actually married to another, it must be acknowledged that the exercise of such vicarious services was also contrary to the law of nature.

And if a man would contend that the definitions of certain acts as 775 set forth in Sacred Scripture apply only to the Jewish commonwealth, and so belong to positive law, he would still be forced to concede that the definitions of acts forbidden by the law of nature should be so drawn up by civil laws, that the purpose and end of natural law would not be defeated, such being the preservation of an honourable and peaceful human society. If, then, any definition of civil law is opposed to this end, he must necessarily grant that it is also opposed to natural law. Thus, if a man would, for example, define adultery as lying with another's wife 'against her will', or robbery as taking a thing 'by night', or homicide as killing a man 'by open violence', there is no doubt that such

¹ [All this is confined to *De Cive*, vi. 16.—*Tr.*]

a procedure undermines the peace of the state. Nor can we believe that peace would be sufficiently insured by the universal terms in which such definitions are cast, so that even though they may at times work a hardship on a man, they can at other times be to his advantage; and that the equality of right which such laws set up between citizens will remove the cause for complaints. For even though we should desire that some things be allowed us alone, yet should they be allowed others as well against us, we would not ask them even for ourselves alone. If such practices were established by civil laws, peace and comely order, the preservation of which nature desires, could not help but be thrown into confusion. Why, if this equality which they speak of were sufficient of itself for the establishment of any right, all laws could on that score be done away with, since that would mean the introduction of absolute equality. Yet that is a thing which no man in his senses would ever think of doing. Thus Sigismund, Baron of Herberstein, *De Rebus Muscoviticis*, says of the Tartars:

Justice is not to be found among them. For whenever a man stands in need of anything he can take it from another without fear of punishment. If a man complains before a judge of violence and injury done him, the accused person does not deny it, but only says that he could not do without¹ the article. Then the judge renders this decision: 'If you in your turn² come to need something, take it from others.'

Although Haythonus, *De Tartaris*, chap. xlviij, gives a little more favourable description of this custom: 'The Tartars', he says, 'gladly share their food with strangers, but wish to be treated in the same manner by them, and if they are not,³ they take things by force.' So by their definition it will be theft, when he who takes a thing against the will of its owner, did not need it. That such a definition almost entirely subverts the law of nature on robbery is obvious enough; and such a law could be the desire of none but desperate ne'er-do-wells, since in the case of industrious men often enough⁴ something could be taken from them, the like of which they could not find in another's possession, or which they would be prevented from carrying off because of the watchfulness⁵ of its owner.

Furthermore, the presupposition of Hobbes is false, that the question as to what is another's and what is mine, is entirely within the province of civil law, in its proper⁶ meaning, and that outside of states there is no property in things. For although those who live in states enjoy a more certain and firm *propriety* of their possessions than those who live outside their bounds, since the former have for their defence the united strength of many men and the aid of the judge, while the latter must depend only upon their own strength, still one may not

¹ [For *secarere* read *se carere*.—Tr.]

³ [For *alio quin* read *alioquin*.—Tr.]

⁵ [For *cunstdiam* read *custodiam*.—Tr.]

² [For *twicissim* read *tu vicissim*.—Tr.]

⁴ [For *saedissime* read *saepissime*.—Tr.]

⁶ [For *praeesse* read *presse*.—Tr.]

thereupon deny that there was any dominion over things before states were established. So also would any man dare claim, that, because to-day sovereigns and states live in relation to one another in a state of nature, and their property is based not on any common law or judge but only on pacts and the method of acquisition possible in a state of nature, one king can seize by stealth or open force the property of another, with whom he has no pact, without being guilty of theft or robbery? And again, although we grant that a man cannot make a valid pact on 776¹ a matter forbidden by civil laws, yet who will deny that those who live in a state of mutual liberty cannot conclude a pact, the violation of which constitutes an injury? Therefore, it is also false that civil laws are the sole source of our knowing what constitutes an injury. Who will go further and deny that a man who kills another without a state of war, or in self-defence, is guilty of murder, if he is only under the rule of natural law? That adultery is a violation of conjugal fidelity can be known by mere natural law, even without the aid of civil laws. And yet it is patent that civil laws can add certain requirements to the marriage contract, which without them may, within a state, be held invalid and null, or else lacking in certain effects.

Finally, a clear distinction should be drawn between what civil laws command, and what they only permit, that is, what is not forbidden under penalty of punishment to be inflicted in a civil court. For a prohibition of natural law, and a permission of civil laws, are not opposed to one another. The permission of civil law does not prevent an act from being opposed to the law of nature, or allow a man to do it without being guilty of a sin against God, but it only declares that he who would perform it is not forbidden by the civil power to do it, and is not punished on that score, and that in a human court such acts are granted the same effects as otherwise attend those that are lawful in the eyes of natural law. And so the laws of the Tartars do not make it mandatory to rob others of their possessions, nor, I fancy, do they forbid owners to defend their property against thieves, but whoever has stolen is not punished, and need make no restoration, and therefore in a Tartar court such purloining is regarded as a legitimate method of acquisition. The same conclusion should be reached about the theft practised by the Spartan youth. For the Greek of Plutarch, *Laconian Apophthegms* [p. 234 A]: 'It was a legal institution (*νενομιστο*) for the boys to steal,' need not mean 'the laws commanded' but 'the laws allowed the youths to practise stealing'. For Xenophon², *Anabasis*, Bk. IV [vi. 14], says in the passage where he was poking fun at Cheirisophus the Spartan, that for the Spartan youths 'it is not disgraceful, but necessary to steal'. Nor was this custom so disgraceful as some would believe, or as it is described in the criticisms of it by Isocrates, *Panathenaicus* [ccxi f.], since the youths

¹ [For '766' read '776'.—Tr.]

² [For *Xenophn* read *Xenophon*.—Tr.]

could indulge in it only among the gardens and kitchens, and when discovered were punished with blows and hunger. See Plutarch, *Lycurgus*; Xenophon, *Constitution of the Lacedaemonians* [ii. 7 ff.]. Far more disgraceful was the freedom allowed theft by the Colchians, as described by Busbecq, *Letters*, iii, p. 155. Here belongs also the account of Plutarch, *Apophthegms*¹ [p. 175 f.], about Dionysius: 'Although he punished other malefactors severely, he favoured such as stole clothes, that the Syracusans might forbear feasting and drunken clubs.' (G.) Add *Digest*, XI. v. 1. So also at Sparta no law bothered the worn-out husband and the youth, and if they reached an agreement the laws did not interfere, while the children born of such cohabitation were treated as legitimate and received their share in the estate. In the same way where the anger of individuals is allowed to vent itself in duels, the death that may ensue is not punished as homicide in a civil court, although the divine tribunal does not treat it so lightly.

But that the civil power may rightfully permit such things, and that not by mere connivance but by express reference in the civil laws, I should not dare assert, since by this course it practically invites citizens to do what is repugnant to natural law. Yet it is excusable to overlook such offences, if the times and the genius of a people do not permit the application of direct remedies of such practices, just as the custom of the Roman law in calling a trial for actual theft an 'action for removed goods', was not lacking in good reason.

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4. The same writer in his *De Givē*, chap. xiv, § 9, states that the precepts of the Decalogue are 'civil' and not 'natural' precepts, and to be explained in this wise:

'Thou shalt not refuse to give the honour defined by the laws, unto thy parents: Thou shalt not kill the man, whom the laws forbid thee to kill: 'Thou shalt avoid all copulation forbidden by the laws: 'Thou shalt not take away another's goods, against the owner's will: 'Thou shalt not frustrate the laws and judgements by false testimony.

Here we should note the utter falsity of his hypothesis, that, before the founding of states, nothing belonged to one man or another, there was no such a thing as marriage, and men were free to do anything whatsoever to one another. Surely it is patent that the commands on these matters obligate those who live, not under a common government, but in a state of nature, and observe mere natural law in their relations to one another, for such men were able to, and actually did, by a pact divide things among one another. Therefore, such men sin no less against the seventh² commandment in laying hands upon or stealing by stealth or by force the property of another, than does a citizen in dealing that way with his fellow citizen. Thus who would dare deny that a man who, living in natural liberty, violates another's bed, commits adultery? See *Genesis*, xx. 3; xxvi. 10. Finally, since in a natural state

¹ [For *apophthegm* read *apophthegm*.—Tr.]

² [Commonly numbered now the eighth.—Tr.]

there may be place for arbitrators to decide questions of fact on the testimony of witnesses (Hobbes, *De Cive*, chap. iii, § 23), use will also be found for the eighth¹ commandment.

In general most of the precepts of the Decalogue may in their subject matter be referred to natural law. But when they are considered as inscribed upon two tables and proclaimed by Moses to the people of Israel, they are properly to be called civil laws, or rather the chief heads of the civil law of that people, which were thereafter elaborated into special precepts by the addition of penal sanctions. Add Philo Judaeus, *On the Ten Commandments*. Here belongs the remark of Grotius, on *Matthew*, v. 27, to the effect that not all crimes, not even such as are punished by civil law, are comprehended (in express terms) in the Decalogue, but only such as are in each class the most heinous. For there is no mention of wounding, but only of murder, none of any kind of gain to another's loss, but only of theft, none of the many kinds of deception, but only of false witness.

5. We should at this point also set forth that Hobbes, *loc. cit.*, chap. xii, § 1, among his seditious opinions, and such as by their very nature lead states to ruin, advances in the first place the following:

That the knowledge of good and evil belongs to each single man. [...] For the rules of *good and evil*, *just and unjust* are civil laws; and therefore what the legislator commands, must be held *good*, and what he forbids *evil*. [...] Therefore wicked is that saying *that kings must not be obeyed unless they command us just things*. Before there was any government, *just and unjust* had no being, their nature being only relative to some command: and every action in its own nature is indifferent; that it becomes *just* or *unjust*, proceeds from the right of the magistrate. Legitimate kings therefore make the things they command *just*, by commanding them, and those which they forbid, *unjust*, by forbidding them. But private men, while they assume to themselves the knowledge of *good and evil*, desire to be even as kings; which cannot be with the safety of the commonwealth.

On this matter we should note that it belongs to the power accorded kings to add to or to withdraw from natural laws the force of the civil, before human tribunals, by adding or denying penal sanction, and to make many things, which lie outside natural laws, *just*, by commanding them, or *unjust*, by forbidding them. But to say that before there were civil sovereignties, justice or injustice, defined by natural law and binding upon the consciences of men, did not exist, is as false as if I should assert that truth and rectitude depend upon the desire of men and not on the nature of things, or that the nature of things can be fashioned by supreme sovereigns at their pleasure, or that the truth about the same thing can be different from itself.

And, in fact, the very thing itself sufficiently disproves the position of Hobbes. He would have it that while those fathers of a family, by 778 whose coming together states first arose, lived still separated, they acted like brute animals, observed none of the pacts, entered into with

¹ [Commonly numbered now the ninth.—Tr.]

others, and robbed others of their own right of life and property whenever they so pleased, while whatever they did was held indifferent. And that even to-day, when absolute kings, who live with relation to one another in a state of nature, do not observe pacts and undertake to rob others of their possessions, they are regarded as having violated no justice, and yet they are certainly not subject to civil laws. Nay, but on the contrary, we would reply, states could never have been formed, and when once formed could not have been preserved, had not some idea of justice or injustice existed before that time. For it is certain that pacts intervened in the establishment of states. Yet how could men have been able to persuade themselves that pacts were of any use at that time, had they not known beforehand that it was just to observe pacts and unjust to break them? And if it is not just to observe pacts before civil laws are defined, what is there to prevent subjects from throwing off obedience and destroying a state at their pleasure, and by that act doing away with the distinction between justice and injustice? For it would be idle for one to hope¹ that so great a multitude of men could hold together forever by the force of mere violence and fear. Therefore, there is surely no king so senseless as to enjoin something which is forbidden by the general laws of nature, or to forbid what they command: To rule, for instance, that it is unlawful to keep one's word, that one need not give a man his due, or live an honest life, that every person may injure another as much as he can, &c. Yet why might not such laws be made, if there is no justice or injustice before civil laws are defined? But it is no more possible for civil sovereignty to create goodness and justice by precept, than it is for it to command that poison lose its power to waste the human body. And from this it is easy to gather how far Polybius, in his sixth book, wanders from the truth in appearing to seek in states the origin of justice and injustice, who is quoted without judgement by Machiavelli, *Discorsi sopra la Primadeca di Tito Livio*, Bk. I, chap. ii. Add Richard Cumberland, *De Legibus Naturae*, chap. v, § 5.

Yet in another sense the thesis of Hobbes can be allowed, if, that is, good and evil be taken as that which does or does not work to the advantage of the commonwealth. For then that is surely a seditious opinion, that 'the knowledge of good and evil', that is, of that which is good or evil, advantageous or disadvantageous to the state, 'belongs to individuals'. That is, that each individual is empowered to pass judgement as to the aptitude of the means which a prince orders to be undertaken so as to secure the public good, with the effect that the obligation of each person to obedience depends upon that judgement. For one may apply here the words of Tacitus, *Histories*, Bk. I, chap. lxxxiii:

It is as fitting that the soldier (and other subjects no less) should be ignorant of some

¹ [For *superaverit* read *speraverit*.—Tr.]

things as that he should know others. [. . .] If every subaltern may discuss the reasons of his orders, discipline is at an end, and the authority of the commander falls to the ground. (O.) (Nor are those words of praise, when the soldiery are described as) 'more disposed to scan than to execute their general's orders'. (O.) (*Ibid.*, Bk. II, chap. xxxix.)

Cato, *On Farming*, chap. v: 'Let not the steward think that he knows more than the owner.' And to this extent the words of M. Terentius, as given by Tacitus, *Annals*, Bk. VI [viii], would be right: 'It is not for us to appraise those whom you exalt above all others, or to ask why you have exalted them. To you the gods have given the supreme direction of affairs; to us has been left the glory of obedience.' (R.) It is the opinion of Plato, *Politicus* [p. 299 c]: 'For no one should presume to be wiser than the laws.' (J.) And with this Aristotle, *Rhetoric*, Bk. I, chap. xv [12], agrees: 'Trying to be cleverer than the laws is just what is forbidden by those codes of laws that are accounted best.' (R.)

6. We must also in this connexion examine the rather difficult question as to whether a subject can ever sin in carrying out the com- 779
mands of his prince, provided he shows forth by his conduct that he is merely engaged in their execution, while all knowledge of the case and necessity of accountability fall upon him who gives the orders. For laws differ from commands in this respect, that the former are general commands lying upon all subjects; while the latter are laid upon certain subjects for a particular matter, although they have an effect similar to that of laws in obligating the one on whom they are laid. Therefore, the idea is commonly held¹ that a man may sometimes be sinning when he obeys the commands of a civil sovereignty, and so a citizen can and should keep his own conscience well informed and carry out such commands in accordance with it. So Antigone says in the tragedy of that name by Sophocles [lines 453 ff.]:

Nor did I deem that thou, a mortal man,
Could'st by a breath annul and override
The immutable unwritten laws of Heaven. (S.)

Nay, it is understood that good men are conscious that they must give an account of their actions before the divine tribunal, and that every kingdom is subject to a still greater kingdom, and should promise obedience only on the condition that they are willing to obey the commands of sovereigns, provided these are not manifestly opposed to the law of nature and of God. For there is no doubt but when a king commands the performance of something that is contrary to civil law, he can be obeyed without sin.

On the other hand Hobbes, *De Cive*, chap. xii, § 2, holds it a seditious opinion 'that subjects sin when they obey their prince's commands which to them seem unjust'. And it is in fact a doctrine dangerous both to states and to the conscience of individuals, to hold

¹ [For *per vulgata* read *pervulgata*.—Tr.]

that if merely a scruple or question arise on the equity of commands, it may be right to refuse obedience. Furthermore, on this score citizens must only too often necessarily fall into sin¹, for they will be acting against their conscience if they obey, and against their plighted faith to their superiors if they do not. For all would agree that when the conscience hesitates between two considerations, it is safest in choosing that side from which there is less danger of sin. Now there is a far more present danger of sin in neglecting in any matter of doubt one's plighted faith, since the commands of superiors are always attended by a presumption of justice, and always follow upon some reason which private citizens are not allowed to pass judgement upon. And so what the same author adds a little further on, deserves careful consideration:

That is my sin, indeed, which committing I do believe to be my sin; but what I believe to be another man's sin, I may sometimes do that without any sin of mine. For if he commanded to do that which is a sin in him who commands me, if I do it, and he that commands me by right lord over me, I sin not.

Procopius, *Gothic History*, Bk. I [vii. 19]:

As for the proposals which an ambassador has received from the lips of him who has sent him [. . .] he himself cannot reasonably incur the blame which arises from them, in case they be not good, but he who has given the command would justly bear this charge, while the sole responsibility of the ambassador is to have discharged his mission. (D.)

Seneca, *Trojan Women* [870-1]:

If aught of sin there be
'Tis his who doth command thee to the deed. (M.)

Add *Digest*, III. ii. 1, words *non iussu eius*. M. Seneca, *Controversies*, Bk. IV, cont. xxvii [IX. iv. 10]:

She is not unchaste who was summoned by the tyrant; he is not called sacrilegious who with his own hands carried to the tyrant the gifts that belonged to the immortal gods, or who consecrated among the images of the immortal gods the accursed portraits of the tyrant².

A man may undertake the mere execution of an act enjoined upon him by a sovereign, which is imputed for sin upon him who commands it, not upon him who carries it out. Yet for this to obtain, we hold it necessary, first, that the mere execution alone be commanded him, that is, that he lend only his body and its strength to the act, and in general
780 that he give no occasion or pretext, or furnish the least excuse for it, but only carry it out as though it were another's act and not his own. And second, that so far as he can, he avoid and beg to be excused from such a task. An excellent example of this is in Ad. Olearius, *Itinerarium Persicum*, Bk. V, chap. xxxii. And lastly, that because of his reluctance a threat of death or some other serious evil, which neither justice nor love requires him to undergo for the sake of another, be laid upon him

¹[For *precandi* read *peccandi*.—Tr.]

²[For *tyranni* read *tyranni*.—Tr.]

by the sovereign, who is strong enough to carry it out, especially when he will inflict that evil upon another even without our aid. Indeed, it is manifest that no commands repugnant to divine right can contain a force to obligate, that is, to lay upon the consciences of any men an intrinsic necessity, and that whoever refuses to obey such commands is free from all crimes.

Yet there is every difference between being obligated by conscience to do something, and being able to do something, without being guilty of sin, in order to avoid a most grave evil. For there are many things that we are in no wise intrinsically obligated to do, which we can, however, undertake quite rightfully upon the urge of necessity. And the question before us is not whether we are bound to perform such and such a thing, but whether we can do it without our own sin, so as not to throw away our life. Nor are we hit by that statement of Pliny, *Letters*, Bk. III, ep. ix, that he had proved to the senate that it was a 'crime even to have ministered in any wise to one', for the defendants in that case, whom he was prosecuting, had not been the mere executioners of another's crime, but had falsely accused innocent persons, so that a governor might have the opportunity to confiscate their property, and as informers they were not acting for others but for themselves, while they were prosecuting such men in their own name¹, not in that of the consul, or as if they were acting under his orders. No more were they led to make such false charges by fear of death. They said, of course, that they were 'citizens of the province and compelled by fear to fulfil every command² of the governors', but it was far more likely that their deeds were inspired by greed for gain, and although the governor may have threatened them with death in case they refused to work his will, it is scarcely believable that he had threatened them with an immediate death which they could in no way have avoided. A case in point is in Tacitus, *Annals*, Bk. XIII [xliii]:

The defence of Sullius was that none of these things were of his own doing: he had but obeyed the orders of the Emperor. [...] He then alleged orders from Messalina; but this defence broke down also:—'How was it', his accusers asked, 'that no other voice than his had been selected to serve the rancours of that abandoned woman? No mercy should be shown to the instrument of cruelties, who, after reaping the reward of his crimes, threw the guilt of them upon others.' (R.)

And so the same author in his *Agricola* [iv] justly praises Julius Graecinus: 'He received orders to accuse Marcus Silanus, and, refusing, was put to death' (H.); and Julius is accorded a great encomium by Seneca, *On Benefits*, Bk. II, chap. xxi.

But we do not feel that in the case given by Pliny the requests of superiors are equivalent to necessity and sovereign injunction, although in general the statement of Plato, *Letters*, vii [p. 329 D], is true enough:

¹ [For *nommine* read *nomine*.—Tr.]

² [For *imperim* read *imperium*.—Tr.]

'We know¹ full well that the requests of tyrants are partly composed of compulsions.' Nor is the case of Doeg, in 1 *Samuel*, xxii, opposed to our position. For we made this express exception, that a man may refuse such a task so far as he is able, and this the other servants of Saul did, and deserve praise for that reason. (Just as the midwives of Egypt deserved praise for evading by lies the ruthless command of Pharaoh, in *Exodus*, i.) But Doeg leaped up with all eagerness to carry out the command of the king, although there is no mention of any threat being connected with it, since he had already accused innocent men of a false crime, hinting that they had connived with David in secret plots against the king. For that he had made false accusations is clear enough from *Psalms*, lii.

Yet it must be confessed that merely to execute some acts seems to
 781 many a harsher fate than death itself: if, for instance, a tyrant should command a man to slay his parents or sons, or to lie with his mother, daughter, or a beast. A brave man would choose death to the performance of such a deed. So also no one could easily criticize the steadfastness of those Romans who, when Hannibal ranged them against each other and commanded brothers to fight with brothers, fathers with children, kinsmen with kinsmen, preferred death by torture to staining their hands with the blood of those who were so near to them. Diodorus Siculus, Bk. XXV in *Excerpta Peiresciana* [XXVI. xiv. 2]. We are informed by Laonicus Chalcocondylas, Bk. I, that Amurath 'commanded the parents of those who had joined in the rebellion of Sauzes to slay their sons with their own hands, and two fathers, who refused to carry out such a cruel command were themselves executed at the same time as their sons. For he used to say that the sons would never have gone over to Sauzes had not their parents advised them to, and that they were playing with both sides while the outcome seemed uncertain.' Yet we do not hold it lawful to be willing to assist in the death of an innocent person in order to save my life, for that would be to make another's life the price of my own, while there are many things which we cannot do for a price, but can under another consideration. Abraham Rogerius, *De Braminibus*, Pt. I, chap. xix, writes that it is held by that people that a wife can do without sin whatever her husband commands her, since an evil done under that condition is to be imputed not to her but to her husband, whom she is obligated to obey.

7. But that a man cannot undertake as his own, at the command of a superior, an action which opposes the dictate of right conscience, no one with any sense of piety will deny. And so those judges in Josephus, *Jewish War*, Bk. IV, chap. xix, were right in refusing to condemn the innocent Zacharias, despite the fact that they knew that they were in immediate peril from the fury of the Zealots. On the

¹ [For ἔσμεν read ἵσμεν.—Tr.]

other hand those described in 1 *Kings*, xxi, involved themselves in the most serious crime, for they pronounced a judgement not as dictated by a king through his sovereign power, but as though meted out by justice herself, when the crime was patent. And their villainy was equalled by that of the witnesses. The same judgement must be passed upon informers who weigh down powerful or wealthy men with calumnies, in order that evil princes may thereby find the occasion to destroy them. Amid whom there was one of some renown named Marcellus Eprius, a well-known informer upon Thrasea, who, as we are informed by Tacitus, *Histories*, Bk. IV, chap. viii, gave as his excuse that 'the overthrow of Thraseas could not be imputed to his speech more than to the decision of the senate'¹. This was merely to share the crime with others, not to clear himself of it. 'The cruelty of Nero accomplished its purpose by means of such mockeries as these.' (O.) But still it was avarice and a lust to advance to high office by disreputable means which led you to encourage that low actor. Others who engaged in the same practices offered as an excuse that by service of this sort they 'redeemed their dignity or their life'. 'Their pleas,' to the effect that 'they preferred to accomplish the ruin of others' rather than to run a risk themselves, 'may be admitted', thinks Curtius Montanus (*loc. cit.*, Bk. IV, chap. xlii), not because he believes that they are entirely innocent; but by a rhetorical device he gives the appearance of conceding some points, in order to insist the more urgently upon others. And very properly 'the senate, after Nero was put to death, demanded that the informers and the ministers of his iniquity should be punished in the established way . . . a description of men called into existence to prey upon the vitals of society'. *Ibid.*, chap. xxx.² (O.) According to Suetonius, *Titus*, chap. viii, such men were treated in this way: 'After they had been soundly beaten in the Forum with scourges and cudgels, and finally led in procession across the arena of the amphitheatre, (the emperor Titus) had some of them put up and sold, and others deported to the wildest of the islands.' (R.) We are informed by Pliny, *Panegyric*, chaps. xxxiv-xxxv, that Trajan had them loaded on unseaworthy vessels, to be drowned in the waves, or cast upon desert islands. Thus the 'private commands of Tiberius' did not clear Cn. Piso of criminal responsibility 782 for the death of Germanicus, if, indeed, he was actually the cause of that prince's death. And although he might have confessed the complicity of Tiberius before the senate, it would only have caused some embarrassment to the emperor, who would have been deprived of any way to excuse himself of a crime which he had ordered; while the senate would still have had the power to condemn him, because he had not declared that he had a command of the emperor for that deed, but had himself eagerly undertaken what could not be ordered with decency, in

¹ [For *senasus* read *senatus*.—Tr.]² [This last clause comes from the *Annals*, IV. xxx.—Tr.]

order that he might by the crime put Tiberius under his obligation. Tacitus, *Annals*, Bk. III, chap. xvi. Nor do we feel that Joab was entirely free from guilt in the death of Uriah, in 2 *Samuel*, xi. 14-16, although, in xii. 9, only David is mentioned as the principal cause. Papinian was also correct in refusing to defend the murder of Geta, adding the famous remark: 'It is not so easy to excuse a murder as it is to commit it.' Others have recorded that he refused to deliver an oration in which he would have inveighed against the brother of the emperor, giving as his reason, 'To accuse an innocent man when he is dead is to murder him a second time.' But Spartianus, *Caracalla*, chap. viii, rejects this account, giving as his reason that 'the prefect of the guard may not compose speeches' (although there seems to be no reason why he could not have received an extraordinary command to do so), and adds that 'it is established that Papinian was killed for being one of Geta's supporters'. (M.)

However this may be, a man is right in refusing to lend his ability to the defence of villainies, even though the defence is to be published under another's name. For a subtle arraying of specious arguments, tricked out with artifices and captivating persuasion, can never be regarded as a full excuse for another's act. But our conclusion would have had to be different if Caracalla had commanded some one to deliver in the senate such an oration, composed either by himself or some one else, upon pain of death in case he refused. This point also¹ can be illustrated by a number of passages in Plato, *Apology of Socrates*. Here also belongs what is told of Sallust by Dio Cassius, Bk. XLIII [ix], whom

Caesar put over the Numidians nominally to rule, but really to harry and plunder their country. At all events this officer took many bribes, and confiscated much property, so that he was not only accused but incurred the deepest disgrace, inasmuch as after writing such treatises as he had, and making many bitter remarks about those who fleeced others, he did not practise what he preached. Therefore, even if he was completely exonerated by Caesar, yet in his history, as upon a tablet, the man himself has chiselled his own condemnation as well. (C.)

Although when a prince's deed has not yet been clearly convicted of injustice, a citizen, and especially a public minister, will be careful not to be over-hasty in condemning it, since it is their duty always to presume the justice of their master. See the political solecism² of Aligrius, Chancellor of France, in Gramondus, *Historiarum Galliae*, Bk. XVI.

8. By the same principle we must decide the question as to whether a citizen may rightfully take up arms in an unjust war at the command of his prince. The opinion of Grotius, Bk. II, chap. xxvi, § 4, is that when it is manifest that a prince is taking up unjust arms against

¹ [For *quo* read *quoque*.—Tr.]

² [For *solaecismus* read *soloeismus*.—Tr.]

another, it is not right for a citizen to be an accomplice in his crimes; but that in case of doubt he should take the safer course, which is to keep out of the war. But it is our feeling that such matters should be considered with due caution, lest¹ the force of civil sovereignty be destroyed by them, and in a matter of such importance the obedience of citizens should depend upon the judgement of individuals; especially since in such questions it is easy for timidity and laziness to furnish a scruple of conscience. Yet if, when a man is admitted to deliberations and has the right to vote, he is not obligated by the decision of the rest without his own consent, he cannot rightfully undertake what he has questions about, and certainly nothing of the injustice of which he is fully convinced. And this will hold good if he is allowed his choice either to go to war or to remain at home. But what if he is commanded simply to obey? In that case we feel that among all nations who pay any heed to honourable conduct it is always presupposed, in their 783 deliberations, that they had just cause to undertake the war, while there is no use speaking of conscience among such as neglect to do this.

But the chief question in this connexion is, whether, at a special time, assuming that the cause is just, it is to the advantage of the state to declare war upon another. In such cases it is presumed that he whose peculiar task it is to care for the state, and who is most thoroughly conversant with the resources of the commonwealth, surely sees more clearly than a private citizen what is for its benefit. But if some man, convinced of the justice of the war, still questions whether it would not be better to overlook or forgive the affront offered the state, rather than avenge it in war, let him know that on no account does this seem to be sufficient reason to allow a citizen to refuse obedience to civil sovereignty and to provoke its discipline against him, because he feels that his state is not observing toward another a virtue which contains only the force of an imperfect obligation. And so the safest course would be for a citizen merely to obey in a case like this, and to leave the supreme sovereign accountable to God for the justice of his war. Rightly does Hector say in Homer, *Iliad*, Bk. XII [243]: 'One omen is best, to fight for our country.' (L.L. & M.) In Tacitus, *Histories*, Bk. II [xxv], it is called a 'crime of the state' for a son to have slain his father² in battle. Add *Digest*, IX. iv. 2, § 1; IX. ii. 37. Yet it should be observed that these points concern only citizens who take up arms at the command of the supreme sovereign, for whoever voluntarily enters the service of a foreign prince, should by all means³ be certain of the justice of his cause. Therefore, it is not without justice that those who sell their services without considering the cause, are in bad repute with men

¹ [For *neexinde* read *ne exinde*.—Tr.]

² [For *omnio* read *omnino*.—Tr.]

² [For *partem* read *patrem*.—Tr.]

of judgement. Gunther, *Ligurinus*, Bk. VII, thus describes them: 'A troop hired for pay, a soldiery intent upon gifts of war, accustomed to change its favour for a price, to accept battle at once upon its payment, and to treat any one as an enemy that their contractor names.' Nor are such men given any undue praise by Thomas More in his *Utopia*, Bk. II.

CHAPTER II

ON THE POWER OF SUPREME SOVEREIGNTY OVER THE LIVES OF CITIZENS IN THE DEFENCE OF THE STATE

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| <ol style="list-style-type: none">1. The supreme sovereign can in time of war expose citizens to peril of their lives.2. Whether a citizen may refuse military service because of a pact¹ with the enemy.3. No man should render himself useless for military service. | <ol style="list-style-type: none">4. How far the obligation of soldiers extends.5. Whether a state can surrender an innocent citizen.6. One state can surrender to another a citizen as a hostage. |
|---|--|

ALTHOUGH men gathered into states to the end that they might find security for their property, and especially for their lives, it was still found necessary for the preservation of states that the supreme sovereignty should exercise some power over the lives of citizens, and this for two purposes, both to avert any evil from the state, and to suppress misdeeds. On the former score the power belongs to the supreme sovereign to expose the lives of citizens to peril, in order to defend the state and to maintain its rights, since those who resort to arms are always bent upon taking each other's lives. In fact, since the proper use of arms requires training, Plato, *Laws*, Bk. VIII [p. 831 A] (although 784 we disagree with him), even held that the lives of citizens could be exposed to danger in this training, and would have such arms used in their military exercises as are exactly like those employed in war, as dangerous, and as suited to strike terror, adding the following law:

If any one dies in these mimic contests, the homicide is involuntary, and we will make the slayer, when he has been purified according to law, to be pure of blood, considering that if a few men should die, others as good as they will be born; but that if fear is dead, then that the citizens will never find a test of superior and inferior in desert, which is a far greater evil to the state than the other. (J.)

Such military exercises are still in use in Japan. See Bern. Varenius, *Descriptio Japoniae*, chap. xix. There is preserved in Demosthenes, *Against Aristocrates* [54-5], an Attic law:

If one man shall slay another unintentionally in a prize-fight [...] he shall not go into exile² [...] (the reason added being): He, the author of the law, looked not at the event, but at the intention of the party. To vanquish without taking life, not to kill. If the adversary was too weak to endure the struggle for victory, he considered that he was the cause of his own misfortune, and therefore allowed him no redress. (K.)

Furthermore, the requirements of military service quite properly demand a very rigid discipline, since in warfare the slightest negligence often imperils the life of the state. Therefore, although a judge upon

¹ [For *popter pactum* read *propter pactum*.—Tr.]

² [For *exulatio* read *exulato*.—Tr.]

the bench commonly makes some allowance for affections which deeply stir the heart of a man, that may not be done in military courts, for in them a man is often condemned to death for deserting his post in order to escape imminent death. Livy, Bk. V, chap. vi: 'Death by cudgelling is the wage of him who forsakes the standards or quits his post.' (F.) Add Michel Montaigne, *Essais*, Bk. I, chap. xv. And yet some have felt that cowardice in soldiers is more effectively checked by ignominious punishments. See Justin, Bk. XXXII, chap. iii; Ferdinand Pinto, chap. x. So also among some nations the avoidance of military duty has received the most severe punishment. See *Digest*, XLIX. xvi. 4, § 10. Thus Lycurgus, *Oration against Leocrates* [129f.], tells of a law in Sparta that any one who refused to face peril for his country should die. In this way they turned the very thing they feared into a penalty. [...] For when a man was faced by two perils of death, he would far rather choose the one at the hands of enemies than the one at the hands of the laws and of his fellow citizens.

Add *Law of the Lombards*, Bk. III, tit. xiii, § 1. And although certain citizens are to be found in most states, who, although otherwise fitted by age and physique to bear arms, enjoy exemption from military service either because of their occupation or of some special indulgence of the state, that privilege is only in force so long as the rest of the citizens, or allies, or mercenaries are at hand in sufficient numbers to defend the state. Otherwise, at the call of supreme necessity, these exempted persons also shall take up arms for their altars and hearths. Surely it is better for the privileges of such men to lie dormant for a while, than for the state to perish because their religious scruples lack timeliness. 'The summons of extreme perils recognizes no distinctions.' At Rome in her early history the exemption from war enjoyed by old men and priests ceased at an invasion of the Gauls. Appian, *Civil War*, Bk. II [cl]. Add *Code*, X. xlix. 3; see also Andreas Maurocenus¹, *Historia Veneta*, Bk. IV, p. 147. Although there was good reason for Plutarch, *Solon* [xxx], to commend the law either of Solon or Pisi-stratus: '[...] Those who are maimed in war shall be maintained at the public charge.' (P.) Nay, when the resources of the state will bear it, some pay or reward is certainly² owed those who are in the service while the rest remain at home, since not only are the former forced to neglect their own affairs, but they also deserve some compensation, in so far as
 785 they give more service in proportion to the state than other citizens. Add also what is recorded by Diodorus Siculus, Bk. I, chap. lxxiii, on the rules of the Egyptians regarding military service.

2. In this connexion the question may be raised, as to whether, if a prisoner held by the enemy has promised, in order to secure his release, that he will not take up arms against them, he can thereafter rightly be obligated by the state to break his promise, and to serve

¹ [For *Morocenus* read *Maurocenus*.—Tr.]

² [For *omnia* read *omnino*.—Tr.]

against that enemy. Some have pronounced such a pact void in itself, because it is opposed to the duty which a citizen owes his state. Our opinion is, that we should not so much reply to this, that not all things which are opposed to one's duty are therefore at once null and void, as deny that it is opposed to the duty which is owed a state to secure one's liberty by promising what is already in the hands of the enemy. For unless the enemy gave him his freedom, the prisoner could never bear arms against them. Therefore, such a pact makes a state none the worse off, for unless the prisoner regains his liberty he must be regarded as dead to his country. And therefore, when a state has received back a former prisoner, it is held to have done so on this condition: That it leave him able to keep his promise to the enemy, especially when he may have recovered his liberty unaided by the state. But may not that eminent force of supreme sovereignty put forth its power over such an obligation of a citizen, if the safety of the state demands it? If, for instance, a state is in immediate danger, unless he also come to its defence? On this we hold, that, since it is absurd for me to be a citizen and yet be under an obligation which also renders me of no service to the state in its extreme necessity, no less absurd is it for me to be able to be obligated by a simple pact so that I may not resist the unjust force of one who is intent upon the destruction of me and mine; and that for this reason such a pact of a prisoner is to be understood as only for an offensive, not a defensive war, especially if my safety will also be imperilled together with that of the state. For why did the enemy grant me my liberty, if he purposed so to bind me that I could not for the future ward off his violence from my life and fortunes? Therefore, such a pact will by no means stand in the way of my taking up arms in defence of the state at the call of my supreme sovereign.

It is a question much like the foregoing, as to whether, when set free by the enemy upon a condition, a man is required to return into captivity when the condition is not fulfilled. This is answered in the affirmative in the case of private citizens, but Bussièrès, *Historia Francica*, Bk. XVI, in the case of King Francis, would raise some doubt about its applying to kings. This matter I leave for others to settle, although my advice would be that he who holds a king captive should be careful not to let him go before the conditions were actually fulfilled.

3. It follows from all this, that, although no present necessity of state should require the military services of its citizens, those who render themselves or others unfit to perform them, deserve severe punishment. M. Seneca, *Controversies*, Bk. I, cont. vii [1]: 'My other limbs are my own; my hands belong to the state.' We read of great numbers of examples of such cowardice in that martial people, the Roman Quirites. Suetonius, *Tiberius*, chap. viii, says, 'Tiberius¹

¹ [For *Tiberio* read *A Tiberio*.—Tr.]

undertook the investigation of the slave-prisons, the owners of which had gained a bad reputation; for they were charged with holding in durance not only travellers, but also those whom dread of military service had driven to such places of concealment.' (R.) This is perhaps the reason why Hadrian is said to have done away with them entirely. See Spartianus, *Hadrianus*, chap. xviii, and the comments by Salmasius. In Valerius Maximus, Bk. VI, chap. iii, it is recorded that C. Vettienus cut off the fingers of his left hand to avoid serving in the Social War, for
 786 which act the senate confiscated his property and imprisoned him for life. Suetonius, *Augustus*, chap. xxiv, says that the emperor 'sold a Roman knight and his property at public auction, because he had cut off the thumbs of two young sons, to make them unfit for military service'. (R.) Ammianus Marcellinus, Bk. XV [xii], in describing the customs of the Gauls, reports: 'Nor has any one of this nation ever mutilated his thumb from fear of the toils of war, as men have done in Italy, who in their district are called Murci.' (Y.)

Many laws were passed against this outrageous practice. *Digest*, XLIX. xvi. 5, § 12 [XLIX. xvi. 4, § 12]: 'The man who, upon the announcement of a levy for war, disabled his son so as to be unfit for military service, was to be exiled according to an order of Trajan.' There is a law of Constantine I in the *Theodosian Code*¹ [VII. xxii. 1]:

Those sons of veterans who are fit for military service, some of whom as slackers refuse to perform military duties, and others are so contemptible as to try to avoid the necessity of service by maiming their bodies, we order, in case they be judged unfit for warfare because their fingers have been cut off, to be brought together for labour and menial employment about the court.

Much the same appears in the *Theodosian Code*, VII. xiii. 4 and 10².

He who avoids the use of arms by foully cutting off his fingers shall not escape that which he shuns, but shall be marked with infamy, and shall be forced to bear the drudgery of military service, since he refused the honour of it. Moreover, those provincial subjects who because of such wanton deeds are frequently short in their levies, shall be given the choice of furnishing two mutilated young men for one sound one, at the time of holding the draft.

But by far the most severe is in *Ibid.*, VII. xiii. 5³:

If any one be found to have done physical injury to himself by cutting off his fingers in order to escape taking the oath of military service, let him be burned to death by the avenging flames, and let his master, who does not prevent it, be severely punished.

Yet it seems likely that the last penalty applied only to slaves, although those previously cited held good for free citizens. For in the early days of their state, as is well known, the Romans forbade military service to their slaves, except when the state was in dire straits. That

¹ [For *libro primo Cod. Theodosius* read *I. Cod. Theodosii*.—Tr.]

² [For *libro quarto & decimo C. Theodosius* read *lege quarta et decima C. Theodosii*.—Tr.]

³ [For *libro quinto* read *lex quinta*.—Tr.]

this was no longer observed in later years is proved by the *Theodosian Code*, VII. xiii. 16¹, where the emperors Arcadius and Honorius issue this law:

Against the attacks of the enemy we command that not only persons but capacities be taken into account, and although we believe that free men are inspired by love of country, yet by the authority of this decree we exhort slaves to offer themselves with all speed to the toils of war, for they will receive freedom as their reward if they take up arms and are found suitable for service, as well as two solidi for drink-money.

For a law in the *Theodosian Code*, VII. xiii. 11², which is also to be found in the *Justinian Code*, XII. xliii. 2³, speaks 'of a slave belonging to another man, and that he who brought him in and offered him for military service, was compelled to pay into the imperial treasury a libra of gold'.⁴ And a law under the same title, the *Theodosian Code*, VII. xiii. 8, does not forbid the levying of slaves for military service, but only decrees: 'In the finest companies of picked troops no slave is to be enrolled.' Vegetius, *De Re Militari*, Bk. I, chap. vii, complains that 'either by favour or connivance the new levies laid upon the owners are approved, and such men are enrolled in the armies as their owners do not care to keep'. Many scholars have held that the Italians and French derived their word 'poltrones' from the cutting-off of the thumbs (*pollices*), but in my opinion Aegidius Menagius, *Origines Linguae Francicae*, is more correct in deriving it from the Italian 'poltro', that is, one who always lies at home upon his couch (*pulvinar*).

4. Whoever, therefore, is obligated to undergo military service, must at the command of the general guard a post, even though he see that it will probably cost him his life. And although otherwise the burdens which all citizens are able to share in should be laid upon them proportionally, or, when this is impossible or unnecessary, should be borne in turn, or balanced off by an equivalent, or even assigned by lot, the nature of war does not permit such dangerous posts always to be distributed by lot. And so a general will have the power to choose for them the most fit, or, if there be many such, those whom it seems best; unless it happen that there be some under him who voluntarily demand for themselves such perils, as did Calpurnius Flamma (Florus, Bk. II, chap. ii), and before him P. Decius Mus (Livy, Bk. VII, chap. xxxiv). Nor will any brave man complain if such posts are assigned him by the authority of the general. Seneca, *On Providence*, chap. iv:

Why in the army are the most hazardous services assigned to the bravest soldiers? A general sends his choicest troops to attack the enemy in a midnight ambushade, to reconnoitre his line of march, or to drive the hostile garrisons from their strong places.

¹ [For *amplus* . . . *libro decimo sexto* read *amplius* . . . *lege decima sexta*.—Tr.]

² [For *libro undecimo* read *lex undecima*.—Tr.]

³ [For *libro secundo detiron* read *lege secunda de tiron*. A number of errors in citation and in syntax, on this page, are clearly due to an effort on the part of the printer to occupy additional space by expanding imperfectly understood abbreviations.—Tr.]

⁴ [The original form of this rescript is much changed in the quotation.—Tr.]

No one of these men says as he begins his march, 'The general has dealt hardly with me', but, 'He has judged well of me'. (S.)

Moreover, since our life, which would long since have been lost had we been exposed to a state of nature, is preserved for a long period by the aid of the state, it should surely not be held a heavy hardship to lay it down for the state, especially since we are indebted to it for many other benefits as well. And so it is not an injustice, if, at an extraordinary command of the state, and only under the stress of great necessity, we expose to peril that life which the state gives us, as it were, from day¹ to day and through all our existence; and especially in view of the fact that in a state of nature every man is forced to defend himself by his single strength, if he would not perish or be reduced to slavery. But as the case now stands, it is far better to be endangered with a company, not only because the hope of victory is made more certain, but also because, even though a man die in battle, his property and dependants will be kept safe by the resources of the state, for which solace there was no hope in a state of nature.

Yet it should be observed that it is not, or at least should not be, the intention of these commands directly to cause the loss of the life of a soldier. I say, 'should not be', for that sometimes generals may sin in this is proved by the case of king David in 2 *Samuel*, xi. 15, who for that very reason is called a murderer in xii. 9. Nor is it an unusual device to throw hated troops upon the enemy to be destroyed. See Curtius, Bk. VII, chap. ii; Polybius, Bk. I, chap. ix; Diodorus Siculus, Bk. XIV, chap. lxxiii; XIX. xlviii; Justin, Bk. XII, chap. v, n. 8; Zonaras, Bk. II, about Maurice. In Sallust, *Jugurtha* [vii. 2], it is said that Jugurtha was sent by Micipsa to Numantia in order that he might fall by his own valour or by the onslaught of the enemy. But the purpose of the rigid commands of generals when soldiers are to battle without quarter, as it were, should be to ward off a great evil from the state, or to win for it some signal advantage, even though it may happen that they must die in securing these ends. The law of such decisive conflict is that we either destroy the enemy or die with him, for the latter is better than for us to fall alone. Therefore, it does not appear absurd for many to clear of the charge of *αὐτοχειρία* [suicide] those naval officers who, at the express order of their superiors, or from a correct understanding of the art of war, blow up their vessel rather than fall with it into the hands of the enemy, and 'Not to throw away their death was their greatest care'. (R.) Lucan, Bk. III [706-7]. For let us suppose an equal number of vessels on both sides. When one of ours is captured, the enemy will be two stronger than we, if ours perish alone, only one stronger, while if both sink together the strength remains equal. And it will scarcely ever fail, that if one of ours is blown up, it carries down

¹ [For *indies* read *in dies*.—Tr.]

with it one or more of the enemy. For the greatest danger of being captured is when ship lies alongside ship. And usually more damage is inflicted by such a course upon the enemy than upon ourselves, for they must be the stronger in order to force us to such extremities. But I do not feel that sinking should be avoided by blowing up a ship, for in that case there can still be some hope of getting away by swimming. Among the Chinese a law of long standing requires a general who fights unsuccessfully, even through no fault of his, to be put to death, on the ground, probably, that when he goes into battle he should think of no other outcome than victory or death, [which, of course, is manifestly unjust. And yet whoever has joined the colours will never desert his post from fear, but will fight to the very last breath; unless he knows that his commander wishes him to save his life rather than hold the position, or unless the position be not worth so much to the state as the lives of those citizens who are defending it].¹

5. But what if the life of a citizen is demanded without a battle, perhaps to placate the wrath of a powerful prince, and in this way some evil or even destruction is averted from the state? On this point we must inquire after the reasons which moved the other to demand that a citizen of ours be turned over to him. For if it be for some misdeed of his, he should yet take particular care, even though he might himself be able by every means to avoid hurt, lest he involve the state in misfortune on his account. And so, although we should suppose that such a man is not bound voluntarily to deliver himself into the power of the enemy, he will still be obligated² to betake himself to some other place, where he may cause no trouble for those who harbour him. Nor do I question the power of a state to banish him against his will, unless it should feel it to be a kinder course to hand him over to the one who demands him. It is said that such a calamity befell Athens because of the murder of Androgeus, for whose death Minos took revenge, and after subduing Athens in war demanded of it as tribute seven youths and as many maidens to feed to the Minotaur. See Maro [Vergil], *Aeneid*, Bk. VI [20]; Hyginus, *Fables*, xli; Ovid, *Metamorphoses*, Bk. VIII, line 170; Plutarch, *Theseus* [xv]. In such a case I do not see on what plea a citizen can refuse the chance of the lot (which is the fairest way to decide between equals), unless there be found another Theseus who will volunteer to slay the Minotaur.

But what must we say if death or some evil akin to it be demanded of an innocent person, not because of any public or private crime? A case of this kind is found in Libanius, *Declamations*, Bk. I, decl. xxvii [42, introd.]:

¹ [Added by Barbeyrac, the first few words being his own, the remainder derived from *De Officio Hominis et Civis*, II. xiii. 2. The supplement was made in order to complete the expression of a thought which Pufendorf himself, in his later work, clearly felt to have been inadequately set forth.—Tr.]

² [For *tenebitur* read *tenebitur*.—Tr.]

A tyrant demanded of a neighbouring city a handsome youth, threatening it with war unless he was turned over. The state preferred to face war rather than hand over the youth. When the tyrant closely besieged the city, the youth's father slew his son and cast his body down from the walls. After the siege was raised he is accused of murder.

See Boecler on Grotius, Bk. I, chap. i, § 6, p. 95. In this case I do not pause either to accuse or to defend the father, who apparently can deliver a more plausible plea than the famous Verginius, in Livy, Bk. III, chap. 1. Yet we hold it to be beyond any question that a state is not obligated to defend such a man to its own destruction, for in that case both it will perish and the innocent person will have been protected in vain. Nor can he demand that the entire state perish on his account and together with him. And so the only recourse for the miserable fellow is to shift for himself, either by flight or some hazardous feat of daring. And when every attempt fails, let him bear his fate, in which he can still preserve his soul unspotted (see *Digest*, III. i. 1, § 6), since, indeed, it is unlawful to avoid such disgraceful treatment by suicide. As for the state, after it has defended the man with all its strength, and moved every stone to make it possible for him to escape by flight or by some other device, yet when all such attempts are in vain, and certain destruction can be avoided by no other course, it can then leave him to his fate, that is, not prevent the tyrant neighbour from seizing him. Quintilian, *Declamations*, ccliii: 'I should regard peace as cheap at the
789: price of the life of one citizen.' But that it should itself deliver him into the hand of the tyrant², or compel him to surrender himself, is, we feel, neither lawful nor necessary. See the illustration of Megacles of Messana in Marselaer, *Legatus*, Bk. I, chap. xxxiii. Worthy of note is also the case of Sperthias and Bulis³ who voluntarily surrendered themselves to Xerxes, in atonement for the foul deed of the Lacedaemonians in killing the Persian ambassadors. Herodotus, Bk. VII [cxxxiv]. Grotius, *On the Law of War and Peace*, Bk. II, chap. xxv, § 3. Yet in general the lives of its citizens should be of too great value to a state for it to be willing to give them up so as to avoid some uncertain danger, or to secure some little needed advantage, nor is a citizen required to offer up his life for such ends. Therefore, the two brothers, the Philaeni, whose story is told in Sallust, *Jugurtha*, and Pomponius Mela, Bk. I, chap. vii, did for their country more than could have been demanded of them. And Caiaphas, in *John*, xi. 50, was giving the worst possible application to an otherwise good rule, namely, that it was permissible to slay an innocent man, in order that the Romans might not suspect that the Jews were rising in revolt and therefore have an excuse to make war upon them. And especially is this true, since there are far more lenient measures for dispelling such a suspicion than by the death

¹ [For 78 read 789.—Tr.]

² [For *tyranni* read *tyranni*.—Tr.]

³ [For *Sperthiis* read *Sperthiae*, and for *Bulis* read *Bulidis*.—Tr.]

of an innocent man. Nor do I see how the deed of Darius can be excused, who by agreement offered several thousand troops for Zopyrus to slaughter, in order for him to gain standing among the Babylonians. Herodotus, Bk. III [clvii].

6. It is often necessary also, in order to strengthen state pacts, for hostages to be given out of the number of citizens, and any citizen can be required by the sovereign authority to undertake this burden, if none come forward of their own accord. And when any powerful enemy has demanded certain citizens, these can scarcely find any ground for refusal. But if several be designated, and it makes no difference to the one with whom we make the pact, or to our state, which one of them is the hostage, the safest way to avoid complaints is to have recourse to lot. And yet if the hostages are to be detained for a long period, the fairest thing will be to relieve them now and then by sending new ones in their place, just as a state is obligated to take care that for whatever extraordinary burden hostages undergo for the rest of the citizens, they shall be compensated, so far as possible, in some other way.

It may be asked, in this connexion, whether the lives of hostages are actually pledged, or only their liberty. My feeling is that in the delivery of hostages the actual bargain was this: 'We give these men here, as the most precious single part of our state, into your hands, on the condition that, if we do not observe what ¹ has been agreed upon, we will none of us raise a voice against your doing with them as you please.' According to Cominaeus, Bk. II, the citizens of Liège gave hostages to Charles of Burgundy, 'on the condition that if they violated their agreement in any way he was at liberty to inflict punishment on those who were in his hands'; yet Charles a little later sent them back unharmed. Therefore, since a breach of such pacts constitutes a cause of war against the guilty party, it is patent that after such a breach, and a declaration of war, hostages automatically pass into the status of enemies, in the very same manner as the other citizens of that state, even those who had in no way contributed to the cause of the war. And there is evidence enough that many have accorded hostages the same treatment as is shown any other enemies, although many others have held it inhuman for a person to alleviate the pain that comes to him from another's act of injury by visiting such miserable and innocent men with suffering. It is surely incorrect to say that hostages are given over with the intention that they shall be objects of punishment for a state's violation of a pact. For it does not appear on what basis the end which men should hold before them in inflicting ² punishments, can be attained by punishing an innocent hostage, who did not himself consent to the violation of the 790 pacts, but only did not refuse to offer himself to be punished for another's evil deed, in which act, considered in itself, there is no wrong. Enough

¹ [For *que* read *quae*.—Tr.]

² [For *summendis* read *sumendis*.—Tr.]

guarantee is to be found in the hostages themselves, even though a penalty, in the proper sense of the term, cannot be exacted from them for another's wrong. For it is enough that they are in such a position that they can at once feel the licence of war, and so their safety depends upon the pleasure of an injured and incensed foe.

However all this may be, the actual truth is that a state pledges only the corporal liberty and not the life of a hostage, since it has or should have the fixed intention to keep faith, and so it regards the case by which another could have the licence to proceed against the life of a hostage, as morally non-existent. Nor is there any doubt that a state does an injury to a hostage if it unjustly violates pacts¹, and subjects that miserable person to another's anger, or if it delivers him over with the purpose that it may be able to cause another, thereby lulled into security, all the greater hurt.

But what are we to say, if he who has taken hostages should abuse his right over them by playing us false and doing us grave injuries, while all the time he threatens us with the execution of our hostages if we resist him? Under such circumstances it seems likely that, if those injuries are so great that it is better for those innocent hostages to be endangered than for the state to endure such wrongs, their peril can be neglected, and resistance offered to the violence of the faithless enemy. Nor is it any more an injury for a state to treat its hostages in this way, than it is for it to assign any of its citizens in war a post, in the defence of which they must either perish or be captured. And they will bear this calamity as a turn of fortune, without a trace of anger at their fatherland, which could not foresee such an outcome. See Ammianus Marcellinus, Bk. XXVIII, chap. vi. Just as such an event will not lessen the value of the civil status, since such cases can happen only at rare intervals, while misfortunes of a similar character cannot help but break in very frequently upon a state of nature. The same conclusion must be reached in the famous case that befell the people of Utica, some of whose citizens were captured by Agathocles and fastened in front of an engine of war, so that their fellow citizens had to kill them first of all if they would beat back the enemy. See Diodorus Siculus, Bk. XX, chap. lv. On this point may in a way be applied what is found in Gunther, *Ligurinus*, Bk. X, on the hostages of Cremona whom Frederick fastened to engines of war. Compare Grotius, Bk. III, chap. xi, § 18; chap. xx, §§ 52 ff.; Boecler on Grotius, Bk. I, chap. i, p. 102.

¹ [For *pacto* read *pacta*.—Tr.]

CHAPTER III

ON THE POWER OF SUPREME SOVEREIGNTY OVER THE LIVES AND FORTUNES OF CITIZENS, WHICH ARISES BY REASON OF THEIR CRIMES

1. Whether the right of life and death can be conferred upon a state by individuals.
2. In natural liberty no place is afforded for human punishment.
3. This is possible only in states.
4. The definition of punishment.
5. The species of justice to which is to be referred the exaction of punishments.
6. It is not unjust for one man to punish another.
7. To whom the power to exact punishment belongs.
8. Human punishment should serve some end.
- 11¹ 9. The first end of punishment is to reform the guilty person.
10. Whether simply any man whatsoever can correct another.
11. The second end of punishment is to give protection to the injured party.
12. The third end is the security of all others.
13. How far private individuals can inflict punishments.
14. What offences it is idle to punish in a civil court.
15. Whether pardon is lawful at any time.
16. How far it is lawful prior to a penal law;
17. And subsequent to it.
18. The seriousness of an offence is measured first by the object;
19. Then by the passion with which a man was moved;
20. Then by the scope of the purpose which he had in mind;
21. Then by the firmness of his purpose;
22. And finally by his habit or record.
23. What is regarded in determining the amount of punishment.
24. What may be the measure of punishments.
25. Respect is had in punishments also to the person of him who is to suffer.
26. Whether the Hebrew law is in every case an adequate measure of punishments².
27. On retaliation.
28. How a body may be punished.
29. The crimes of a body are finally extinguished with the passage of time.
30. Not every misfortune is human punishment.
31. A loss directly inflicted is one thing, and that which comes by consequence is another.
32. The occasion of an evil is one thing, its cause another.
33. No one should be punished for another's misdeed.

THERE belongs also to the supreme civil power a right over the body and life as well as over the property of citizens, and this by reason of their crimes, which is usually called more accurately the right of life and death; although we may add that this is very different from the right of God over His creatures (*Psalms*, xc. 4), and of men over animals. On this power the first question that arises is: In what way can such a power be conferred upon a state by individuals through the medium of pacts? For since a punishment is something inflicted upon a man against his will, and yet what any man does to himself cannot happen against his will, it cannot avoid being a matter of some difficulty

¹ [In the running folio for *Caput I.* read *Caput III.*—*Tr.*]

² [For *poeanrum* read *poenarum.*—*Tr.*]

to explain how any man may have the power to punish himself, and how he can transfer that to another. For the afflictions to which ascetics or others subject their own bodies in lacerating their flesh, or in observing the rigorous discipline of certain religious bodies, are either no punishments at all, properly speaking, but only some kind of medicine, sedatives to restrain the bursting forth of vices, or else they are not undergone voluntarily, but only at the command of priests, who base their authority upon their divine office. In their case there is no alteration in the nature of punishment, because, for example, it is inflicted by their own hands, since they are moved by the consideration of a greater evil which would have awaited them had they refused to obey, just as we see criminals walking to the place of execution, who would be dragged, did they not follow of their own accord. In fact¹ among some peoples criminals at the command of a judge take their lives with their own hands. Diodorus Siculus, Bk. III, chap. v, tells of the Ethiopians: 'One of the lictors is sent to the criminal, bearing before him the badge or sign of death; upon sight of which the party goes home and kills himself.' (B.*)

Therefore, we must recognize, on this point, that, just as in the case of natural substances there may result, from the mixing and balancing off of several simple substances, a compound, in which are to be found qualities not observable in any of the ingredients of the mixture, so moral bodies as well, composed of several men, can possess some right, consequent upon their union, which was not formally inherent in any of the individual members, which right, also, arising from such a banding together, is exercised by the governors of those bodies. See *Digest*, XLI. i. 46. Thus no one would say that individual
 792 men have the faculty of passing laws for themselves, and yet when all subject their will to the will of one, there arises the power to prescribe laws for all. In the same manner there can exist in the head of a moral body the faculty of restraining each member by punishments, which faculty, however, was not before that time in the individuals. And it is very easy for this to arise, since they individually obligate themselves not only not to undertake to defend, but, if need be, to be willing to lend their aid against him whom the governor of the state is going to punish. From this fact also appears the reason why it does not follow, as some would have it, that what a superior takes from subjects by way of penalty, is taken away with their consent, for the reason that they had formerly agreed to confirm beforehand all acts of their superior. For since that case in which the power of a superior² will exerts itself over the life of a subject, is in the control of the subject himself, and he may, if he please, prevent it forever, that case is considered by individuals as one which will never arise. Compare Hobbes, *De Cive*, chap. ii, § 18.

¹ [For *Quinimo* read *Quin imo*.—Tr.]

² [For *superioris* read *superioris*.—Tr.]

Although the same writer, in his *Leviathan*¹, chap. xxviii, lays down that the right held by a state to punish does not arise from the concession of citizens, but that the foundation of this right is based upon that other, which, before the establishment of a state, belonged to every man, namely, to do whatever seemed to him necessary for self-preservation. And that therefore this right was not given but left to the state, which, however, it may use at its own pleasure, supposing it has the strength, in order to preserve all its citizens. To this the reply can be made that the right to exact punishment differs from that of self-preservation, and that since the former is exercised over subjects, it is impossible to conceive how it already existed in a state of nature, where no one man is subject to another.

We should also mention the fact that we are treating at this point only of those punishments which are ordained at the arbitrary, as it were, disposal of human legislators for crimes, and are distinguished from such evils as are by natural consequence attendant upon sins.

2. Now in developing the point of this right of requiring punishment of subjects, we would make it clear, first of all, that we are discussing only that right which man exercises over man, and wish our conclusions in no way extended to the process and methods of the divine tribunal, which in many parts of its jurisdiction is by nature different from those of men. And this seems to have been partly recognized by Plutarch, *De Sera Numinis Vindicta* [iv, p. 549 F], when he says:

It cannot be said that it is safe or easy for a mortal to speak otherwise of the Supreme Deity than only this, that He alone it is who knows the most convenient time to apply most proper correctives for the cure of sin and impiety, and to administer punishments as medicaments to every transgressor, yet being not confined to an equal quality and measure common to all distempers, nor to one and the same time. (G.)

To begin at the very first, we must recognize that there are to be found in most sins, especially in such as terminate in another, two features or factors: The defect itself, or the amount of the deviation of the sins from the law; and the loss which they directly or indirectly bring upon another. Now it is certain that I am obligated by the law of nature to indemnify another for damage done him in any way through my fault, and in case that has proceeded from ill-will, to give him a guarantee that it will not happen in the future. But in requiring² this guarantee there is a difference between the cases of such as live in natural liberty, and such as are subject to states. Apparently the law of nature does not obligate the former, after a man has been affected with repentance and moved of his own accord and not by force to offer to make good a damage, to give one another any guarantee other than

¹ [For *Levith*: read *Leviath*.—Tr.]

² [For *exhigendam* read *exigendam*.—Tr.]

their word by simple declaration, or upon oath, to refrain from such offences for the future. And this because a voluntary repentance serves as sufficient evidence of a change of heart and a firm resolve to refrain henceforth from injuries. And so if he who has been injured refuses to be satisfied with such an adjustment, and because of unfounded mistrust or hardness of heart wants to extort by force a larger guarantee, he will be guilty of violating the peace, and the other will be able rightly to resist him, since by the law of nature he is not obligated to furnish such a larger guarantee. In such a case the strife that follows will be a just one for him who did the injury, and unjust for him who received it. But when a man has to be forced to render satisfaction, a fact¹ which shows his utter and perverse obstinacy, and the injured party can obtain no satisfaction unless he overpower the one who wronged him, it will be allowable for the victor in the struggle to secure whatever guarantee for his security he may think most fair. And in such cases we cannot only proceed to seize the other's arms, raze or occupy his fortified places, keep him in perpetual bonds, and the like, but even put him to death, if we are satisfied that his freedom will only mean another threat against our existence, and that we can find no better way to avoid him. Yet as the exaction of a guarantee of this sort is secured by means of war, and not by means of punishment, as it is properly understood (for some apply the term punishment in a looser sense to all evils which attend sins in natural consequence, and so also to such as are inflicted in a state of natural liberty in return for undeserved injuries), so one cannot rightly be said to be obligated to furnish² such a guarantee. Because it supposes and connotes, in him from whom it is wrung, some fault of mind and sin against the law of nature, inasmuch as it is the denial of voluntary satisfaction and a defence by force³ of one's sin. Moreover, since evils which are inflicted by means of war are not, as will be clear from what follows, punishments in the proper sense of the term, it is also obvious that human punishment, in the proper sense of the word, and as it follows upon human sovereignty, cannot fall upon those who live in natural liberty. Equally clear is it, however, that such are liable to those evils which follow by natural sequence upon sins.

3. But if a man receive any loss within the bounds of states, it is not only recovered more easily than is possible in natural liberty through a war carried on by his own strength, but citizens are also guarded in advance against suffering injuries and damages, so far as the condition of human affairs allows, since there awaits violators of the laws a punishment which is to be exacted in the courts of the state. For the human will, ever naturally capable of being turned to good or evil, can be directed and controlled in no way more easily than by the threat of a present evil.

¹ [For *idipsum* read *id ipsum*.—Tr.]

² [For *violentiam* read *per violentiam*.—Tr.]

³ [For *teneri* read *teneri*.—Tr.]

4. A punishment can in general be defined as an evil of suffering that is inflicted in proportion to an evil of action, or as some troublesome evil which is imposed upon a man by way of coercion, and by the authority of the state, in view of some antecedent crime. We say 'an evil of suffering', for although forms of labour are often required in lieu of punishment, such as condemning a man to the mines, the galleys, the workhouse, to labour on a fortification or on a road, &c., yet such employments are considered only in so far as they are laborious or troublesome to the one so employed, and are therefore to be referred to sufferings. It follows, moreover, that because we said a punishment was inflicted 'in view of some antecedent crime', that those inconveniences which a man suffers by reason of some contagious disease or a deformity, or some other impurity, such as we find frequently mentioned in the Hebrew law, where lepers are shut off from contact with the rest of the people, or men with deformities¹ are excluded from the priesthood, &c., are not punishments in the proper sense of the word. These are no more punishments than for a foreigner or a man of low birth to be deprived of serving in a certain capacity in a state, or for a person to suffer pain while a broken bone is being set. Although such things are sometimes *ἀκρίτως* [improperly] called punishments, because of their similarity to them, just as it is commonly said of permanent invalids or misshapen persons that their very existence is a punishment to them. It also follows from this, that imprisonment, the purpose of which is to prevent a guilty person from making his escape, is not properly punishment, since no one is justly punished before he is condemned. Therefore, it is contrary to natural law for a condemned person, before he is heard and condemned, to suffer more ill from his custody than it requires, and so anything of that nature must either be made up to him, or else subtracted from the subsequent punishment. See *Digest*, XLVIII. xix,² §§ 8, 9; *Code*, IX. xlvii. 25³. Furthermore, by having said that a punishment is imposed 'by the authority of a state', we separate it from those evils to which men are exposed involuntarily in war, or a fight, and from the stubbornness or open injury of another. Therefore, for example, a man is not disgraced by the cutting off of his ear or a blow of a club, but only by the cause for such treatment. Now Selden, *De Jure Naturali et Gentium*, Bk. IV, chap. xi, holds that 'slaughter in war can be included under the head of punishment'. But that is not to be admitted, save in the sense that war justly waged upon a person because of some antecedent injury, and the evils therefrom which befall the author of the injury, may be looked upon as a natural punishment, and that the evils of war should, so far as possible, be tempered by a pious warrior to the process which is usually observed

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¹ [For *multi* read *nutilati*.—Tr.]

² [For *libr. Paragraph. octav. non* read *lex octav. paragraph. non*.—Tr.]

³ [For *libro vigesimo quinto* read *lege vigesima quinta*.—Tr.]

by the punishment of a human court. Although Tacitus, *Annals*, Bk. I [xlvi], would suggest also another distinction between punishments and the evils of war: 'In time of peace cases are judged upon their merits; when it comes to fighting, innocent and guilty fall alike.' (R.)

So also evils which follow upon a sin by natural consequence are not held by a human court to savour of punishment; as when a man loses his health by some illegal act, or attacks another and is repelled with blows. For these evils are not inflicted by a civil sovereign by virtue of his authority. Therefore, if a man has by his sins seriously impaired his health or fortunes, or made himself hated of other men from whom he might otherwise have expected considerable wealth, he is none the less liable for punishment.

And we add, in conclusion, that punishment is inflicted by way of coercion, or, in other words, on the *unwilling*, for if this is not true, punishment will never attain its end for men, which is to deter them by its harshness from sins. Quintilian, *Declamations*, xi [8]:

Let not any malefactor choose his own punishment. My lords, you will open a door to a boundless presumption in wicked men, if a condemned person may pick and choose what punishment he pleases himself. [. . .] It eases all pain and torment whatever, when the mind is prepared beforehand for its suffering. He is mistaken that thinks human tortures are measured only by the cruel appellation they go by. No, there can be no such thing as punishment, but to him that is loath to come to it. No man is pained but when he is made to abide that which he can't abide; for 'tis terror that makes anything cruel and piteous. Does any man call that a punishment which he leaps freely at? which he earnestly desires? No, I beseech you, drag your condemned persons thither, where they are loath to follow you. (W.*)

- 795 Although the choice of a punishment does not always make it appear voluntary, since it only avoids or mitigates a certain degree or manner of punishment, while the punishment itself which is chosen comes to the recipient against his will. Seneca, *Controversies*, Bk. IV, cont. xxiv [IX. i. 10]: 'It was no punishment for me to be in prison; I went there of my own accord.' Arrian, *Epictetus*, Bk. I, chap. xii [23]: 'A man's prison is the place that he is in against his will.' (M.) Add Charron, *De la Sagesse*, Bk. I, chap. xxxix, n. 9. And so we must conclude, as well, that it is not proper to say that any man is obligated to bear punishment, or that it is owed by a man, because punishment signifies something which should be imposed on a person against his will, and involves an aversion of his will to it, while the things to which we are properly held are understood to be such as we should be moved to perform of our own accord and at our good pleasure. This makes clear the reason, why, for instance, when a peasant is working at the construction of a fortification without pay, at the command of his master, and a criminal is engaged in the same task because he has been condemned to it, the work is for the latter a punishment, but not for the former, since the task is understood to lie upon the former because

of his obligation, and so is done by him willingly, while it is imposed on the other as something abhorrent to his will. Add *Digest*, III. ii. 22. And so, for example, when criminals in Japan, who have been condemned to death, disembowelled themselves with their own hands, that is no more to be considered a voluntary action than it is such when with us the condemned walk to the place of execution, or when, as we are told, in Spain the officer does not even bind a prisoner, but only says, 'Follow me'. Just as they say that it used to be the custom in Lithuania for criminals to erect their cross and to hang themselves with their own hands. For all these cannot be regarded as the acts of the criminals themselves, since they are actually the means of avoiding greater troubles which would befall them if they refused to do so for no purpose. It is an unusual thing, recounted in Livy, Bk. XXIV, chap. xvi, that Gracchus forced some cowardly soldiers to take this oath: 'None of them [. . .] will, so long as they serve, take either meat or drink in any other posture than standing' (S.); for it was still against their will that they took the oath, in order that they should hold it better to suffer disgrace of their own accord than to convict themselves of perjury. So also a man does not suffer punishment in the proper sense of the term when he goes surety for a person of his own accord, and later is forced to pay it; for the other's sin is only the occasion for his experiencing a loss, while the immediate cause is his obligation which he undertook of his own accord.

It follows, further, from what has been said that just as when a man has already made good the damage which he has inflicted, he is by no means required to accuse himself, so as to have passed upon him the punishment set by the laws; hence he can, for the same reason, by denial, hiding, or flight avoid it without violating any obligation. Quintilian, *Declamations*, cccxiii: 'The nature of all confession is such that it makes it possible to regard any man who confesses as out of his head.' *Idem*, *Declamations*, cccxxviii: 'And there is no man so low down, so useless even to himself, that he does not commit his crimes with the view of denying them.' For the following statement of Boecler in his preface to Grotius, p. 9, is rather involved: 'The merit of human punishments belongs to natural law, both as it is law and as it is natural. If it is a law it produces an obligation, and there would be no obligation, or none could be conceived, without conceiving likewise of some penalty as being imminent upon a violation of the law.' It is, of course, certain that a punishment awaits the violators of natural law, because it is the companion of every law, and it is in no way opposed to nature that he who did an evil should suffer one. But it would surely be an unskilful piece of reasoning to say that a law produces an obligation, and that therefore whoever violates a law is obligated voluntarily to deliver himself up for punishment in a court of men. Hobbes, *De Cive*, chap. xiv, § 7, well says: 'The second part of law, which is called penal, is

mandatory and addresses itself only to public ministers.' No such command as this is to be found in the law: 'Do thou, a thief, because of thy theft voluntarily proceed to the place of punishment'; but only this: 'Do thou, a magistrate, see to it that the thief be convicted and hung¹.' Therefore, it is no sin in the thief, if he be not hung, but the magistrate was lax in the performance of what was to the advantage of the state. The arguments of Socrates in Plato, *Crito* [p. 50 f.], when Crito was urging him to escape from prison: 'This course would break the laws of his state, which every upright citizen is obligated to observe. He must abide by the decisions handed down by the state, must not return upon his country injury for injury, nor endeavour to point out that it is acting unjustly, &c.'² are noble words, such as some great and innocent soul should perhaps follow under certain circumstances, but they in no wise affect our assertion. From this the further conclusion may be drawn, that just as no one is obligated to accuse himself before a human tribunal, or voluntarily to confess his crime, so it is unjust in criminal cases to require an oath of innocence of the defendant. Although we are informed by Demosthenes, *Against Aristocrates* [68], that this was customarily required before the court of the Areopagus, and surely it was an awesome thing for a man to stand before the sacrifice of a boar, a ram, and a bull, and to call down destruction upon himself, his clan, and family. And so Hobbes, *De Cive*, chap. ii, § 19, concludes that: 'Answers (forced by torture) are no testimony of the fact, but helps for the searching out of truth; so that whether the party tortured answers truly or falsely, or whether he answer not at all, whatsoever he doth, he doth it by right.' Compare *Digest*, XLVIII. xviii. 1, § 23; XLVIII. xviii. 18, § 2; Charron, *De la Sagesse*, Bk. I, chap. xxxvii, n. 8; Montaigne, *Essais*, Bk. II, chap. v. In this connexion we should note what is recorded by Ctesias, *Indica* [*Photius, Bibliotheca*, p. 47a Bekker], that among the Hindus there is a fountain the water of which thickens into the consistency of cheese so soon as it is drunk, and that if any man drinks a half a drachm³ of this with other water he at once tells whatever he has done, for on that day he loses his mind. And the king uses this method upon men when he would know for certain whether they are implicated in some crimes, for if a man confesses that of which he is accused, he is forced to be his own executioner, while he is let go if his own testimony does not convict him of crime.

But it should be carefully observed that in most laws the part which contains the body of the law and that which contains the threat of punishment are expressed by two separate declarations, as in this way: 'Thou shalt not do so and so,' and 'Whoever does so shall be punished'; where the second element is a kind of condition of the

¹ [For *suspenbi* read *suspendi*.—Tr.]

³ [For *obulos* read *obolos*.—Tr.]

² [A mere summary of the passage.—Tr.]

preceding interdiction, as though it ran: 'Thou shalt not do so and so, unless thou art ready to pay for it by a fine.' And in this type of law what can be regarded as a penal sanction is in fact but a kind of tax, inasmuch as it is left to the will of subjects, whether they are ready to pay the sum of money fixed in the law, or to refrain from an act. And this is especially the case in sumptuary laws, the end of which is often a choice between leading the citizens to a life of frugality and replenishing the treasury; for as to the law of nature it would be unlawful to sell for money the right to violate its precepts. But all other laws regularly have the sole purpose of employing punishment to frighten citizens out of committing crimes¹. Therefore, that hasty youth had no idea of the nature of punishment, who, upon learning from the judge what was the fine for a slap in the face, paid down the sum and then gave the judge himself one. For the laws about injuries are not passed with the object that, for a sum of money, an indulgence may be purchased to injure another. From this it also appears that it is only in those laws where the prohibition is alternative or conditional, that a man is free from guilt who has paid or is ready to pay the fine which he is obligated to pay, 797 and not in others which contain an absolute prohibition. And we would add our opinion that there should be no purely penal laws, such, that is, as have no other end than to make profit from a fine. Although there are some who call any law purely penal, which only affixes a punishment to a simple command and does not expressly command or forbid anything. As an example of this they offer the following: 'Any citizen who refuses the mayoralty when elected, shall pay one hundred gold pieces into the public treasury.' But it is our opinion that this and similar precepts imply the following kind of command: 'Let no one when legally elected refuse the state his services'; and so the first form of statement stands as the added penal clause to the one which I understand. Compare Robert Sanderson, *On the Obligation of Conscience*, Prelection² VII, §§ 13 ff.

5. Furthermore, since a judge who inflicts a penalty in proportion to the offence of the culprit, is supposed to be just, and since it is said that justice is administered whenever penalties are rightly meted out, philosophers have therefore discussed to what species of justice the imposition of penalties belonged, whether to commutative or distributive, or if you prefer the terms adopted by Grotius, whether to expletive or attributive. Those who have referred the exaction of penalties to distributive justice, use the argument that the same principle applies in the assignment of penalties as in that of goods, namely, more to him who deserves more and less to him who deserves less. And since in their opinion distributive justice is concerned with those things which are given to the parts by the whole, that is to the

¹ [For *dē peccatis* read *à peccatis*.—Tr.]

² [For *paerlect.* read *praelect.*—Tr.]

individual citizens by the state, penalties fall to individuals from the state. The reply to this is that what they suppose is false. Distributive justice takes place whenever an equality is established between more than two terms, that is, so often as something must be divided proportionally between more than one. For in the contract of a partnership the dividends are divided *pro rata* when there is more than one stockholder, and yet in this contract the dividends are owed in a very different way from that in which rewards or penalties are owed. For it is surely obvious that penalties are not owed because of a pact, nor does any man in subjecting himself to a state agree that punishment shall be laid upon him for his crimes. And so the imposition of penalties in no way squares with distributive justice as we described it above. In the next place, the fact that the more guilty are punished more severely, and the less guilty less severely, comes about only by consequence and by accident, not because that was intended primarily and for its own sake. For in imposing a penalty for a crime, that crime need not necessarily be compared with¹ another, nor the punishments meted out in both cases be proportioned in accordance with the respective gravity of the offences, but to each crime, separately, as it were, from all others, there is accorded a punishment, more or less severe, as it appears more to the advantage of the state, although it usually happens that the punishment in question is proportioned to the seriousness of the crime.

Some of those who refer penalties to commutative justice, take the view of the matter that a penalty is meted out to a criminal in the manner usual in contracts. They have been led to this error through the habit which we have of saying that a 'punishment is owed him who offends', which, however, is an *ἀκυρος* [improper] way of speaking. For he to whom something is owed in the strict sense has a right over the debtor whereby he can require of the other his due. But who would say that a criminal has the right to demand that the magistrate inflict a punishment upon him? Therefore, the real meaning of the expression² is that the magistrate can properly require of a guilty person the penalty defined in the laws. Grotius, Bk. II, chap. xx, § 2, writes that expletive justice, primarily and for its own sake, is observed in the infliction of punishments, and this for the reason, that, 'in order for him who punishes to punish lawfully, he should have a right to punish, which
798 right arises from another's crime.' Yet here the ambiguity of the term 'right' has led him astray, for to have a right to do something, and to have a right to receive something from another, are two very different things. The former means that the power belongs to me to perform some act, in the exercise of which no one should hinder me; the latter means that I have such a right to have something from another that he is also under an obligation to give it to me. And yet when we speak of

¹ [For *eum* read *cum*.—Tr.]

² [For *istius locutionis* read *istius locutionis*.—Tr.]

expletive justice, the word right is taken not in the former but in the latter sense, and this right lies in him who receives a thing, not in him who gives it. For instance, when I pay a workman his wage I am said to be fulfilling expletive justice, not, however, because I possess the faculty to give him something, but because he has the right to demand of me his wages. Thus I may properly say that I have the right to command my servant to pull off my shoes, but who would conclude from such a command that when I order a servant to do that for me, I am exercising justice? Another conclusion, on a par with this, is, that since a penalty can be inflicted properly only by him who has the right to inflict it, expletive justice is therefore exercised by means of a penalty.

A second argument of Grotius [II. xx, § 2, n. 3] is

<because in crimes and punishments> there is something that approaches the nature of contracts. For just as he who sells, even if he says nothing specifically, is considered to have obligated himself to all¹ the things which are naturally involved in a sale, so he who does wrong seems by his own will to have obligated himself to a penalty, because <as reason would suggest to any one>² a serious crime cannot be unpunishable; hence, whoever directly <and of deliberate purpose>² wills to sin, by consequence has willed also to deserve a penalty. (K.)

Therefore, in Sacred Scripture as well it is a common thing to call sin by the name of a debt, which we are as much obligated to atone for as any man is obligated to pay his creditor a loan. Add *Digest*, XLIX. xiv. 34; *Code*, IX. viii. 6. In Tacitus, *Annals*, Bk. XII [liii], a woman who has married another man's slave without the knowledge of his master, 'is said to have consented to her slavery'.

To this we answer as follows: It is manifest that, if a man knows a penalty to have been fixed for a crime, and yet proceeds of his own accord to commit it, he cannot complain that an injury is done him or that he is being treated inhumanely, when he is brought to punishment, which sense is set forth in a figurative way by most of the passages which Grotius cites. Yet it is not proper to say on this account that any man has directly and immediately given his consent to his own punishment, or, better, has by his own agreement obligated himself to undergo that punishment. For no man ever commits a crime without having the hope that by concealment or in some other way he will avoid the penalty. Thucydides, Bk. III [xlv]:

Now the death-penalty has been prescribed in various states for many offences [. . .] but nevertheless men are so inspired by hope as to take the risk; indeed, no one ever yet has entered upon a perilous enterprise with the conviction that his plot was condemned to failure. What state ever meditated revolt in the belief that the resources [. . .] at hand were inadequate for success? (S.)

Vasquez, *Illustrium Controversiarum*, Bk. I, chap. xxviii, n. 12, 13, contends to no purpose that criminals are obligated to suffer punish-

¹ [For *adeo* read *ad ea*.—Tr.]

² [Added by Pufendorf.—Tr.]

ment by their own consent, for the reason that penal laws also are included in the agreement of citizens, or at least because the legislative power arises from such an agreement. For we have shown in another place that laws are not pacts or agreements, nor is it absurd for some power to be constituted by my consent which can afterward exercise certain acts over me against my will. Although the fact that I have myself agreed to that power would make it impossible for me to complain, if it afterwards exerts its power over me. But a sin is compared to a debt, not because a man is obligated to bear a penalty by his own consent, but because a legislator has secured no less power to exact a penalty from a criminal, than a creditor can exact the money once lent
 799 from a debtor, and because the body and property of a sinner is no less in the power of a magistrate for crimes than is the property of a debtor in that of a creditor for his debts.

On the division of obligations, laid down in the elements of the Roman law, into those which arise from *consent*, and those that arise from *crime*, it should be observed that there arises from a crime an obligation, in the proper sense of the term, only to repair the damage, not to bear a penalty. And this obligation is properly¹ based not on the fact that a man has agreed to a penalty, but because natural law, after the introduction of dominion in things, produced the necessity of making that restitution. Thus when Aristotle makes some 'contracts voluntary' and others 'involuntary', his words are to be explained in this way: That just as in onerous contracts² equal must be recompensed by equal, so also in the case of a crime a damage must be paid for by its equivalent. But the reason why the obligation to repair a damage is classed by him under an involuntary contract, is because, for example, in the case of a loan it rests with the will of the creditor as to whether the debtor shall receive the money, while, for example, the fact that a thief is obligated to restore to me either the article which he took from me or its value, is due to the deed having been done without my consent, and his having laid upon himself that obligation without my consent. For I would surely have preferred that he leave me my property intact than involve me in the task of threatening him with an action for theft, especially when the most I will gain is merely the principal without any interest. A further point which has bearing in this connexion, is to keep in mind that every right has a corresponding obligation in another. Therefore, upon the commission of a crime there lies in the injured person a right to demand reparation for the loss, and upon the injurer an obligation to repair it, and this is the concern of expletive justice. But in so far as a crime is a deviation from the law, there resides in the governors of states a power to require a fitting penalty, but no obligation in the offender to pay the penalty of his own

¹ [For *propri* read *proprie*.—Tr.]

² [For *nontractibus* read *contractibus*.—Tr.]

accord; and on this score the exaction of penalties does not agree with expiative justice.

In view of what has been said, nothing remains for us but to conclude that punishments belong to neither species of justice, but fall under a branch of justice peculiar to itself. Although one might prefer to say that the imposition of penalties as well as the distribution of rewards, on which there has been no agreement in advance by a special pact, are parts of the prudence which is connected with the duty of ruling others, and so is to be referred to universal justice.

6. It is, therefore, admitted by all sane persons, that, although all men are equal by nature, and there is something harsh and hard in a penalty itself, while men voluntarily undertake to afflict or destroy their fellows, and that although the most wise Creator also has so disposed the nature of things and men, that evils necessarily accompany their doing and wreak their revenge, as it were, upon their author, positive punishment, however, at the hands of men has nothing in it repugnant to natural equity, nay, more, is of the highest necessity to mankind's safety and prosperity. For as the safety of mankind required that, by the establishment of sovereignty, the equality of men be done away with, so the force of sovereignty would perish in a mass of men's criminal tendencies and aversion to rectitude, could not wicked human beings be restored to reason and order by being brought face to face with some evil. Since, then, public notice is given beforehand of what should be done and avoided, as well as of the penalty which awaits those who do otherwise, whoever brings down the harshness of penalties upon himself by voluntarily sinning against the laws, has no one to blame but himself.

7. Now on the question, to whom belongs the power to inflict penalties, and from whom they are to be exacted, Grotius, Bk. II, chap. xx, § 3, has this to say:

But the subject of the right (to inflict punishments) [...] has not been definitely fixed by nature itself. [...] Excepting so far as this, that nature makes it clear enough that it is most suitable that punishment be inflicted by one who is superior; yet not to the degree that this is shown to be altogether necessary, unless the word superior is understood to imply that he who has done wrong by that very act may be considered to have made himself inferior to some one else. [...] Wherefore it follows that in any case a guilty person ought not to be punished by one equally guilty. (K.)

See *John*, viii. 7; *Romans*, ii. 22. But we are entirely convinced that the power to exact penalties is a part of sovereignty, and so no one can impose upon another a penalty, properly speaking, unless he have sovereignty over him. For although when we posit the evil tendency of men and their proneness to injure others, the exercise of penalties is seen to be necessary in order to preserve a social life between men, and although every person should suit his acts to that social life, as the good

of all mankind, it still does not follow that individuals should make all their acts accord with this social life, since they cannot be performed to advantage save upon the fulfilment of certain requisites. Thus men have need of sovereignty, but not merely anybody can and should exercise it over any and every one else.

In the next place, not every evil, inflicted because of an antecedent sin, is a punishment, but such as has been announced in advance, and was imposed after cognizance was taken of the crime. And so evils consequent upon war are excluded from the class of punishments, even though they do furnish some guarantee against suffering them in the future. For in war his guarantee or protection is secured by every man by his own strength and at his own judgement, while by punishments it is secured for the injured parties by the strength and at the judgement of their superior. That a person should be overcome and coerced in war is the interest only of him who was injured, but that a man should receive civil punishment is not the interest of such a person only but of the entire state. So also the question whether an injured person wishes to revenge his injuries by war, is left entirely to his own discretion, but whether a civil penalty is to be required, lies in the power of a superior, who can require it even over the head of the injured party.

Finally, the quantity of punishment is regularly fixed before the crime, while a guarantee in war is set according to our own status and that of the enemy. Furthermore, although nature no more determines whether Gaius or Sejus should be the ones to exact punishment, than it has designed them to be kings, yet reason herself points out clearly enough that punishment, as it is the execution of a judicial sentence, should come from a superior, that is, one who holds sovereignty over the guilty person. Nor is there any need for too nice a definition of the word 'superior'. For the statement is false, that every sin so lowers the dignity of a man, that he must immediately upon its performance be classed among the beasts. Nor is it a logical deduction that, because this man has committed a crime, I therefore have the power to require a penalty of him. For if a crime has been committed against me in a state of natural liberty, I can require reparation for the loss and guarantee for the future by recourse to war. But if the sin was against another, whose defence has not been laid upon me as a special charge, I can no more take upon myself to avenge him, unless bound to him by a treaty, than to pronounce laws to such as are not subject to me. See *Exodus*, ii. 14. The saying of Democritus, 'It is in accord with nature that the superior should bear rule', should be explained in the sense that, if sovereignty is to be conferred upon some one by the consent of a body, the most convenient and reasonable thing, when no one man enjoys a special right to hold it, is for it to be conferred upon the most excellent, and upon him who is gifted above the rest in the arts

required for good government. But such a man will never claim sovereignty over others, unless they have voluntarily subjected themselves to him. The saying of Grotius that 'a criminal should not be punished by one who is equally guilty' properly concerns not those who possess the public authority to require penalties, but such as rush forth on their private authority to censure or denounce vices, when not their necessary duty and only to show their aversion to all unrighteousness. Although it is surely unbecoming, and most effective in diminishing the respect for magistrates, if he who administers justice is found to be guilty of the same vices as he would punish in others, for he who 801 punishes in others the sin which he himself commits, seems not so much to be angered at vices as to envy others their delights. See Pliny, *Letters*, Bk. VIII, ep. xxii. Plato, *Minos* [p. 320 B]: 'He is an evil man, who has laid down laws to a certain effect, and then habitually acted contrary to his own laws.' Add Gratian, *Decretum*, II. iii. 7. 3, 4. Yet it would not have been unlawful for Nero, after murdering his mother, to have put to death such as were guilty of the same crime; 'although Domitian could not have convicted of adultery the women whom he himself had debauched'. Zonaras, Bk. II. Here belongs the statement of Medea in the play of Seneca [500 ff.]:

He who by sin advantage gains,
Commits the sin [. . .].
Let her be guiltless in thine eyes who for thy gain
Hath sinned. (M.)

Much more should voluntary informers and censors see to it that the following strictures of Juvenal, *Satires*, II [22 ff.], do not fall on their heads:

Let the straight-legged man laugh at the club-footed, the white man at the black-moor: but who could endure the Gracchi railing at sedition? Who will not confound heaven with earth, and sea with sky, if Verres denounces thieves, or Milo cut-throats? If Clodius condemns adulterers, or Catiline upbraids Cethegus; or if Sulla's three disciples inveigh against proscriptions? (R.); (or the following of the same author, *Satires*, III [II. 38-40]): O happy times to have you for a censor of our morals! Once more may Rome regain her modesty; a third Cato has come down to us from the skies. (R.)

Seneca, *Controversies*, Bk. II, cont. xiv [VI. v]: 'It is disgraceful to punish vices in such a way as to be imitating them yourself.' Cicero, *Tusculan Disputations*, Bk. III [xxx]: 'It is the peculiar characteristic of folly to perceive the vices of others, but to forget its own.' (Y.) Plautus, *Truculentus* [160 f.]: 'He who accuses another of dishonesty, him it behooves to look unto himself.' (R.) For as Ovid, *Fasti*, Bk. VI [647-8], observes: 'Thus is his Censorship discharged, and thus is an example given, when the assertor of morality himself practises that which he enjoins on others.' (R.)

Yet in general Hobbes, *Leviathan*, chap. xxviii, agrees with us, that

a penalty should come from a superior by virtue of his position, although otherwise his definition of punishment is too narrow, both because he included only those inflicted by civil sovereignty, and because he mentions but one end. 'Punishment', he says, 'is an evil inflicted by public authority (on a transgressor of the law) [. . .] to the end that the will of men may thereby the better¹ be disposed to obedience.' Yet he rightly infers from his definition, that the injuries or acts of revenge of private individuals, evils inflicted by public authority but without any antecedent formal condemnation, evils inflicted by a usurper of the sovereignty, and those inflicted without intent to reform citizens, are not punishments properly understood, but are all only acts of hostility. In which connexion, however, we should observe that a state of hostility does not follow at once upon a spurious punishment of this kind, nor does it furnish the right to exercise the licence of a public enemy; in other words, he who is the victim of such an evil does not at once receive licence to take steps of open war against the one who does him the evil.

The same writer also excludes from the category of punishments evils which follow in natural sequence upon evil actions; for instance, when a man is killed or wounded while assaulting another, or when he falls sick because of that unlawful action; although such consequences may appear to be a punishment from God. Again, if the evil inflicted is less than the benefit which naturally follows upon the commission of the crime, it is rather the price or redemption of a crime than a punishment.

Under acts of hostility he lists cases in which a greater punishment is inflicted than is set by the law, if a punishment is required for a deed not forbidden by any law, if a king is attacked, if an evil is inflicted upon an open enemy. But the statement he adds, namely, that, if a former citizen has declared himself an enemy, he shall suffer as an enemy and not as a citizen, and that therefore such as are guilty of treason can be punished, like enemies, with an arbitrary punishment, can in my opinion not be accepted, by reason of the fact that the punishment meted out to a rebel proceeds from the force of sovereignty and as from a superior, although such a rebel may have adopted a hostile attitude towards the sovereign and may sometimes have to be overcome in battle, before he can be treated as a criminal. In the same way he who pursues a runaway slave, does it by his right of dominion and not that of war. A further consideration is that the evils inflicted upon an enemy carry with them no infamy, while that is one of the chief attendants upon punishments meted out to rebels.

802 8. We must now consider the end of punishments, which men should hold before their eyes, in requiring them after the loss has been repaired, or by its nature cannot be. Here we assert, first of all, that of

¹ [Pufendorf changes this to 'by fear of it'.—Tr.]

course it does not appear unjust that he who inflicts evil should also suffer evil. Pindar, *Nemean Odes*, iv [52]: 'Tis fitting that whoso doeth aught should suffer also.' (S.) Euripides, *Hecuba* [1250-1]:

Forasmuch as thou hast dared
To do foul deeds, even drain thy bitter cup. (W.)

And yet we should presume that a man may not rightly inflict punishments unless they will bring some advantage. And therefore, Hobbes, *De Givē*, chap. iii, § 11, has claimed that the following also is one of nature's laws:

In revenge and punishments we must have our eye not at the evil past, but the future good: that is, it is not lawful to inflict punishment for any other end, but that the offender may be corrected, or that others warned by his punishment may become better.

Plato, *Protagoras* [p. 324 B]:

He who desires to inflict rational punishment does not retaliate for a past wrong, for that which is done cannot be undone, but he has regard to the future, and is desirous that the man who is punished, and he who sees him punished, may be deterred from doing wrong again. (J.)

The same sentiments are repeated by Seneca, *On Anger*, Bk. I, chap. xvi. Add Grotius on *Leviticus*, xix. 18.

We should, of course, in every case look back to the evil done, that is, the antecedent crime, since it is obviously this which makes it a punishment, but we should also look forward to the end of punishment, in order that a man, who, although guilty, is still of our frame, may not suffer to no purpose for a deed which can no longer be made good.

This law of his, Hobbes proves by two reasons: First, because every man is required by natural law to pardon another, provided he is furnished with a guarantee for the future; and second, because revenge, in so far as it considers only the past, is nothing other than a triumph and glory of the mind, which is directed to no end, and so is vain and senseless¹. The following statement, given by Jornandes, *History of the Goths*, chap. xxix, is worthy of an Attila: 'What is sweeter to a brave man than to take vengeance with his own hand? It is a great boon of nature to glut one's heart with revenge.' Add Bacon, *Essays*, chap. iv. But a judge, on the contrary, should never derive any pleasure from the punishment of the guilty, when necessity requires that he pronounce judgement on them. Valerius Maximus, Bk. II, chap. ix, § 3. Claudian, *On the Consulship of Manlius*² [224 ff.]:

He is a savage who delights in punishment and seems to make the vengeance of the laws his own. [. . .] But he whom reason, not anger, animates is a peer of the gods, he who, weighing the guilt, can with deliberation balance the punishment. (P.)

Vulcatius Gallicanus [xii] says about Avidius Cassius: 'It never looks well in a prince to inflict punishment for a personal affront.'

¹ [For *plaster* read *praeter*.—Tr.]

² [For *Mallii* read *Manlii*.—Tr.]

Augustus did right, when, as we are informed in Suetonius, chap. xxxii: 'He struck off the lists the names of those who had long been under accusation, from whose humiliation nothing was to be gained except the gratification of their enemies. [. . .]' (R.) Seneca, *On Anger*, Bk. [I, chap.] vi:

The ruler of a state [. . .] drives the condemned out of life with ignominy and disgrace, not because he takes pleasure in any man's being punished [. . .] but that they may be a warning to all men, and that, since they would not be useful when alive, the state may at any rate profit by their death. (S.*)

Yet we will not join with Hobbes, *Leviathan*, chap. xxviii, in calling it a hostile act, when the sovereign power does not hold before its eyes the genuine end of punishments, provided that the punishment otherwise be inflicted in accordance with the laws of the state. Add *Digest*, XVIII. vii. 7, at end; Grotius, Bk. II, chap. xx, § 5.

9. Now the genuine end of punishments is precaution against injuries, which is secured either if he who has sinned is led to mend his ways, or others are by his example deterred from sinning, or if he who has sinned is so restrained that he is no longer able to repeat his crimes. This principal Grotius, Bk. II, chap. xx, § 6, expresses in the following way: 'In the case of punishment we must consider the advantage either of the person who does wrong, or of the person against whose interest the wrong was committed, or of other persons in general.' (K.)

803 Compare Seneca, *On Clemency*, Bk. I, chap. xxii. The first kind of punishment looks to the end that the sinner's mind be cured and be freed of the desire to sin, by a method of cure which works through contraries. For since every action, especially such as is premeditated and repeated, gives rise to a certain proclivity, which when developed is called a habit, vices should as soon as possible be stripped of their enticements. Here applies the statement of Socrates in Plato, *Gorgias* [p. 525 f.]: 'A man is made unjust and worse if he never pays the penalty for his crimes, but less so if he does suffer and receives a punishment that is just in the sight of gods and men.' For 'he who pays for his crimes, is purified in mind.'¹ Seneca, *On Anger*, Bk. I, chap. v:

Sincere and discreet correction is sometimes necessary.² For it does not injure, but heals under the guise of injury. We char crooked spear shafts to straighten them, and force them by driving in wedges, not in order to break them, but to take the bends out of them; and, in like manner, by applying pain to the body or mind we correct them. (S.*)

That, however, is not necessary which follows a few lines further on: 'Whether we have done the deed ourselves, or the injury has been inflicted by some one who is dear to us, we ought of our own accord to present ourselves to the judge, to be punished, just as we would to a physician; and this to prevent the moral disease of doing injury to others from becoming so deepseated in the soul as to render it incurable.'

¹ [This is only a paraphrase of Plato.—Tr.]

² [Slightly changed from the original form.—Tr.]

(S.) For he who has a mind so disposed that it voluntarily wishes to seek punishment in order to correct a vice, needs no judge to act as his physician, but is himself sufficient for his own cure. Apuleius, *De Dogmate Platonis*¹ [II. xvii]: 'There is more disquiet and bitterness if a criminal be granted² impunity, and be not promptly visited with the castigation of men, than in any kind of punishment.' Plato, *Laws*, Bk. IX [p. 854 D]: 'No penalty which is inflicted according to law is designed for evil, but always makes him who suffers either better or not so bad.' (J.) Aristotle, *Nicomachean Ethics*, Bk. II, chap. ii: 'Punishments are in a sense remedial measures, and the means employed as remedies are naturally the opposites of the diseases to which they are applied.' (W.) Alcinous, *De Doctrina Platonis*, chap. 32: 'It is as proper for a wicked person to receive punishment as to turn over the sick body to a physician for treatment. Because every correction is a kind of medicine for a diseased soul.' Tacitus, *Annals*, Bk. III [liv]: 'When the mind has become corrupt and the breeder of corruption, its distempered and fevered condition can only be assuaged by remedies as potent as the passions which have inflamed it.' (R.) Plato, *Critias* [p. 106 B]: 'And the proper retribution of him who errs is to set him in the right way.' (J.)

10. On the person who shall exact this kind of correction, Grotius, Bk. II, chap. xx, § 7, holds: 'The punishment which serves (the good of the wrong-doer) is by nature permitted to any one of sound judgement who is not subject to vices of the same kind or of equal violence.' (K.) (Isocrates, *De Permutatione* [14]: 'Those I regard as most wicked and worthy of extreme punishment, who, when they are themselves guilty of some misdeed, have the effrontery to charge others with the same.' Lactantius, *Divine Institutes*, Bk. IV, chap. xxiii: 'Before you correct the character of others, correct your own.' (C.) When in Tacitus, *Histories*, Bk. II [x], Crispus, who had himself brought forward and had been rewarded for the same kind of accusations, condemned Faustus, it is added: 'It was not the punishment of the crime that aroused disgust, but the person of the avenger.' (O.) Arnobius, *Against the Heathen*, Bk. I [xxxvii]: 'You act with great injustice, in regarding that as worthy of condemnation in us which you yourselves habitually do; what you allow to be lawful for you, you are unwilling to be in like manner lawful for others.' (B. & C.)) [Grotius continues]:

However, in the case of corporal chastisements and other punishments that contain an element of compulsion, the distinction between those who may or may not apply them is not made by nature (for this could not be the case, except in so far as reason entrusts to parents in a special sense the exercise of this right over their children on account of the tie of relationship), but by the laws which have limited that common connexion of the human race to the nearest relationships for the sake of obviating quarrels. (K.)

¹ [The correct title is *De Platone et eius Dogmate*.—Tr.]

² [For *differatur* read *deferatur*.—Tr.]

But these remarks do not satisfy us, for we have already observed that no punishment, properly speaking, whatever its end be, can be inflicted save by a sovereign. And therefore, such reproof as is delivered
804 by words, appears to be more like counsel and admonition than punishment, and even when it is enforced by more violent language, it is not sanctioned so much by any common right, as by the special law of friendship. A proof of this is, that, whenever any one starts to criticize a stranger, he is at once attacked in the words of Terence, *Self-Tormentor*, Act I, sc. i [75 f.]: 'Have you so much time to spare from your own affairs that you can attend to another man's with which you have no concern?' (S.) Therefore, when Chremes in the same passage undertakes to reprove the other he calls upon the right of a neighbour, which he himself holds [57] 'the half-way house to friendship'. (S.) Curtius, Bk. III [xii. 16], says in speaking of Hephæstion: 'He alone was allowed by Alexander to address him in the free and candid language of a monitor; a liberty which he so exercised, that it seemed rather to be conferred by Alexander than assumed by himself.' (A.) Cicero, *On Duties*, Bk. I [xvii]: 'Counsels, discourses, exhortations, encouragements, and even sometimes reproofs, flourish best in friendships.' (E.) Homer, *Iliad*, Bk. XI [793]: 'And good is the persuasion of a friend.' (L.L. & M.)

A further consideration is, that prudence should by all means be used in such matters, in order that a cure too hastily attempted may not turn troubles upon our own heads, and aggravate the disease in the other. Here belongs the advice of Musonius Rufus in Tacitus, *Histories*, Bk. III [lxxx].

Now parents have a twofold right to correct their children; both because they are unable properly to give them the rearing enjoined by nature unless they are allowed to use some fairly severe discipline as occasion demands, and because such parents as dwell outside of a state enjoy a sovereignty over their children, which, although straitened to a great extent in many states, has yet retained nearly everywhere some of its former power, so that they can in their own judgement reprove them for such sins as are committed more in youthful imprudence¹ than from mature evil design, and affect more the domestic than the public peace. Add *Digest*, XLVII. x. 7, § 3; Libanius, *Declamations*, xx. Much the same power is held by those who must govern the youth in their parents' stead, such as guardians, teachers, and masters, who can scarcely meet their duty without some degree of restraint. Seneca, *On Anger*, Bk. II, chap. xxvii: 'Correction on the part of parents² and teachers ought to be submitted to by us in the same spirit in which we undergo the surgeon's knife, abstinence from food, and such-like things which hurt us for our benefit.' (S. *) What power over others belongs

¹ [For *prudencia* read *imprudencia*.—Tr.]

² [For *pare num* read *parentum*.—Tr.]

to the rest of one's kinsmen in such matters, may be seen in *Code*, IX. xv. 1. Plato, *Laws*, Bk. VII [p. 808 D], decrees in his state that since a boy

is of all animals the most unmanageable, [. . .] being a freeman, he must have teachers and be educated by them in anything which they teach; but he is also a slave, and in that regard any freeman who comes in his way may punish him and his tutor and his instructor, if any of them does anything wrong. (J.)

Xenophon, *The State of the Lacedaemonians* [vi. 1 f.], says: 'Lycurgus gave any father authority over other men's children as well as over his own. [. . .] If a boy tells his own father that he has been whipped by another father, it is a disgrace if the parent does not give his son another whipping.' (M.*) Yet what the same Xenophon, *Anabasis*, V [viii. 18], says: 'If I chastised any one for his own good, I claim to suffer the same penalties as parents pay their children, or masters their boys. The surgeons also cauterize and cut us for our good' (D.*)—is intended merely to excuse the accusation of lawlessness brought against him. But what is lawful for a general is not without further ado lawful for every one else.

But Grotius denies that this form of punishment can proceed even to death, since it is absurd, in order to effect a reform, to throw a man into a state where no kind of reform is possible, although some hold that it is better for one who labours under an incurable depravity to be no more, especially in view of the fact that such a person must always be a source of very great trouble to others. Seneca, *On Anger*, Bk. I, chap. xvi:

You [. . .] have an incurably vicious mind, and add crime to crime. You have come to such a pass, that you are not influenced by the arguments which are never wanting to recommend evil, but sin itself is to you a sufficient reason for sinning. You have so steeped your whole heart in wickedness, that wickedness cannot be taken from you without bringing your heart with it. Wretched man! you have long sought to die; we will do you good service; we will take away that madness from which you suffer, and to you who have so long lived in misery to yourself and to others, we will give the only good thing which remains, that is, death. (S.)

Idem, *On Benefits*, Bk. VII, chap. x: 'The cure for men of that stamp lies in the end of their life, and the best fate for him who will never come to his senses is death.' Plato, *Gorgias* [p. 512 B]: 'The bad man had better not live, for he cannot live well.' (J.) Thus in Tacitus, *Annals*, Bk. XV [lxviii. 1], Sulpicius Asper gave as the reason for his forming the conspiracy against Nero: 'There was no other mode of curing his iniquities'; (R.) or as it is put by Suetonius, *Nero*, chap. xxxvi: 'Some even made a favour (of their guilt), saying there was no way except by death that they could help a man disgraced by every kind of wickedness.' (R.) Iamblichus, *Protrepticon*, chap. ii [p. 4 A]: 'Just as it is better for an abscess to be cauterized, so it is better for

a wicked man to die.' [Sadi] *A Persian Rose Garden*, chap. i: 'Whoever is better asleep than awake¹, had better die than live a bad life.' Yet charity urges that a man should not lightly be held a hopeless case. And this form of punishment often is for the benefit of others as well. For when a man's mind is reformed by the severity of the punishment, others are safe enough henceforth from him, and when an incorrigible criminal is taken from the world, no further trouble need be expected from him. The rule that only incorrigible criminals should suffer death, a thing desired by Plato, *Laws*, Bk. IX, may perhaps be well enough for moderate misdeeds, such as have nothing atrocious about them. But it surely does not apply to atrocious crimes. For since a man is finally held incorrigible only when he has been apprehended time and again in the same crime, surely it will be of little advantage to a state to wait until a person has repeatedly committed the worst excesses.

11. The second end of punishment is the benefit of him to whose interest it was that the sin be not committed, of the one, that is, who suffered by the other's sin, so that he may not suffer in that way again either at the hands of the same person or at the hands of others. This benefit can be secured in three ways: If the guilty² party is executed; if his ability to work harm is taken away even though his life be spared, for instance, by keeping him in prison, by taking from him his weapons, by removing him to a distance; or, finally, if he is taught by his punishment to sin no more, which is connected with the reform we were just discussing. Now a person who has once been the victim of violence can be secured from that of others, not by merely any form of punishment, but by one that is open and public, and serves as example and warning. This is the reason why executions are usually held not in secluded corners of prisons but in the most frequented places, and with terrifying features which may be able to strike fear into the hearts of the common sort. And this end is so appropriate to punishments, that even when, in the heat of our anger and the sudden desire for revenge, we have given our assailant a thorough beating, we usually send him away with the warning, 'Go now³ and see if you want to try it again'. But the right to exact such a punishment belongs to supreme sovereignty, although in some states, because of the ferocity and stubbornness of the people, legislators have given some indulgence to that base passion which makes us yearn, when injured, to satisfy our wrath by taking the punishment into our own hands. An instance of this is found even in the law of God in the person of the avenger of blood (*Numbers*, xxxv; *Deuteronomy*, xix; Selden, *De Jure Naturali et Gentium*, Bk. IV, chap. ii; Grotius on *Exodus*, xxi. 12), unless we should prefer to explain that custom as one of the survivals of a state of nature. Add also Rochefort,

¹ [For *vigilius* read *vigiliis*.—Tr.]

³ [For *nunc* read *i nunc*.—Tr.]

² [For *quid aliquis* read *qui deliquit*.—Tr.]

Descriptio Antillarum, Pt. II, chap. xix. Some would find the remains of a similar custom in the case of Theoclymenus in Homer, *Odyssey*, Bk. XXIV [xv. 272 ff.¹]. Certainly scarcely any other explanation can be found for the law of Euripides, *Orestes*, line 515: 'By exile justify, not blood for blood' (W.); which must mean that the old custom of private revenge had been abrogated, lest it never stop, a reason not applicable to a punishment exacted by a magistrate. Although it appears from Homer, *Iliad*, Bk. IX, lines 702 ff., that it was also customary to buy off exile by paying the nearest relative of the slain man a fine in money. See also Apollonius Rhodius, *Argonautic Expedition*, Bk. I, line 90. So also in our own day the relatives of a slain man in Morocco cannot only arrange terms of settlement with the murderer, but can also slay him without any legal process, provided he has not yet been apprehended by a magistrate, it being held a rule among them that revenge is not a sin. A passage in Tacitus, *Germany* [xxi], can also after a manner be brought under this head: 'It is incumbent to take up a father's feud or a kinsman's not less than his friendships; but such feuds do not continue unappeasable: even homicide is atoned for by a fixed number of cattle and sheep, and the whole family thereby receives satisfaction.' (H.) And one in Dionysius of Halicarnassus, Bk. I [lxxxix]: 'But he left his punishment to Numitor, saying, that he who had done the injury, could be punished by none so justly, as by him, who had received it.' (S.) Add Grotius, Bk. II, chap. xx, § 8.

12. The third end of punishment is the benefit of any and every man, in that severity of the punishment contributes to the security of all. Plato, *Laws*, Bk. XI [p. 934 A]: 'The malignant are punished, not because they did wrong, for that which is done can never be undone, but in order that in future times, they, and those who see them corrected, may utterly hate iniquity.' (J.*) Seneca, *On Anger*, Bk. I, chap. vi:

The ruler of a state [. . .] drives the condemned out of life with ignominy and disgrace, not because he takes pleasure in any man's being punished [. . .] but that they may be a warning to all men, and that, since they would not be useful when alive, the state may at any rate profit by their death. (S.*)

Tullus says in Livy, Bk. I, chap. xxviii: 'Let another dare such a deed thereafter if I do not speedily visit such a punishment on him as shall be a conspicuous warning to all mankind. [. . .] You shall yet by your punishment teach the human race to hold sacred the obligations you have violated.' (F.) And again (*Idem*, Bk. I, chap. xxxiii), king Ancus 'to overawe men's growing lawlessness, built a prison in the midst of the city, above the Forum.' (F.) Add Agathias, Bk. IV, at the beginning [i]. Lucian, *Phalaris*, No. I [viii]: 'No other measures are of any use if unattended by fear and the expectation of punishment.' (H.)

¹ [For ω read ο.—Tr.]

This type of punishment is employed, first of all, in order that the one who has injured another may not later injure others as well, which end is secured if the guilty person is either executed, or disabled, or confined in such a way that he can do no further injury. Gunther, *Ligurinus*, Bk. I [527 ff.]: 'No better punishment could have been devised for the fury and pride of a foolish people than to take from them their wealth, the cause of such conceit. Thus poverty could bring to their senses those whom undue wealth had puffed up.' Here the poet is speaking of the inhabitants of Utrecht of whom Frederick exacted a large sum of money because of their revolt. Or the offender may be led by the extreme severity of the punishment to put off his lust of sinning; or, finally, the punishment is sought in order that no other men may be induced, by impunity allowed crimes, to make themselves troublesome to yet other men. This last end is secured by public executions, commonly called by the Greeks *παράδειγματα*, or examples, the sight of which make all other citizens show due respect for law. See *Code*, IX. xxvii. 1; IX. xx. 7. Quintilian, *Declamations*, cclxxiv: 'When we crucify malefactors we select the most frequented thoroughfare, so that the largest possible number may see the sight and be warned by the terror of it.' Seneca, *On Anger*, Bk. III, chap. xix: 'The more public an execution is, the more power it has as an example and lesson.' (S.) Although the exact opposite was the custom among the Lacedaemonians, where criminals were dispatched not during the day but the night (Herodotus, Bk. IV [cxlvi]), unless they may have believed that the very darkness would add to the terror. Compare Valerius Maximus, Bk. II, chap. ix, § 3.

Under this end of penalties can also be included that advantage whereby they support the structure of government, or strengthen its authority, which is at times not a little weakened, and especially¹ by 807 malign and outrageous transgressions of laws. For it is to the interest of the entire state that its authority remain unimpaired, and, when this is the case, the evil inclinations of men are vigorously curbed. It does not appear necessary, that, with Selden, *De Jure Naturali et Gentium*, Bk. I, chap. iv, in addition to these ends we should set another called the end of satisfaction, or purgation, or expiation, as though a deviation from law were made up, as it were, and the consequent inequality of action corrected. For although² he draws his arguments from Sacred Scripture, they concern either the tribunal of God, or the special religious vows of the Hebrews.

13. Regarding the exceptions added by Grotius, Bk. II, chap. xx, § 9, to the general rule, that the execution of exemplary punishments lies within the power of the governors of states, it should be observed, that, whatever punishment is inflicted in such places and upon such

¹ [For *cum primis* read *cumprimis*.—Tr.]

² For *Et si* read *Etsi*.—Tr.]

persons as are not under the jurisdiction of certain courts of justice, such as pirates, belongs to the right of war, which is something different from the power to exact penalties. For against pirates and freebooters, inasmuch as they are enemies of all mankind, every man is a soldier in defence of his country. Although we should not fail to note what he says further on (§ 14), that it would be a wiser step were all seafarers supplied with instructions from the state authority to proceed against pirates, wherever they may come upon them on the seas, so that when the occasion arose they could treat them, not as though on their own initiative, but as if under orders from the state. And although the law of *Deuteronomy*, xiii. 9, does not appear to grant every private citizen the right to slay one who would lead him into idolatry, but only to bring him to justice, and have him stoned to death by the people upon the showing of cause, yet should we admit that every private citizen was given the power to kill the one who was guilty of that crime, surely the fact of the previous existence of such a law would make what is here undertaken by a private citizen to be understood as done by an agent of the supreme sovereignty, and so on the authority of the state. Add the remarks of Grotius on that passage. And it should be borne in mind, that the deed of Phineas was based upon the special approval of God, for were such zeal otherwise allowed every one, it would seriously disturb the civil order and give a pretext to all unrestrained passions. On a judgement of zeal add Selden, Bk. IV, chap. iv. The right of life and death, which fathers of families hold in some states over children and slaves, although not tracing its origin to states, yet, when found in them, can appear to be a certain portion of the state sovereignty, the exercise of which by fathers of families over their household is conceded them by the state authority. Nor is there anything repugnant in there being a magistrate in a state who can in certain cases mete out extraordinary punishment upon criminals without a judicial hearing, provided he does not abuse that right. Thus when a certain reward is set upon the heads of proscribed persons in case any one kills them, it is held that such an act is done by the authority of the state. For although such a declaration does not always have the force of a command, yet when some one is killed by reason of it, the act is defended as though authorized by the state. Add *Code*, III. xxvii. 1. Grotius observes on *Esther*, ix. 10, that it used to be held by the Hebrews: 'If any one has undertaken to betray an Israelite or his property to the Gentiles, or if any one has signally affronted the whole body of Jews, an Israelite will not be doing wrong if he procure his destruction, his property, however, being left to his heir.' And yet the licence and execution of revenge which the Jews enjoyed at that time seems not a little abhorrent to the nature of civil life. The following law is found in Andocides, *Orations*, i [96]: 'If any one overthrows the democracy of Athens, or,

upon the dissolution of the sovereignty of the people, holds any magistracy, he shall be an enemy of the Athenians and may be slain with impunity.' There then follows an oath which the Athenian people took by tribes, to the effect that they would kill whoever was guilty of such things. In Livy, Bk. III, chap. lv, Valerius sanctioned this law: 'No one should appoint any magistrate without a right of appeal; if any person should so elect, it would be lawful and right that he be put to death; and that such killing should not be deemed a capital offence.' (S.) Among the Panchaei, according to Diodorus Siculus, Bk. I, chap. xlv [V. xlv]: 'It was not lawful for any of the priests to go out of the verge of the consecrated ground; and if they do, it is lawful for any man that finds them to kill them.' (B.)

We should observe, in this connexion, that in these and similar laws a general edict, with the added evidence of fact, and such as admits of no doubt of interpretation, has the force of a formal judgement, so that the execution, which follows, appears to have been done upon the decree of a magistrate. And if a private citizen, incited by such a law, when it rests upon just reasons, has slain some person, not only will he go free in a court of law, but he will also rest with easy conscience, provided he was not influenced by a private grudge, but believed that his action was for the good of the state; and especially is this true, if the law allowed or enjoined upon every man the execution of the penalty, for the reason that such attempts threaten the state with immediate disaster. It is different with those executions in which the law makes an allowance for just grief and violent indignation, and blots out the human punishment but not the guilt of the act. Of this kind is the law allowing a husband to kill his adulterous wife and her lover when they are caught in the act. For the law, as dispensed in a civil process, pardons a grief that was conceived only because of so outrageous an injury, although it would, on the whole, have been more fitting for the injury to be punished by a magistrate, provided the state would not have been imperilled through postponing the revenge. See Gratian, *Decretum*, II. xxiii. 8. 33; Seneca, *Controversies*, Bk. I, cont. iv; Bk. IV, cont. xxiv; Xenophon, *Training of Cyrus*, Bk. III; Valerius Maximus, Bk. VI, chap. i, § 13; Boecler on Grotius, Bk. II, chap. i, § 14; Ant. Matthaeus, *De Criminibus*, V. ii, on *Digest*, XLVIII; Grotius, *Florum Sparsio*, on *Digest*, XLVIII. v. 22, § 4.

14. But it is obvious, from the end of punishment, as well as the condition of human nature, that there can be some injuries which are evil enough in themselves, and yet for them to meet with punishment in a human court would be both superfluous and useless. To their number are commonly referred, first of all, purely internal acts, such as thoughts, yearnings, and desires concerned with some sin, although they may afterwards in some manner, perhaps by subsequent confession,

come to the attention of others¹. Add Grotius, *De Imperio Summarum Potestatum circa Sacra*, chap. iii, n. 1. For since no man receives any hurt from an internal urge of this kind, no man also is interested in seeing any one punished on that account. See *Digest*, XLVIII. xix. 18. For the statement of Philo Judaeus, in the work entitled *That the Worse is Wont to Attack the Better* [xxvi. 97]: 'For as long as we only conceive wicked things in the bad imagination of our minds, still, during that time we are guilty of thoughts' (Y.), belongs to the divine tribunal, although Grotius on *Matthew*, v. 28, shows from the abundant testimony of pagan writers, that such thoughts should, on the basis of mere reason, be regarded as actual sins. Add Bodin, *On the Republic*, Bk. IV, chap. vii, p. 734. An instance of abominable calumny is told by Ammianus Marcellinus, Bk. XV, chap. ii [XV. iii. 5-6], about a certain Mercurius:

If any one in his sleep (when nature roams about with an extraordinary degree of freedom) communicated to a friend that he had seen anything <Mercurius> exaggerated it, colouring it for the most part with envenomed arts, and bore it to the open ears of the emperor. And for such speeches men were attacked with formidable accusations, as if they had committed inexpiable² crimes. The news of these events having got abroad, men were so cautious of even relating nocturnal dreams, that, in the presence of a stranger, they would scarcely confess they had slept at all. And some accomplished men lamented that they had not been born in the country of Mt. Atlas, where it is said that dreams never occur. (Y.)

But it is another matter when internal acts are measured as they are joined with external, for they are of the greatest influence on the quality as well as the quantity of actions. And so crimes are punished which have been attempted, even if they have not attained their ultimate end. See Grotius, in *Florum Sparsio*, on *Digest*, XLVIII. viii. 14.

In the next place, it would be too great a hardship to undertake to subject to punishment at the hands of men also, those extremely slight mis-steps, which in the very condition of human nature it is not possible to avoid, however much attention a man proposes to give them. For Themistius, *Orations*, x [ix, p. 123 D], was right in saying that 809 there were three classes of human mis-steps: 'A misfortune, an error of judgement, and a criminal act'; then he adds: 'A ruler should pity the first, correct the second, and punish only the third.' Compare Robert Sanderson, *On the Obligation of Oaths*, Prelection III, § 18. Here belongs what is related by Jerónimo Osorio, Bk. X. 384, of Alphonso, King of the Congo.³

After having read⁴ five volumes of the laws of Portugal he praised the wisdom of the laws and the order and discipline of the state, but found it difficult to approve the drawing up of laws on such trifling matters. And so, poking fun at the meticulous care of their laws,

¹ [For *filiurum* read *aliorum*.—Tr.]

² [For *inexplicabili* read *inexpiable*.—Tr.]

³ [Not 'Arrogon', as Kennet translates the passage.—Tr.]

⁴ [For *evoluerit* read *evolveret*.—Tr.]

he asked the Portuguese, what punishment had been fixed¹ for those who set² foot on the ground.³

Julian, *The Caesars* [p. 314 c], in his account of the emperor Probus says:

It is impossible to govern either horses, or oxen, or mules, and least of all, men, unless you yield to them in some of their special delights, just as physicians indulge their patients in trifles so as to get them to follow directions in greater matters.

Add Grotius, Bk. II, chap. xxx, § 19 [II. xx. 19], although the following statement seems not entirely exact: 'Indeed, one may doubt whether such (lapses) are rightly and properly called sins, since they lack, when considered in general, the freedom of action which they seem to have in particular instances.' (K.) For there is a flaw in the following argument: 'It is morally impossible for a man not to fall into some sins; therefore the sins of daily occurrence, as they call them, have not the nature of sins.' The same writer adds in the following section (20), that sins should not be punished which⁴ concern neither directly nor indirectly human society or another man. For, as he says, there is no reason why such sins should not be left to God for punishment, since He is all wise to find them out, all just to weigh them, and all powerful to punish them, and therefore, for men to undertake to punish them would be clearly to no advantage and would lead to injustice. And yet one may well question, whether, if you except thoughts that do not emerge into acts, there really are any such sins.

Furthermore, civil laws deny many acts the power to give rise to an action, or exempt them from human punishment for the sake of the peace of the state, or for other reasons; for instance, if an action may be more splendid, when it does not appear to have been undertaken with an eye to human punishment, or if it does not appear important enough for judges to be bothered on account of it, or if the matter requires the most minute investigation, or if an evil of long standing⁵ cannot be destroyed without overturning the state (an instance of which is to be found in the letter of Tiberius on luxury, in Tacitus, *Annals*, Bk. III [liii]), or if a countless multitude of disputes may in that way be avoided. Add Seneca, *On Clemency*, Bk. I, chap. xxii. And finally, all such faults of the mind must be exempted from human punishment, as result from the general corruption of men, and are found in such numbers that to punish them with human penalties must certainly lead to the overthrow of states. So long as such have not broken out into outrageous acts, they should be let alone. Some of these are avarice, ambition,

¹ [For *esse* read *esset*.—Tr.]

² [For *poneret* read *ponerent*.—Tr.]

³ [So also Kennet, Barbeyrac omitting the translation of the passage. James Gibbs, however, in his translation of Osorio (*The History of the Portuguese*, &c., London, 1752), translates the phrase, 'in terra pedem ponerent', as 'throw a louse on the ground', which although perhaps historically correct is certainly not the natural meaning of the words as here recorded.—Tr.]

⁴ [For *que* read *quae*.—Tr.]

⁵ [For *innolitum* read *inolitum*.—Tr.]

inhumanity, ingratitude, hypocrisy, envy, the desire to belittle others, pride, anger, discord, and the like. These our Saviour endeavoured to do away with, primarily by the holiness of His precepts. And so far as they are concerned, the statement of Seneca, *On Anger*, Bk. II, chap. xxi: 'For if every one who has a crooked and vicious disposition were to be punished, no one could escape punishment' (S.), is true enough.

15. Nor is it true that, if any crimes are fit for punishment in a human court¹, they are under so great a necessity of receiving it, that there can never be any place for pardon. The Stoics used to take the opposite position and their view is thus set forth in Stobaeus, *Sermones*, XLIV [*Anthology*, II. vii. 11 d]: 'They say that the wise man does not forgive.' And the reason is, that 'the person who forgives must also think 810 that the sinner did not sin voluntarily, although every man sins because of his own vicious desire. Therefore, it is rightly said that sinners ought not to be forgiven.' Their argument appears to run as follows: A man sins either of his own fault or not of his own fault. If not of his own fault, it is not a sin, since every sin is committed *παρὰ τὴν ἰδίαν κακίαν*, 'out of one's own viciousness', and so in that case there is no need for pardon. But if he sins of his own fault, pardon cannot possibly be shown, because it is allowable only for misdeeds that do not arise in the person himself. This argument obviously begs the very point at issue.² They added: 'The good man is not merciful. Because a merciful man pleads for one who deserves punishment. And yet every one should without exception suffer what he deserves.' But what his *ἀξία* is, desert or merit, differs as concerns good or evil. A good owed a man cannot rightly be withheld from him, but such is the nature of an evil (such, that is, as does not tend to the advantage of the recipient) that it can be denied without injury. Finally, they say: 'When a man is merciful it means that he either holds that the penalties set upon delinquents are too harsh, or else he feels that the lawgiver has imposed undeserved punishments.' But such reasoning comes to nothing. For there is no contradiction between the statements that punishments prescribed in a law are just, and that they can rightfully at times be remitted. For laws only define in general what punishments are due each crime, without considering the peculiar circumstances which sometimes arise in connexion with a certain person, or a certain condition of the commonwealth; while pardon is granted individuals for certain reasons which are not observable at all times or in all transgressors. See also Cicero, *For Murena* [xxix], and Seneca, *On Clemency* [II. vii], where he says: 'Pardon is the remitting of a deserved punishment. [. . .] Now the wise man does what he ought to do.'³ (S.*) But there lurks a mistake in the word 'deserved'. For if you understand that punishment is 'deserved' by him who has

¹ [For *foreo* read *foro*.—Tr.]

² [For *principio* read *principio*.—Tr.]

³ [In the original this sentence is cast in the double negative, but to the same effect.—Tr.]

sinned, that is, that he can be punished without injury, or without just cause for complaints, it will not follow that, if a man does not inflict punishment, he does what he should not do. For I can do many things rightly and lawfully, which are still not necessary for me to do. Furthermore, as it is not correct to say that a transgressor is owed (*deberi*) punishment, as though there was within him some right which must be satisfied by punishment (for no man ever complains that his punishment was remitted, unless possibly it be of the omission of corrections which looked only to his reform, when in later years childish faults, concealed at first, often develop into open crimes of manhood), so it is also improper to say that a transgressor should (*debere*) suffer punishment, that is, that he is under some obligation to meet with punishment, the reason for which is shown before. But if we take the word 'deserved' in the sense that a wise man is under some obligation to require punishment, we must say, first, that no man is under an obligation in the matter before us, unless the guardianship of the laws has been publicly or privately entrusted to his keeping. And, secondly, that the obligation lying upon sovereigns concerns not transgressors but the whole state or social group whose safety they should provide for also by this method of coercing wicked men by means of punishments. When the governors of states neglect to do this, they do¹ no injury to malefactors, but they do violate that obligation which they owe the state. And yet it is manifest that by the granting of pardon in the proper place and time, the safety of a state is not undermined but is in fact sometimes strengthened.

16. The statement of Grotius, Bk. II, chap. xx, § 22, to the effect that there is place for pardon even 'antecedent to a penal law', requires a sagacious interpretation, for otherwise it becomes a mere commonplace to say that, when there is as yet no law, there can also be no punishment, or crime, or pardon for crime. Moreover, a law is penal
 811 not only when a certain kind of punishment is expressly defined, but also when it is left to the decision of the judge to define the quality and quantity of a punishment. Therefore, it must be recognized in the case before us, that in any state which does not use written law, the place of civil laws is taken by natural laws, and justice is administered in accordance with them, while whoever transgresses them is visited by the judge with an arbitrary punishment. But even where the civil laws are written, inasmuch as not every way in which human evil may display itself can be expressly set forth, it is everywhere understood that natural law and reason supplies the defect of civil laws, and in cases where an express sanction is wanting, it lies at the discretion of the judge to define the punishments. *Lycurgus, Against Leocrates* [9]: 'The punishment for such crimes was omitted, not by the negligence of

¹ [For *inserunt* read *inferunt*.—Tr.]

those who made the laws at that time, but because such things did not happen in those days.' It is in this way that we are to understand how there is place for punishment 'antecedent to a penal law', and on the same grounds is to be explained the statement of Cicero, *Against Verres*, Bk. I [II. xlii]: 'Nor in any law is time past ever implicated in blame, except in cases which are of their own nature wicked and nefarious, so that, even if there were no law, they would be strenuously avoided.' (Y.)

But although in such states the governors have power to inflict punishment upon malefactors, not each and every transgressor should be punished on that score, for the course to be taken will depend upon the connexion between the ends for which punishment is established, and punishment itself. Therefore, if in a certain case those ends are in moral estimation not necessary, as in case it does not appear wise to publish a certain crime, or if opposing ends come¹ into consideration, which are no less useful and necessary, as in case the same or a greater advantage can be gained by waiving the punishment, or, finally, if the ends proposed for penalties can be reached more conveniently by another course, it is obvious enough that there is nothing which precisely obligates their imposition in a human court. See *Decretum*, II. xxiii. 3. 18, 24 [II. xxiii. 4. 18 and 24].

An example of the first case is a sin which is known only to a very few, and public notice of which is therefore not necessary or even harmful. For many persons refrain from a sin more out of ignorance of vices than love of virtue, and by the punishment of such a crime, which was before entirely unknown to them, they are not so much deterred from it, as led by idle curiosity to commit it themselves, and to incline to what is forbidden. Here belongs the reason advanced by Solon for not drawing up a law on parricide, namely, lest he should appear not so much to be forbidding it as to be keeping it before the mind. Apuleius, *Metamorphoses*, Bk. X [iii]: 'What nobody knows, almost² doesn't happen.' Add Seneca, *On Clemency*, Bk. I, chap. xxiii. Busbecq, *Letters*, iii, writes: 'The Turks do not delve into secret misdemeanours, lest they open the way to calumny, but punish severely open and discovered crimes.' This is not very different from the advice given Augustus by Maecenas on the exaction of punishments. Dio Cassius, Bk. LII.

An example of the second case can be found in him who advances as an adequate offset to his present guilt, his own merits or those of his parents or ancestors. For sometimes it may be of as much or more advantage to a commonwealth to reward a certain kind of noble deed, than to punish a bad one, and not only is an injury wiped out by a supervening benefit, but also by one that has preceded it. Procopius, *War of the Vandals*, Bk. II [xvi. 19]: 'While a wrong which has once been

¹ [For *occurrant* read *occurrent*.—Tr.]

² [For *pene* read *paene*.—Tr.]

committed can never be undone in all time, still, when it has been corrected by better deeds on the part of those who committed it, it receives the fitting reward of silence and generally comes to be forgotten.' (D.)

An example of the third case is to be seen in him who is led by good advice to reform, or satisfies the injured party by an apology and a promise to refrain from such things in the future, so that a punishment is no longer required for these ends and the wrong will not do harm as an example. Seneca, *On Anger*, Bk. I, chap. xvi [I. xix]:

812 The wise man often lets a man go after detecting his crime, if his penitence for what he has done gives good hope for the future, if he perceives that the man's wickedness is not deeply rooted in his mind, but is only, as the saying is, skin deep. He will grant impunity in cases where it will hurt neither the receiver nor the giver. (S.)

From all this, as we may note in passing, it appears how far a crime may be atoned for by settlement with the accuser or the injured party, for they can regularly remit what is to their private interest, but their action may not prejudice the interests of the commonwealth. And so the agreements of individuals can remove the second end of punishments, but not the third. Tacitus, *Annals*, Bk. III [lxx]: 'Forbearing as the Emperor might be in regard to his own private wrongs, he should not be indulgent to an offence committed against the State.' (R.) To this case also you may refer the so-called follies of youth, which just men readily pardon when the heat of that age is past and there is a return to virtue. Juvenal, *Satires*, viii [166]: 'Let some of your misdoings be cut off with your first beard.' (R.) Add Aristotle, *Rhetoric*, Bk. II, chap. iii, at the beginning. Here also belongs the remark of Arrian, *Anabasis of Alexander*, Bk. VII [xxix]:

When a man has been done an injury, he does not take it so hard if his injurer acknowledges that he was in the wrong; and a man has good reason to hope that he will not be injured any further, if the one who wronged him plainly shows that he regrets his deed.

And in such cases it is considered an act of clemency to incline to pardon rather than to punishment. For since every punishment, and especially one of considerable severity, has something in it, which, considered in itself, does not appear repugnant to justice, and yet opposes the charity which results from the common kinship of all men, therefore reason readily suffers a penalty to be superseded. Plutarch, *Roman Questions*, lxxxii:

Why are the rods of the magistrates carried tied in bundles with the axes fastened to them? Does this hint that the wrath of the magistrate ought not to be ready and unbound? Or is it because the hindrance and delay caused in the course of his anger by the leisurely unfastening of the rods often causes him to change his mind about the punishment? (Juvenal, *Satires*, vi. [220]: No delay can be too long when a man's life is at stake. (R.)) As some badness is curable, some incurable, the rods correct that which is capable of amendment, while the axes cut off the incorrigible. (R.)

For sometimes a higher and juster charity demands punishment without gainsaying, as it were, in order that the pardoning of one may not cast the burden of other evils upon many. Julian, *Misopogon* [p. 371 B]: 'Clemency towards rascals and thieves increases and fosters wickedness among mankind.' (W.*) Appian of Alexandria, *Mithridatic War*, xvi. 112]: 'Baseness, if shown mercy, is ever ungrateful.' And for that reason pardon should not be granted, save to such as repent of their wrong-doing. Gunther, *Ligurinus*, Bk. I [478 ff.]: 'Long-sufferance in a king is often more harmful than severity: The former injures but a few, the latter incites all, in that they hope their crimes will go unpunished.' Sadi, *A Persian Rose Garden*, chap. viii: 'To forgive is praiseworthy and virtuous, but it is folly to bind up the wound of him who is an enemy to mankind. Does not he know who takes pity upon a serpent that he does an injury to all mankind?' King James, in his *Donum regium*, Bk. II, considers the following to be crimes which should on no account be pardoned: 'Sorcery, robbery, incest, sodomy, poisoning, counterfeiting, oppression or public violence.' Here belongs the statement of Lepidus, in Tacitus, *Annals*, Bk. III [1], who felt that some leniency should be shown the foolish poet because 'his life will be no danger to the State; his death will teach no lesson'. (R.) In cases of this kind the Stoics used to say that a wise man 'spares' but does not 'forgive'. As though we cannot join with mankind in calling that 'forgiving' which they call 'sparing', or as if it were not unworthy of a wise man to quibble over terms when the fact is agreed upon!

17. But after a penal law has been passed it seems a matter of greater difficulty to have a criminal freed from punishment; in other words, it is easier to find place for pardon when punishment is arbitrary, than when it is expressly defined by laws. And this not so much because a legislator is expected to act in conformity with his own laws, as 813 because the authority of laws is cheapened unless the execution of them is neglected only for the most urgent reasons, and because a magistrate seems of his own accord to invite others to sin, when he offers as great or greater hope of pardon than fear of punishment. Arnobius, Bk. VII [viii], remarks: 'The number of sinners increases, when there is some chance to redeem one's sin; and people run readily into wrong-doing when the favours of those who stand ready to pardon are for sale.' Therefore, although the force of all human laws depends upon the will of men, not only for its origin but also for its duration, they should, nevertheless, not be annulled or changed save for very urgent cause, for this involves a serious restriction upon the rules of government. Nay, not to prosecute without good cause a law still in force, in the case of certain persons, appears a more serious thing than completely to abrogate it, since the former course gives rise to the sharpest

complaints that those who deserved equal treatment are not accorded it. Nevertheless, as a supreme sovereign is able to abrogate a complete positive law under just cause, so he can remove its effect in a certain person or case, although it remain in force in every other respect. I say this can be done by the 'supreme sovereign', for petty judges may well be kept in mind of the statement of Lysias, *Orations*, ii, *Against Alcibiades* [9]: 'If any one of you hold the punishment to be heavy or the law too severe, let him bear in mind that you have come here not to frame a law, but to pass judgement in accordance with laws already enacted.' Themistius, *Orations*, v: 'One kind of praise and virtue belongs to a king, another to a judge: the latter must observe the laws, the former must sometimes even correct them and point out their severity and harshness, since he is the living and breathing law.' *Digest*, XL. ix. 12, § 1; XLIX. viii. 1, § 2.

Grotius, Bk. II, chap. xx, § 24, divides the grounds for freeing a man from punishment consequent to the enactment of a penal law, into intrinsic and extrinsic. It is for him an intrinsic case when the punishment would not, indeed, be unjust, since it has been formally enacted and announced, and yet it is harsh when applied to a particular case. Although, to my way of thinking, if the punishment set by the laws be in general too harsh, it would be better to correct the entire law than to pardon one or only a few, and leave the rest liable to an unjust punishment. Yet even if special circumstances arise, in the case of this or that man, which mitigate its atrocity as the law conceives it, judges are obligated by equity itself not to abrogate the law in its entirety but only to mitigate its severity. In this case there resides intrinsically, as it were, in the fact itself a cause not for pardon but for tempering the punishment. Therefore, it is more proper, in my opinion, to speak only of there being extrinsic causes for making a punishment less severe, for instance, when some former merit of the transgressor himself (see Diodorus Siculus, Bk. XV, chap. xi) or of his ancestors or kinsmen, or some other fact commends it, or, finally, when there is great hope that the sin itself will be atoned for by worthy deeds. Cicero, *On Invention*, Bk. II [xxxv]:

It will be desirable, therefore, for the man who entreats to be pardoned for what he admits that he has done, to enumerate whatever services of his he is able to perform, and, if possible, to show that they are greater than those offences which he has committed, so that it may appear that more good than evil has proceeded from him; and then to put forward also the services done by his ancestors, if there are any such; and also to show that he did what he did, not out of hatred, or out of cruelty, but either through folly, or owing to the instigation of some one, or for some other honourable or probable cause; and after that to promise and undertake that he has been taught by this error of his, and confirmed in his resolution also by the kindness of those who pardon him, to avoid all such conduct in the future. (Y.)

Thus many men have been pardoned for the fame and merits of

their ancestors, or at the intercession of influential personages. It is recorded in Xiphilinus, *Epitome of Dio's History*, that Hadrian mitigated the punishment of transgressors in proportion to the number of their children. See Livy, Bk. VIII, chap. xxxv. So some have been freed because they were the last of an illustrious family. When Phryne the courtesan was pleading for her life in Athens the orator Lysias¹ procured her acquittal by the stratagem of pulling off her upper garment, so that the judges could see her nude bosom. M. Antonius freed 814 M. Aquilius from the charges of bribery, of which he was plainly guilty, by making him stand at the conclusion of his plea in sight of all and tearing the tunic from his breast, so that the Roman people and judges might see the scars which he had received with his face to the enemy. Cicero, *Against Verres*, Bk. V [i]. Polydorus Virgilius, *Historia Anglica*, Bk. XXVI, writes that in early England no prisoners, 'who could read', were ever condemned to death for anything save treason, but were only condemned to life imprisonment.

Considerations like this will suffice all the more if the reason for the law ceases, at least in a particular sense, in the fact which is being scrutinized. The general reason why a law should be observed is the authority and will of the legislator as endowed with supreme sovereignty, which should be sufficient when no other reason appears; but the particular reason is some outstanding advantage accruing to the commonwealth, or the damage which the observance of the law avoids, an example of which is to be seen if we imagine in some countries the existence of sumptuary laws. In the case of these the general reason is the will of the legislator, while the particular is that citizens may not waste their patrimonies in useless and immoderate expenditures. Now although the universal reason of law is sufficient to uphold the authority of such, yet when the particular reason ceases, the result will be that the punishment can be remitted more easily and with less affront to the authority of the laws, if, for instance, the transgressor be so wealthy that he cannot be impoverished by such prodigality. Yet it is not safe under strict rulers to neglect a law or mandate merely because its particular reason ceases. Thus we find in Herodotus, Bk. III [xxxvi], that Cambyes was glad because the life of Croesus had been saved, but those who had failed to execute him at the command of the king were put to death. One is also greatly inclined to pardon, if a crime is committed through ignorance, although not such as is entirely blameless, but due to inattention, or if it be due to some mental weakness which can be overcome only with effort. To the former class can be referred the instance of Charondas, who through inadvertence came into the assembly carrying a sword, which was contrary to one of his own laws; although surely that was no reason for his falling upon it. Diodorus Siculus, Bk. XII, chap. xix.

¹ [But it was Hypereides.—Tr.]

A similar account is given by the same author (Bk. XIII, chap. xxxiii) of Diocles of Syracuse, one of whose laws was: 'That, if any man came armed into the market, he should be put to death, without any exception of ignorance, or of any other circumstance of the fact whatsoever.' (B.*) Yet on the report of a raid by the enemy he set out for the forum¹ armed with his sword, and when he heard that the forum was in a tumult he hurried thither still carrying his sword. But upon being advised by a friend of what he was doing he slew himself. And yet he had himself eliminated the consideration of pity, because in his law he had made no exception for inadvertence or similar circumstances. Nor is what has been said overturned by the tedious arguments set forth by Antonius Matthaeus, *De Criminibus*, XIX. v, on *Digest* XLVIII.

In conclusion we should add that, as otherwise in a human court the advantage of the state sets the measure of punishment, so it also often enjoins the indulgence of pardon to delinquents because of their great number. For although usually it is no excuse for a crime to claim that others are guilty of the same (see Isocrates, *Busiris*, [45], towards the end), it is still the part of prudent governors to see to it that the justice whose end is the preservation of human society, should not² be the cause of the overthrow of a state. Lucan, Bk. II [141 ff., 198 ff.]:

And while he amputated the limbs now too corrupt, the healing art exceeded its limits, and the hand followed too far where the malady led it. The guilty perished; but when now the guilty alone could possibly be surviving. (*Ibid.*): So many youths at the same instant to fall by a hostile death, full oft has famine, the rage too of the ocean, and sudden earthquake caused, or pestilence of climate and locality, or slaughter in warfare, vengeance it never was that did so. (R.)

Claudian, *The Gothic War* [120 ff.]:

The Physician's skill deals more carefully with grave diseases and ulcers that are near the heart; here he is more sparing of the knife for fear lest the blade, driven too deep, 815 should slip and sever beyond healing some vital organ. (Y.)

Seneca, *On Anger*, Bk. II, chap. x: 'Where a whole army deserts, it must needs be pardoned.' (S.)

Therefore, that prince deserves our praise who, as described by Ovid, *From the Pontus*, Bk. I, el. ii [125], 'controls many things by the fear of punishment, few by punishment itself.' (W.) So also necessity often leads us either to modify the excessive rigour of some laws, or to allow them to lapse. In Tacitus, *Annals*, Bk. III [xxv, xxviii], mention is made of

the relaxation of the Papia-Poppaeian Law; (and for the following reason): The multitude of persons exposed to prosecution was continually increasing, not a house but was at the mercy of the interpretations of informers. (And the added reason): The inquisitors did

¹ [So the text, obviously in error. The original has at this point 'ἐπὶ τῆς χώρας, for the country'. No doubt Pufendorf wrote, or intended to write, *foras*, 'out of the city'.—Tr.]

² [For *ne-quae* read *ne quae*.—Tr.]

not stop there; the capital, Italy, and Roman citizens all over the world, fell into their clutches; ruin was brought into many households, and terror hung over every head. (R.*)

In the same author, *Annals*, Bk. IV [III. liii and liv], the letter of Tiberius is worthy of notice, where he holds it wiser 'to overlook ailments of long standing, come to a head through time, than, in the attempt to correct them, to disclose only such crimes as they were not strong enough to correct'. Since it is better for them 'to seek a remedy within themselves', and to wait until 'we senators may be turned to better things by shame, the poor by necessity, the wealthy by satiety'. (R.*) All of which means that man was not made for punishment, but punishment for man. Therefore, if an act of punishment by those in whom the right lies to require it, would be followed by their ruin, they are under no more obligation to inflict it than they are to take their own lives. If a pilot had committed a crime on board ship, and there were no one else to run it, the man who would require that he be punished would imperil all the passengers. A magistrate must pass over many misdeeds, the punishment of which would lead to the ruin of the commonwealth, and when the men guilty of them are necessary to the preservation of our state, although a magistrate may never make any direct agreement about the permission of sins, or turn such to the public gain. See 2 *Peter*, ii. 15. Under this head may fall the case, that, in Italy bandits are sometimes promised immunity if they bring in the head of another bandit, although that custom is censured by Henri Estienne, *Apology for Herodotus*, chap. xviii, who says that such a principle could better meet the approval of a Plato or an Aristotle than of a Christian. The reason for this was that such villains might become suspicious of one another, and so no longer be able to form into bands which cause serious troubles to the commonwealth. The contrary opinion is expressed by Thomas More, *Utopia*, Bk. II.

18. Our next task is to discuss the rating of punishments, that is, how great punishments may properly be fixed for each crime. On this question we should observe, in addition to what we have already said in Bk. I, chap. vii, 'On the Quantity of Actions', that in a human court crimes should be weighed primarily by their object, by the amount of damage which they cause to the commonwealth, and by the purpose and evil intent of the transgressor, which last are inferred by means of various conjectures.

Now the more noble and valuable the object of the action which has been violated, the more grave and serious is held to be the action. As among such objects the most Good and Great God takes far the first place in nobility, so an action which tends directly to irreverence toward Him is properly deserving of censure before all others; and as His worship, which consists chiefly of an attitude of heart, should govern every act of our lives, so, in accordance with His own expressed will, actions which

are concerned with the external observance of His worship yield to such as render some outstanding advantage to men or avert serious damage, when delay in performing them is fraught with peril. See *Luke*, xiv. 5.

The next degree from these actions is held by such as concern the entire society of men, followed by such as disturb the public order of a state. After them come crimes which concern individual men, among which in a civil court first place is accorded to life, which is the foundation of all temporal possessions, then the non-vital members without the use of which life itself is but a sorry thing at best, and which are valued in accordance with the nobility of their service. Add Isocrates, *Against Lochites*. Then follow those crimes which disturb or disgrace the families of citizens, the foundation of whose honour is marriage, 816 although Philo Judaeus, in two of his works, *On the Ten Commandments* and *On Special Laws*, places the commandment about adultery before that about murder. Next place is given to such as destroy or deny other desirable things which serve the necessities or conveniences of life, and this either directly or indirectly, by causing the damage in deliberate malice. Last of all come such as destroy civil fame or reputation.

Regarding these crimes considered separately, first place is held by completed crimes and last by such as have advanced to certain acts but not to their consummation, where the degree of their heinousness is measured by the length to which they have gone. In this connexion we should observe that the proposal and desire to perpetrate some villainy naturally cannot in any way be regarded as being so serious as the completed act, since evil takes on a far more horrid aspect to the mind when the step is taken to its actual performance, and since it requires a more hardened heart to face the consummation of an evil deed than to propose and consider it at a distance. Therefore, when it is sometimes said that the will is as good as the deed, the statement is to be taken of that will which is joined with the final act of an undertaking, so that there takes place between such a resolution and the consummation of the villainy no new operation of the will, even though the end in view may not be attained, as, for instance, when a man for all his aiming has missed his victim. Thomas More, *Utopia*, Bk. II [chapter 'On their Marriages']:

He that tempts a married woman to adultery is no less severely punished than he who commits it; for they believe that a deliberate design to commit a crime is equal to the fact itself; since its not taking effect does not make the person that miscarried in his attempt at all the less guilty.

But most evils are rated higher or lower in accordance with the disparity of the subjects against which they are directed, as to their status, degree of fortune, age, time, or necessities, or any special affection whereby they incline to some peculiar good, or are averse to a certain form of evil. Nor is consideration given only to such evils as

follow directly and immediately upon an action, but also to such as in all probability would follow upon it, as in the burning of a building or the breaking of a levee the misery and death of many people are also to be considered. Grotius, Bk. II, chap. xx, § 30. And so the Chinese make it a capital offence for one to have started a fire even by accident.

19. In judging of the resoluteness or weakness of the *προαίρεσις* [moral purpose or will] consideration is regularly given first of all to the causes which have led men to sin. Scarcely any man is evil for nothing; and if not, when he finds pleasure in vice for its own sake, or even sins from mere perverseness, or because, to use the words of Calpurnius Flaccus, *Declamations*, ii, 'The reason for his sin is to commit an incredible sin', he reaches the lowest level of human depravity. Hence it is, as Cicero, *On Laws*, Bk. I [xiv], says, that 'no villain was ever so audaciously impudent, but what he either denied that the action in question had been committed by him, or pretended some cause or other for his just¹ indignation, or sought a defence of his deed in some right of nature'. (Y.) Most mortals are led to sin by their passions, of which some violently impel the mind to avoid a present or a threatening evil, and these are most effective in excusing or extenuating a sin. Therefore, whatever deeds are undertaken by reason of death, imprisonment, excessive grief, or extreme want, usually appear to offer every ground for excuse. Thus a wise Hebrew concludes that a thief who is driven to the deed by want is less base than an adulterer. So also a robbery to satisfy hunger will be accounted less heinous than one to satisfy excessive avarice, just as it is a lesser evil to commit perjury out of fear of death, than to deny a sum of money left with you so as to claim it for your own. The writer of the treatise *Ad Herennium*, Bk. II [xix], says: 'It is a greater crime to debauch a free-born woman than it is to commit sacrilege; for the one act is committed at the instigation 817 of actual need, the other in ungovernable insolence.' Add Valerius Maximus, Bk. VIII, chap. i, towards the end. A pimp, who for a base livelihood supplies the objects for the lusts of others, merits a severer punishment than he whose own lust goads him on to gratify his passions. Thus the judgement of Marcus Antoninus [Aurelius], Bk. II, § 10, is justified:

[. . .] The offences which are due to lust are more heinous than those which are due to anger. For the man who is moved with anger seems to turn his back upon reason with some pain, and unconscious compunction; but he that does wrong from lust, being mastered by pleasure, seems in some sort to be more incontinent and more unmanly in his wrongdoing. (H.)

Libanius, *Declamations*, xxiii [viii. 22]: 'Anger incites and constrains more violently than love. For the latter allows time for con-

¹ [For *justs* read *justi*.—Tr.]

sideration and reflection, but anger creates turmoil in the heart, well nigh drives one to insanity, and rages until it has satisfied itself.'

The other passions draw one toward some real or imaginary good. Of the things which are really good it is opposed to the very nature of some to lead to sin, as is the case with the virtues and actions that proceed from them. Some are good in themselves, and yet furnish the occasion for sins, according to the heart of him who is their subject, while of these some give delight or pleasure, and others, again, are the cause of securing delights and are also called useful. Whatever transgression is traceable to these passions, all else being equal, is considered less heinous, the more the good sought is agreeable to nature, or the greater the difficulty for her to go without it. But that is an imaginary good the price of which is set by nothing but the folly and vanity of men, and their vices. Under this category fall vainglory, or a craving merely to excel all others, in so far as it is not¹ based upon virtue, and has no relation to anything of substantial value, as well as revenge, when it has no other purpose than to make the offending party suffer. The farther such an imaginary good departs from nature, and the more easily it can be forsworn, the baser are judged to be the crimes committed because of it. But it is also certain that all crimes which are committed out of error are far more heinous² than those committed out of clear knowledge, and among errors that into which a man is led from a stubborn purpose to gratify his own principle and ideas, is more heinous than what he has imbibed³ from public teachers. Compare Grotius, Bk. II, chap. xx, § 29. It has also been well observed by Hobbes, *Leviathan*, chap. xxvii, that if a transgression of the laws arose because a man trusted to his strength, or friends, or wealth, which a malefactor relies upon in resisting public officials, it is a greater crime than if it had arisen in the hope of escaping detection, or seeking refuge in flight; and if, as Juvenal, *Satires*, vi [97], says, such guilty men 'if they be doing a bold, bad thing, fail not in their courage'. (R.) For the former implies a contempt for the laws, while the latter does not. Add Aristotle, *Rhetoric*⁴, Bk. I, chaps. xii and xiv. *Idem*, *Rhetoric*, Bk. II, chap. iii:

Those who contradict us and deny their offence we punish all the more, but we cease to be incensed against those who agree that they deserved their punishment. The reason is that it is shameless to deny what is obvious, and those who are shameless toward us slight us and show contempt for us. (R.)

Seneca, *On Anger*, Bk. I, chap. xvi [I. xix]:

In some cases the wise man will punish great crimes more leniently than lesser ones, if the former were the result of momentary impulse, not of cruelty, while the latter were

¹ [Supplying the negative, necessary for the sense, which was erroneously omitted.—Tr.]

² [So also the 1759 edition of Barbeyrac's translation, although an early hand, in the copy of the University of Illinois, has changed 'plus' to 'moins' (and yet such a change is not recorded in the *errata*), while Kennet (1710 edition) exactly reverses the statement.—Tr.]

³ [For *houstus* read *haustus*.—Tr.]

⁴ [For *Rbetoricor.* read *Rhetoricor.*—Tr.]

instinct with secret, underhand, long-practised craft. The same fault, committed by two different men, will not be visited by him with the same penalty, if the one was guilty of it through carelessness, the other with a premeditated intention of doing mischief. (S.)

20. But it also tends to show the great force of moral purposes or intentions, if to the common cause which should restrain all men from sin, there is added a special one founded in the person of the criminal, or of the victim, or upon some other circumstance. And so Juvenal, *Satires*, viii [140-1]: 'The greater the sinner's name, the more signal the guiltiness of the sin.' (R.) Dio Chrysostom, *Orations*, i [43]: 'The transgression of a ruler is greater and more conspicuous.' (M.) The words of Pliny, *Natural History*, Bk. V, chap. i, can also be applied here: 'Never is implicit credence more readily given, than when a falsehood is supported by the authority of some personage of high consideration.' (B. & R.) Thus the sin of a priest, when known to the world, is regarded as more heinous than the same sin in another, since the former should furnish others an example of a pious life. Libanius, *Declamations*, xxix [1, III]: 'If a man scrupulously avoids himself what he sees fit to lead others to do, he refutes the counsel of his words by that of his deeds, exhorting by the weaker argument and dissuading by the stronger.' Cicero, *On Laws*, Bk. III [xiv]:

For it is not so great an evil that the chiefs of the city should do wrong, though that must be allowed to be very considerable of itself, as the fact that there are a great many imitators of those chiefs. [. . .] On which account, great men of a vicious life are doubly pernicious to the state, as being not only guilty of immoral practices themselves, but likewise of spreading them far and wide among their fellow citizens. Nor are they mischievous to it inasmuch as they cherish vices themselves, but also because they corrupt others; and they do more harm by their example than by the crimes which they commit. (Y.)

Seneca, *Hercules Raging* [745-6]: 'The sins of you who rule with heavier judgement shall be judged.' (M.*) Tacitus, *Annals*, Bk. III [lxx]: 'The infamy of Capito was all the more notable, that being himself a jurist, skilled in all law human and divine, he had brought disgrace upon his own personal accomplishments as well as on his high position in the State.' (R.) Cicero, *Tusculan Disputations*, Bk. II [iv]:

For just as if one who professed to teach grammar, should speak with impropriety, or a master of music sing out of tune, such conduct has the worse appearance in these men, because they blunder in the very particular with which they profess that they are well acquainted: so a philosopher, who errs in the conduct of his life, is the more infamous, because he is erring in the very thing which he pretends to teach, and whilst he lays down rules to regulate life by, is irregular in his own life. (Y.)

Quintilian, *Declamations*, iii [15]: 'For this is the case of superiors, what they do seems a command, and the greater the author in a bad matter, the more pernicious his example.' (W.) In Peru, under the rule of the Incas, a magistrate who committed a crime was punished more severely than a private citizen, on the basis that he is especially appointed to render justice to others, and that he was given the office

because he was supposed to excel others in probity. Garcilaso¹ de la Vega, *Comentarios Reales*, Bk. II, chap. xiv. So also we are more hurt by the injury of a friend than by that of an enemy. Petronius [107]: 'A person who injures a stranger is called a robber, but a man who hurts his friends is practically a parricide.' (H.) Although among the Celts a man who killed a stranger was punished more severely than he who slew a fellow citizen, for the former was put to death, while the latter was only exiled (Nicolaus of Damascus, *De Moribus Gentium* [fr. 103 e Jakoby]). On the other hand a kindness at the hands of an enemy is considered something greater than one which comes from a friend, although it is the opinion of Terence, *Brothers*, Act II, sc. iii [254 f.]: 'To get a good thing from any one, when you want it, may give you joy, but the only real delight is when your benefactor is the right man.' (S.) In the same way it is more humiliating to be the butt of a common man's jest than of one's equal or superior (see *Digest*, XLVII. x. 17, § 3), of one's own children and servants than of another's. See 2 *Samuel*, xvi. 11.

There are also sins which fall under special censure, and are regarded as peculiarly base, because they run counter to a special duty which was owed some particular person. Such are a lack of respect for parents and of kindness to kinsmen, and ingratitude to benefactors, all of which acts are far more heinous under such circumstances than if they had been directed towards other persons. A passage of Lysias, *Orations*, IV[vi. 17], applies on this point: 'You should, O Athenians, be more severe upon citizens when they are guilty of sacrilege, than upon foreigners; for such a sin on the part of the latter has a kind of foreign aspect, while one on the part of the former is native and touches the heart of the state.' Again, the place or time at which a deed has been committed is a matter of no little consequence. Thus the same sin, when committed in a public place and before witnesses, is more heinous than if a person makes an effort to conceal it, both because what is concealed is less
 819 harmful, at least by way of example, and because that man is accounted a more hardened criminal who parades his sin and has no respect for the presence and sight of honourable men. Add Aristotle, *Problems*, Bk. XXIX, chap. xiv. Thus² it is a viler thing to be guilty of misconduct in a temple than in a tavern, and to be beaten at a session of court than in the privacy of one's own house. Again, a man who gets drunk on a week day, other things being equal, has done something less sinful than one who acts intemperately on a day especially dedicated to prayer. See *Digest*, XLVII. x. 7, § 8; XLVII. x. 9, § 1; XLVII. x. 17, § 3. Thus Cicero, *Philippics*, II [xxv], very greatly magnifies the drunkenness of Mark Antony, which led him to vomit while seated on the judge's bench. Quintilian, *Declamations*, cclii:

[Just as a citizen when injured will bring suit—if he be a magistrate, the charge will be

¹ [For *Gorçilassus* read *Garcilassus*.—Tr.]

² [For *Si* read *Sic*.—Tr.]

lese-majesté, if an ambassador, the injury will be avenged in war: and the same sum of money taken from a private citizen will be theft, but from a shrine or temple, sacrilege; so the ravisher will pay ten thousand sesterces to the injured party¹ on a charge of simple rape, but a person will not be let off so easily if he has committed rape in the public square, if he has raped a virgin who was a candidate for a priesthood, nay, so as not to be ungrateful toward the benefaction of the people, who, as far as they were concerned, had already been elected to that priesthood. (W.)

Idem, Declamations, cclxiv [cclxv]:

Violence anywhere else may deserve only a moderate reproof. But in a temple, where we are chary about even speaking, where we compose our spirits, where we keep even our mind quiet, to attack another person as though one were out in a lonely spot, as though one were in some secret place, this cannot be tolerated.

Add *Idem, Institutes of Oratory*, Bk. VI, chap. i. Demosthenes, *Against Meidias* [xxi. 74]:

I was insulted by an enemy, sober and in the morning, who did it purposely and not under the excitement of wine, in the presence of many persons both aliens and citizens, and that too in a temple, and where, being choir-master, I was compelled to go. (K.)

Add *Digest*, XLVIII. xix. 16; XLVIII. xix. 28, § 8.

Finally, the method and instruments used in the performance of a crime seem to aggravate or to mitigate it by reason of the fact that they form the basis for a conclusion about the degree of a man's purpose². Consequently, a robbery is considered to be more heinous when it is accomplished by breaking or cutting through the walls, or when the locks are picked by instruments especially designed for the purpose, than when the thief enters the house through open doors.

21. It is also of no little importance, in the weighing of crimes, to determine how far a person was able to avoid committing some sin. For some are of keener wit than others to grasp the reasons for which they should refrain from transgressions. One man also is swept with greater violence into a certain kind of sin than are others, which is due to his physical constitution or temperament, age, sex, education, and other considerations. See *Digest*, XLVIII. xiii. 6. For it is easy to observe that children and women and men who are endowed by nature with little wit, or are but poorly educated, show little understanding of the difference between just and unjust, lawful and unlawful, and have slight ability to judge their respective claims. Procopius, *War of the Vandals*, Bk. II [iv. 30]: 'And for an Erulian not to give himself over to treachery and drunkenness, but to strive after uprightness, is no easy matter and merits abundant praise.'³ (D.) Those whom choler controls are inclined to hasty anger, others whose blood runs hot, to venery; old age turns desires one way, youth another. Gramondus, *Historiarum Galliae*, 13: 'Young persons rarely show any wisdom, since it is their special privilege

¹ [For *qui* read *quae*.—Tr.]

³ [Only a paraphrase of the original.—Tr.]

² [For *aere* read *haere*.—Tr.]

to be indulged in their sins.' Libanius, *Declamations*, xxi [x. 16 and 17]: 'The following are the accompaniments of youth: to pass by duties, to be ignorant of something or other that is becoming.' And again: 'Wherever there dwells the race of man, there also their age is offered as an excuse for the young.' So also the nearer the threatening evil seems to be, the more violent the fear which it elicits, and the greater
 820 difficulty a man finds in resisting it. A fresh passion stirs the mind more violently than one which has been softened or appeased by the passage of time, and a fresh grief which will scarcely give ear to reason, than such as has run its course and been poured out, and is already broken by a period of relief. And the general judgement is that it is worse for a man to undertake a villainy when his mind is composed, than when it is disturbed by passions. Cicero, *On Duties*, Bk. I [viii]: '[. . .] Those things which proceed from a short, sudden fit, are of slighter moment than those which are inflicted by forethought and preparation.' (E.) Philo Judaeus, *On Special Laws* [III. xvii], says: 'That is but half a crime, when the mind was not for some long time before occupied by the pollution.' (Y.*) Plato, *Laws*, Bk. IX [p. 867 B]: 'We make the penalties heavier for those who commit homicide with angry premeditation, and lighter for those who do not premeditate, but smite upon the instant.' (J.) Aristotle, *Nicomachean Ethics*, Bk. VII, chap. viii:

But everybody will agree that a person is worse, if he does something disgraceful without desire, or without any strong desire, than if he does it at a time when his desire is violent, and worse, if he deals a blow in cold blood than when he is angry; for what, it may be said, would such a person do if he were in a passion? (W.)

Although the law of Pittacus on drunkenness, preserved in Aristotle, *Politics*, Bk. II, chap. x [II. xii], and also mentioned in Plutarch, *The Banquet of the Seven Wise Men* [p. 155 F], was just the opposite: 'If a drunken man strike another, he shall be more heavily punished than if he were sober; he looked not to the excuse¹ which might be offered for the drunkard, but only to expediency, for drunken more often than sober people commit acts of violence.' (J.) Of the sins caused by the passions, those which come from passion aroused at the sight of evil are less odious than such as follow upon a craving for pleasure, especially such as is superfluous. For the latter stirs the mind more gently and can be more easily put off, or else satisfied quite harmlessly in another way. Aristotle, *Nicomachean Ethics*, Bk. III, chap. xii: 'It is more difficult to endure pains than to abstain from pleasures.' (W.) *Ibid.*, chap. xv: 'While pain distracts and destroys the nature of one who suffers it, pleasure has no such effect, but rather leaves the will free. Hence licentiousness deserves more severe reproach. [. . .]' (W.) *Idem*, Bk. VII, chap. vii: 'The incontinence of angry passion is not so

¹ [For *adveniam* read *ad veniam*.—Tr.]

disgraceful as the incontinence of the desires.' (W.) *Idem, Magna Moralia*, Bk. II, chap. vi [p. 1202 b]:

The impulse to anger [. . .] is not greatly to be blamed, but the impulse to pleasure is blameworthy. [. . .] For incontinence due to anger is a pain (for no one feels anger without being pained), but that which is due to appetite is attended with pleasure, for which reason it is more blameworthy. For incontinence due to pleasure seems to involve wantonness. (R.)

A similar passage is in Marcus Antoninus [Aurelius], Bk. II, § 19. Add Aristotle, *Problems*, Bk. XXIX, chap. xvi.

Lastly, if a man's relatives have moved him to commit a sin, that fact is of no little influence in mitigating the punishment. See *Digest*, XLVII. xvi. 2. Add Grotius, Bk. II, chap. xx, § 31.

22. Finally, it is customary also to consider whether a man was the first to commit some crime, or was led astray by the example of others; and whether he has done it only once or repeatedly. For when any citizen is the first in a state to commit a crime that may serve as an example, and, as it were, teaches it to others, he is guilty of a greater crime than is one whose natural modesty has been undone by contact with frequent malefactors. Velleius Paterculus, Bk. II, chap. iii: 'For examples do not stop where they begin; but if allowed to spread through a channel ever so narrow, make way for themselves to any extent.' (W.) (Yet compare Gellius, Bk. X, chap. xix; Polybius, *Selections on Embassies*, XCIII, chap. v [XXXII. v].)

Likewise, a criminal will be held to have committed a greater offence if what he does is consistently punished, than if there are many instances of impunity; because a greater contempt for the sovereign and the laws is visible in the former case than in the latter. But the more or less frequent repetition of the same kind of crime does not make it worse or better in itself, except in so far as it serves to show that it proceeds from an established habit. See *Digest*, XLVIII. xix. 28, § 3; Ant. Matthaeus, *De Criminibus*, I. i. 9, on *Digest* XLVII and XLVIII. iv. 28, on *Digest* XLVIII. And since the matter of habit is of the greatest 821 consequence in connexion with moral actions (since it is understood that actions which result from it are performed almost with full premeditation, which is the reason why it is commonly said that bad habits are worse than bad acts), it is sufficiently clear why a good act, which a man had performed many times before is commonly considered to be more praiseworthy than one which he performs for the first time, or only at rare intervals; and, on the other hand, why an evil one, repeated with some frequency, is held to be worse than one which is performed by the same man but once or twice. Here you may refer the law of the Emperor Julian on liars, as given by Libanius, *Legatio ad Julianum* [xv. 54]:

If one of those who attend upon me lies once, I bear with him; if he presumes to do

so a second time, I bear it also; even if he be caught in an untruth a third time, he still does not incur my displeasure. But if he would impose upon me a fourth time, he is forbidden my presence.

But the Peruvians under the rule of the Incas made every effort to see that the first crimes were punished, giving as their reason, that, in this way, a man could not sin a second or third time. For, they said, if the weeds are not destroyed at the beginning of spring, it is impossible that they fail to cause a bad¹ harvest, and where punishment is exacted only after repeated misdemeanours, individuals will scarcely be able to restrain themselves from taking vengeance into their own hands, which must necessarily disturb the public peace. Garcilaso de la Vega, *Comentarios Reales*, Bk. II, chap. xiv. Nor is it an objection that a good habit helps a good deed, and an evil one, on the other hand, makes it difficult to refrain from an evil one; for the labour involved in forming a good habit is a matter of cost, so that an action may not lightly be rated as of less value, even though its performance be accompanied with some pleasure to a good man. And we hate evil all the more, because so often the result of evil conduct is that a man can scarcely ever act any other way, and because shame is entirely lost by repeated sinning. Every man will now and then fail to recognize what life demands of him, but to err repeatedly in the same matters bespeaks an unbalanced mind. Add Thomas Browne, *Religio Medici*, Sec. 41 [42], who says very wisely: 'The same vice, committed at sixteen, is not the same, though it agrees in all other circumstances, at forty; [. . .] for, besides the constant and inexcusable habit of transgressing, the maturity of our judgement cuts off pretence unto excuse or pardon.' And all these circumstances are properly observed in imposing punishments. For it is easier to grant pardon, or to allow some leniency to a man who has committed some trifling crime for the first time, than to one who has struck over and over again upon the same rock. Lucian² [lxxxiv], *De Saltatione*: 'One fit of insanity is enough.' Sometimes also the pardon of former crimes is made to depend upon future reform as a condition, and when that does not appear, the punishment of the former crimes is demanded along with that of the present. See 2 *Kings*, i. 52; ii. 23. And this shows us in what sense the common saying is true: 'The estimate set on a past crime is never increased by any subsequent one.' [*Digest*, L. xvii. 138, § 1.]

In this connexion we should consider how far the custom of the Persians, of which Herodotus, Bk. I [xiii], tells, is just in the eyes of nature; namely, that a man's past life should be taken into consideration in judging a crime, and if the former abounded in good services, the latter might go unpunished.

Now that properly had no bearing upon the intrinsic estimate of

¹ [For *pravam* read *pravam*.—Tr.]

² [For *Luianus* read *Lucianus*.—Tr.]

a crime, nor do we feel that it ever was the custom in the worst offences, and in those where the premeditated evil intent of the malefactor was clearly apparent. The truth is, as Grotius, Bk. II, chap. xx, § 30, holds, that this principal was, or should have been, followed¹ in cases where men, otherwise of upright life, were suddenly caught off their guard by some enticement to sin, or where, in case the proof of the crime was not entirely clear, a man's past life gave some hint as to whether he would likely have done such a thing, since a man is not usually said to turn scoundrel over night. Yet there is the case in Herodotus, Bk. VII [xciv], namely, that of Sandoces, whom Darius had ordered to be crucified, because, while acting as one of the royal judges, he had been bribed into rendering unjust decisions; but when the king called to mind that he had to his credit more services rendered the royal house than sins against it, he had him taken down from the cross, and received him back into the circle of his friends. The same thought is found in Cicero, *For Sulla* [xxv]:

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In every case, O judges, which is of more serious importance than usual, we must judge a great deal as to what every one has wished, or intended, or done, not from the counts of the indictment, but from the habits of the person who is accused. (In other words, because) according to the opinion that is formed of a man's habits, do people conjecture what has or has not been done by him. (Y.)

Idem, *For Cluentius* [xxv], towards the end. And this was the reason, why, in the trials of the Romans, it was customary for the prosecution to attack the entire life of the accused, while the defence offered excuses for the same, or else defended a man's record by calling in witnesses to praise it. And in view of the well-known fact of the corruption of mankind, it is highly desirable that human judges should not hastily destroy a citizen in whom there may appear to be more good than evil fruit. And yet it should be carefully noted that the character and former life furnish a strong presumption for either side, when the crime is not clear. But when a man has fully cleared himself of a charge, he will do well in guiding himself by the advice of the author of the treatise *Ad Herennium*, Bk. II [iii]: 'That he is not speaking of his client's morals before the censors, but only of the crimes of his opponents before the judges.' On the other hand, when a man with a good record has changed the entire manner of his life, the laws have good reason to be incensed at him on two scores, both because he has sinned, and because he has changed from a good citizen into an evil one. Polybius, in *Excerpta Peiresciana*, Bk. VII [xii. 11]: 'For his purposes being now entirely reversed, it inevitably followed that men's opinions of him should be reversed also, as well as the success of his various undertakings.' (S.)

23. For although it is perfectly evident, from what has been said,

¹ [For *habere* read *habere*.—Tr.]

that one crime is more serious than another, and that in a human court of law the same penalty should never be meted out to all alike, it must still be confessed that both the precise quality and quantity of human punishments depend upon the definition of civil sovereignty, which is governed first of all by the advantage of each individual state. A case in point is the course followed by Anysis, king of Egypt, who in his reign put no one to death, but sentenced each man, in proportion to the magnitude of his offence, to bring a certain amount of earth to the city in which he resided, and in this way the cities were elevated enough to avoid all troubles from the inundation of the Nile. Herodotus, Bk. II [cxxxvii]; add Diodorus Siculus, Bk. I, chap. lxxv. And yet we are informed by Diodorus Siculus, Bk. I, chap. lx, that Actisanes, after the founding of Rhinocolura, deemed it best to remove such dregs of states into a place by themselves, where they could not infect others with their evil ways. Nor is it necessary for there always to be the same proportion between punishments as there is between the objects of the crime; rather every crime can have its own separate punishment fixed, as the advantage of the commonwealth demands, without considering whether an equal or even a less punishment is laid upon another crime, which in itself appears less or greater than the one in question. And so Plato, *Laws*, Bk. XII [p. 941 c D], gives his approval to such a law as this:

If a man steals anything belonging to the public, whether that which he steals be much or little, he shall have the same punishment. For he who steals a little steals with the same wish as he who steals much, but with less power.¹ He who takes up anything more than he has deposited is unjust in the highest degree; and therefore the law is not disposed to inflict a less penalty on the one than on the other, because his theft is less, but on the ground that the thief may possibly be in the one case still curable, and in the other case incurable. (J.)

It would follow from this that judges should so far observe an equality in imposing punishments that those who are guilty of equal offences should suffer equally, and that never without the most urgent cause should a crime in one man be forgiven in another, since such unequal dealing must give rise to the most serious disorders in a commonwealth, and punishment is entirely without effect when it is apparently meted out not for the public good but to please private interests. But such equality as Plato mentions should be understood only of those who have committed the same kind of crime, not different
 823 kinds, for time and again men impose a heavier penalty upon a crime that appears not serious in itself, and *vice versa*, all as the need of the commonwealth and the judgement of the legislator may dictate. Nor can a complaint of the defendant about this injustice amount to anything, since he was aware of it beforehand. Calpurnius Flaccus,

¹ [For *minorivi* read *minori vi*.—Tr.]

Declamations, v: 'When the penalty is threatened beforehand the fault is the victim's own.' For instance, although theft in itself is a far less heinous crime than murder, a thief has no cause for complaint if he suffers death along with a murderer, even if he has not committed a crime equal to his. And yet not a few offences, unequal in themselves, are punished alike by death, for the reason that men know no punishment more severe than death (Lycurgus, *Oration against Leocrates* [§ 8]: 'The greatest and most extreme of all punishments is death.'), although sometimes it is reached by a short and easy road, and again only after long and cruel tortures. Ovid, *Heroides*, Ep. x [82]: 'Death holds less of dole than the delay of death.' (S.) Still some are to be found who regard a sudden death as milder punishment than a life of misery. See the speech of Caesar in Sallust, *Conspiracy of Catiline* [li]. In Suetonius, *Tiberius*, chap. lxi: 'When a man begged for a speedy death, he replied, "I have not yet become your friend".' (R.) Seneca, *Hercules Raging* [513]:

Forbid the wretch to die, the happy slay. (M.)

Idem, *Agamemnon* [995-6]:

AEG. An unskilled tyrant he who punishes by death.

EL. Is aught worse than death?

AEG. Yes, life, if thou longest to die. (M.)

Euripides, *Hippolytus* [1047]: 'For easiest for the wretch is swift death.' (W.) Nay, Charron, *De la Sagesse*, Bk. I, chap. xxxix, n. 11, classes among the foolish opinions of the common sort that of killing a man by way of revenge, for such an act, he says, only deprives the victim of all power of feeling, and leaves the slayer exposed to every evil, unless our security requires that an enemy of ours be not left alive. In Philostratus, Bk. I [xxxvii], Apollonius punished the eunuch who had lain with the king's concubine by giving him his life.

Yet sometimes the punishment of death is heightened by visiting with ignominy the man's body or memory (Aelian, *Varia Historia*, Bk. IV, chap. vii), which is occasionally inflicted some time after the person has passed from this world, and may again be rescinded. See Socrates, *Ecclesiastical History*, Bk. VII, chap. xlv. At times, also, the will of the legislator may have somewhat to do in determining punishment, not in so absolute a way but that it should always have respect to the need of the state, and yet so much so that the exact form of punishment may in fact depend upon it. Another consideration is that so atrocious is the character of some crimes that even the extreme penalty may be visited upon those who are found to be in any degree implicated in them. Add Ant. Matthaeus, *De Criminibus*, Prolegomena, i, § 5-6, and V. iii. 10 and XVIII. iv on *Digest* XLVIII; Ziegler on Grotius, *loc. cit.*, § 39; Valerius Maximus, Bk. VI, chap. i, § 8. *Digest*, XLVII.

xi. i, § 2; XLVIII. viii. 1, § 3; XLVIII. viii. 3, §§ 1, 2, 3; XLVIII. viii. 14. Philo Judaeus, *De Confusione Linguarum* [xxx]:

And even if any one, rising up as it were from ambush, were to try, but to be unable, to slay a man, still he is none the less liable to the punishment due to homicide, as the law which is enacted about such persons shows. 'For if,' says the law, 'any one attacks his neighbour, wishing to slay him by treachery, and escapes, thou shalt apprehend him, even at the altar, to put him to death.' (Y.)

The same thought appears also in his *On Special Laws* [xvi and xvii]. Tacitus, *Histories*, Bk. II [lxxvii]: 'For those who deliberate about revolting have revolted already.' (O.) Here belongs a sentence in Plutarch, *Caesar* [lxvii]: 'For those who inflict punishment do not exact a penalty for what was done, but for what men wished they had done.'¹ Quintilian, *Declamations*, ccclxxii: 'The law punishes the mind.' Lysias, *Orations against Simon* [42]:

We all know that the authors of our laws did not want a man banished for the reason that he may have broken another's head in a quarrel, but if one hurts another while attempting to kill him, for such a one they instituted severe penalties, holding that men should be punished for whatever they attempted with deliberate intention. For although
824 they had not attained their end, they had made every effort to do so.

Add Aelian, *Varia Historia*, Bk. XIV, chap. xxvii. The judges of the Areopagus, however, were too severe, who, according to Quintilian, *Institutes of Oratory*, Bk. V, chap. ix [13], 'condemned a boy to death for picking out the eyes of quails [. . .] because such an act was the indication of a cruel disposition, likely to do mischief to many if he should be allowed to reach maturity.' (W.) Seneca, *On Benefits*, Bk. V, chap. xiv 'He is a brigand even before he has dipped his hands in blood, because he carries² deadly weapons and has intentions of robbing and murdering. His wickedness consists and is shown in action, but does not begin thereby.' (S.*) Velleius Paterculus, Bk. II, chap. viii, observes on those who sentenced C. Cato for a trivial offence: 'They considered the inclination of the man to dishonesty rather than the magnitude of the offence, and estimated deeds, in general, by intention, regarding rather what had been done than to how great an extent.' (W.) Add *Code*, IX. viii. 4, at beginning, and Grotius in *Florum Sparsio* on this law.

In the crime of *laesa maiestas* [injury to the dignity of authority] and treason mere knowledge of the affair without assent, and failure to communicate it, merit punishment. An example of this is found in the case of Thuanus in Benjamin Priolo, *History of France*, Bk. I, chap. vi, and of David Berchin in Buchanan, *History of Scotland*, Bk. VIII; compare Diodorus Siculus, Bk. XI, chap. liv.

Yet so far as possible leniency may regularly be shown even in punishments, and that severity of Draco, which Solon corrected, was surely deserving of censure. See Plutarch, *Solon* [xvii]. A like severity was shown by the Peruvians, who punished practically every crime with

¹ [Pufendorf generalizes a specific statement.—Tr.]

² [For *am armatus* read *armatus*.—Tr.]

death, not giving heed so much to the crime as to the fact that it violated a command of the Incas, to whom they paid the same reverence as to God. Garcilaso de la Vega, *Comentarios Reales*, Bk. II, chaps. xii, xiii. And yet it is lawful to intensify punishments, if that course is urged by a livelier regard for the entire people of a state, whose security is to be guaranteed by the death of criminals. So, for instance, if a great danger threatens from the malefactor, unless he be suppressed at once. Here belongs a story given by Henri Estienne, *Apology for Herodotus*, chap. xvii, of a certain man in France, who threw the blame upon the king when the latter had denied him his petition for pardon for his seventh murder: He himself, he said, had committed only one murder; the rest should be charged to the king, since he would never have committed the others had not the king pardoned the first.

Sometimes also an example must be made of one offender so that the rest may be struck with terror¹, especially when the general incitements to sin are present, the chief of which are facility and habit, and can be restrained only by harsh measures. It was because of facility that the Hebrew law laid a heavier punishment on theft from a field than from a house. Compare *Exodus*, xxii. 1 with 7 and 9; *Digest*, XLVII. xviii. 2. Justin, Bk. II, chap. ii, says of the Scythians: "They considered no offence more serious than theft. For among a people which had no barns or defence for its flocks and herds, what could be safe, if theft were allowed?" Therefore, in the laws of some nations robbery by a native of the country is considered more heinous than by a foreigner, although the laws of Rome apparently took just the opposite stand. *Digest*, XLVIII. xix. 11, § 1; XLVII. ii. 17, 36, § 1; XLVII. ii. 52, 89. See Ant. Matthaeus, *De Criminibus*, I. iii. 2 and 3 on *Digest*, XLVII. Add Aristotle, *Problems*, chap. xxix, § 14, where he discusses the question why one who steals from the baths, or the palaestrae, or the market-place, or some similar spot is put to death, while one who steals from a private dwelling gets off by paying back twofold. See *Digest*, XLVII. xvii. 1, with the remarks on that law in Ant. Matthaeus, *De Criminibus*, VIII. i and ii on *Digest*, XLVII. Add also the comments made by Philo Judaeus, *On Special Laws*, to magnify the crime of sorcery. Here applies what is given by Curtius, Bk. IV, chap. vi [5 f.], on the custom of the Persians:

It is a moral habit of the Persians to keep with illustrious fidelity the secrets of the king; neither fear nor hope can extort a word tending to discovery; for the venerable institutes of that monarchy fortify silence by the penalty of death. The Persians punish intemperance of the tongue more severely than any other delinquency; nor can they esteem a man qualified for great employments who feels any difficulty in conforming to enjoined taciturnity, a duty which nature has rendered easy. (A.)

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And although an accustomed deed or some vice that has grown, as

¹ [For *tertor* read *terror*.—Tr.]

it were, into the public customs (for I have already spoken of the habit which individual men form by repeatedly sinning) detracts somewhat from guilt, it still demands in part the severity of punishment. Tacitus, *Annals*, Bk. III [liv]: 'When the mind has become corrupt and the breeder of corruption, its distempered and fevered condition can only be assuaged by remedies as potent as the passions which have enflamed it.' (R.) *Digest*, XLVIII. xix. 16, 10. Claudian, *Against Eutropius*, Bk. I [II. 11 f.]:

When the body is overwhelmed with long-standing disease 'tis all in vain that thou makest use of healing medicines. When an ulcer has penetrated to the marrow of the bones the touch of a hand is useless, steel and fire must save the place that the wound heal not on the surface, like any moment to re-open. The flame must penetrate to the quick to make a way for the humours to escape; in order that, once the veins are emptied of corrupted blood, the fountain-head of the evil may be dried up. Nay, even limbs are amputated to assure the healthy life of the rest of the body. (P.)

Therefore, Grotius, Bk. II, chap. xx, § 35, carefully notes that in trials a general habit of sinning has some effect in diminishing the heinousness of an offence, since judges¹ should always take into consideration the amount of guilt in the individual, which is unquestionably less when he has been carried along in the stream of those who commit such deeds. But when laws are to be passed, the result of a deep-rooted custom is that the penalty which aims to abolish it is made all the more severe, because laws look more at the advantage of a punishment as it affects everyone. Nevertheless, when a vice has become so deep-seated that the multitude of the offenders leaves no place to exact punishment, unless one is willing to weaken or overthrow the state by wholesome executions, the necessity of the commonwealth requires that the law suffer rather than the state. See the letter of Tiberius on luxury in Tacitus, *Annals*, Bk. III. That is, as Plutarch, *Solon* [xxi], says: 'A law must regard the possibilities in the case, if its maker wishes to punish a few to some purpose, and not many to no purpose.' (R.)

Finally, if the necessity of the commonwealth requires it, as at the menace of war, and there be none others able to defend her, who would hesitate to remit the death sentence hanging over the head of an able general, since the commonwealth is unable for the time to do without his services? An illustration is found in the famous saying of Fabricius, when he was casting his vote for Cornelius Rufinus as consul, an able leader but an avaricious man: 'He would rather be robbed than sold.' [Gellius, IV. viii.] After the disaster at Cannae the dictator Junius made the proclamation: '[. . .] Of such persons as had been guilty of capital crimes or were in prison on judgement of debt, those who would serve as soldiers with him, he would order to be released from

¹ [For *iudiciis* read *iudicibus*.—Tr.]

their liability to punishment and their debts.' (S.) Livy, Bk. XXIX, chap. xiv [XXIII. xiv]. Add Grotius, on 1 *Kings*, ii. 6.

24. Now it is clear, I should think, from what has been said, that there is no vindicative justice in a civil court which enjoins that a certain measure of punishment in a definite nature be meted out to certain crimes, but that the true measure of punishments is the welfare of the state, and they are to be required with greater or less rigour at the discretion of the supreme sovereignty, as it appears that their ends can be most conveniently attained, all this, however, understanding a great latitude in such discretion. Therefore, a punishment will be greater than justice requires when the ends of punishments could have been secured by some less rigorous course, and milder than such requirement when it is lacking in the severity capable of securing those ends, and so of restraining the evil propensities of citizens, and of procuring the inner security of the state, or is such as is despised by the offenders. See Gellius, Bk. XX, chap. i, on the wilful conduct of L. Veratius. When a legislator has sinned the one way, he cannot escape the charge of cruelty (see Hobbes, *De Cive*, chap. iii, § 11), and when he leans the other way he renders punishments useless, and leaves an open field, as it were, for the vices. For since the threat of punishments should turn a man's will from a love for sin to obedience to the law, and yet, since in their deliberations men regularly weigh as in a balance the advantages and disadvantages which accrue from the same thing, it is readily seen 826 that when the advantages or delights connected with any vice surpass the loss and pain consequent upon punishment, the latter is by no means sufficient to divert a man's mind from vices. Add Hobbes, *loc. cit.*, chap. xiii, § 16, and *Leviathan*, chap. xxvii; the author of *De Principiis Justitiae et Decori* [Velthuysen], p. 200; Richard Cumberland, *De Legibus Naturae*, chap. v, § 39.

25. It should also be added that, since not all people are affected alike by the same punishment, and consequently not equally deterred from sinning, it is easy to see that in the general application of punishments as well as in their application to individual cases, regard should be had to the person of the sinner and to those qualities which may, on account of age, sex, status, wealth, strength, and the like, increase or decrease the sense of punishment. See *Digest*, XLVII. ix. 4, § 1; XLVII. ix. 12, § 1; XLVII. x. 45; XLVII. xi. 6; XLVII. xii. 11; XLVII. xiv. 1, § 3; XLVII. xxi. 2; XLVIII. viii. 3, § 5; XLVIII. viii. 16; XLVIII. xix. 1, 10, 16, § 3; XLVIII. xix. 28, § 16; XLVII. xvii. 1; XLVII. xviii. 1, §§ 1, 2; XLVII. xx. 3, § 2; XLVIII. viii. 1, § 5. For the same fine will be a burden to a poor man, but not to a rich, and a punishment with infamy will rest lightly upon a common man, but be a serious humiliation to one of high station. Moreover¹, a man and a

¹ [For *Ex* read *Et*.—*Tr.*]

person of mature years can bear a punishment more readily than women or children. See *Digest*, XLVIII. v. 38, § 24; XLVIII. v. 39, § 4; XLVIII. xiii. 6; *Code*, IX. viii¹, § 3. *Digest*, IV. iv. 37, § 1; L. xvii. 108. Add also Ad. Olearius, *Itinerarium Persicum*, Bk. III, chap. vi, on the fine imposed by the Russians for contumely, which they call Biszestia². Yet at the present time the Moroccans punish women for loose conduct more severely than men, since they hold that the former for the most part offer the occasion and the invitation to lust. Still it does not follow from this that a geometric proportion may be followed in imposing punishments, or a harmonic proportion, as Bodin, *On the Republic*, Bk. VI, the last chapter, proposes. What is necessary is only a simple equation between the crime and the punishment, the discovery of which is not a little aided by the condition of the individual. But if for qualities, which, although equal in merit, have no bearing upon a crime or upon any sense of punishment, unequal punishments are inflicted, that is vicious *προσωποληψία* [respect of persons] of which Grotius does not always clear the Roman laws. Some find an illustration of that in *Digest*, XLVIII. viii. 1, § 5, where the husband who has killed his wife, when taken in adultery, is sentenced to perpetual exile if he be of the common sort, but is exiled only for a time if a man of some position. For the disgrace attaching to such a wife can be felt as much by a common man as by one of high position, and the loss of country is as grievous to the former as to the latter. See also *Edict of Theodoric*, chap. xci; add Ziegler on Grotius, Bk. II, chap. xx, § 33.

We may note, in conclusion, that among certain nations a special ignominy attaches to a certain kind of punishment. Euripides, *Helena* [299 ff.]:

Unseemly is the noose 'twixt earth and heaven:
Even of thralls 'tis held a death of shame.
Noble the dagger is and honourable. (W.)

Pliny, *Natural History*, Bk. II, chap. lxiii: 'The uncanny punishment of the halter which stops the breath that is seeking to escape.' Add *Digest*, XLVIII. xix. 28, § 2. The statement of Dio Chrysostom, *Oration to the Alexandrians* [xxxii. 49], may be applied here: 'For one³ is the death of a criminal, the other⁴ of a wretched slave.' (M.) In Homer, *Odyssey*, Bk. XXII [462 ff.]. Telemachus refuses to slay the worthless handmaids 'by a clean death', that is, by the sword, but has them hanged, although on the other hand strangling is the regular method of execution in the Osmanli family, because they hold it wrong to wet the
827 earth with such noble blood. The Hebrews also considered it more disgraceful to be beheaded than to be strangled or stoned to death. Selden, *De Jure Naturali et Gentium*, Bk. VII, chap. vi. Thus Philo

¹ [For *§* read *v.*—*Tr.*]

³ [For *illa* read *illa*.—*Tr.*]

² [Properly now *bezchestie*, 'dishonour'.—*Tr.*]

⁴ [For *hic* read *haec*.—*Tr.*]

Judaëus, *Against Flaccus*, expresses his anger because Jewish magistrates and senators of Alexandria¹ were scourged in the same manner as the fellahin of Egypt. Here belongs the statement of Seneca, *On the Steadfastness of the Wise Man*, chap. iv: 'You will find a slave who prefers to be flogged to being slapped.' (S.*) And I suppose it is a very ignominious punishment which is mentioned in *Law of the Burgundians*, tit. X, Additamentum, 1. On the other hand a certain degree of honour is held to reside in some punishments. An illustration of this is found in the indignation which stirred the Athenians that Hyperbolus, a man of the very dregs of Athens, should be banished by ostracism. See Plutarch, *Alcibiades* [xiii], where the following lines are cited from the comic poet Plato:

And yet he suffered worthy fate for men of old;
A fate unworthy though of him and of his brands.
For such as he the ostrakon was ne'er devised. (P.)

And the same writer in his *Nicias* [xi] speaks of the same occurrence:

They thought that even chastisement had its dignity, or rather, they regarded the ostracism as a chastisement in the cases of Thucydides and Aristides and such men, but in the case of Hyperbolus as an honour, and as good ground for boasting on his part, since for his baseness he had met with the same fate as the best men. (P.)

Thus there is comfort in the thought that 'twas by the hand of great Aeneas that you fell'. (B.) Vergil, *Aeneid*, Bk. X [830], and the comments of de la Cerda.

26. And we see no reason or necessity for every nation to impose on crimes the same punishment that is found in the Hebrew law, and this because that part of their law is the positive and civil law of the Hebrews, tempered to the genius of that people and commonwealth. And since from this the genius of other peoples, and the nature and order of their states differ in many points, it would be but reasonable for their punishments also to be fixed on another principle. But whether this rule should be applied also to capital punishment may well be questioned, since, as it appears, that punishment was laid down not for the Jewish people alone but for all mankind. And its reason is patent to every one: For when a man is so evil-minded that he shows no scruple at killing men by deliberate purpose, other men will never be safe from him until they have put him out of existence. This sentiment is strengthened by the statement of Antiphon, *Orations*, xv [v. 11]: 'All courts try murder cases under the open sky, and this for no other reason than partly that the judges may not enter the same room with men of unclean hands, and partly that the prosecutor may not be under the same roof with the murderer.' Add Libanius, *Progymnasmata*, the standard passage against murder. Nevertheless if a homicide is not given the death sentence because of the condition of the commonwealth, it

¹ [For *Alexandriæ* read *Alexandriæ*.—Tr.]

will not be a direct contravention of the command of *Genesis*, ix. 6. For since the determination of all punishments belongs to positive law, which may properly be suited to the necessities of the commonwealth, the same exception may justly be understood to lie in that law. Compare Grotius on *Matthew*, v. 40, and on *Genesis*, *loc. cit.* Although some say that this verse contains not so much a divine law as a threat, whereby God announces that He will wreak vengeance upon murderers, either by the hands of men or by other horrible means, if in any way they have escaped the rigour of a human court. See *Acts*, xxviii. 4. Nor does the explanation offered by Grotius, Bk. I, chap. ii, § 5, reject the exception to be found in the condition of the commonwealth. Add the same author's remarks in *Florum Sparsio*, on *Digest*, XLVIII. viii. Selden, Bk. IV, chap. i, expressly states that this verse was not taken by the Hebrew teachers as a formal law whereby death must necessarily be the penalty for every case of murder, but as the express indication of God's hatred of that crime in His designating the most severe punishment for it, which mankind might limit or inflict in accordance with each case, and with the differences in the administration of the state. For this reason the Hebrews did not inflict the death penalty upon any of their faith who had killed a proselyte of the gate, or any other

828 Gentile. Even when a number of Hebrews, or other circumcised persons, had killed one of their nation by blows or kicks, in such a way that no single one had contributed enough to have caused his death, they were all free from any judicial sentence or murder, since no one of them was personally a murderer. See Selden, *loc. cit.*, for further details. And yet I should be unwilling to suggest that this punishment be forborne too freely. Nor would I lightly approve the implication of the clause in a constitution of the kings of Poland on the punishment of murder among the nobility, which runs: 'We, moderating the rigour of divine law.' Add Philo Judaeus, *On Special Laws*.

In this connexion we should touch on the question, so painstakingly discussed by many writers, of the death sentence for robbery. On the whole subject see the opinion of Grotius, Bk. II, chap. i, § 14. Yet Selden, *De Jure Naturali et Gentium*, Bk. VII, chap. vi, says that the Jews punished with death robbers among the so-called Sons of Noah, or Gentiles, but were more lenient to their own race. Josephus, *Antiquities*, Bk. XVI, chap. i, condemns as too harsh the law of Herod, that thieves who dug through walls and stole by night should be sold out of the kingdom into slavery to foreigners. In Athens it was a law of Solon's that for simple theft the payment should be twofold, if the article was recovered, and tenfold if not recovered, although it was added:

If a man filched a cloak or an oil-cruet or the most trifling article from the Lyceum or the Academy or the Cynosarges¹, or any of the utensils from the gymnasia or the ports,

¹ [For *Cynosargae* read *Cynosarge*.—Tr.]

above the value of ten drachmas, he enacted that such a person should be punished with death. (K.) [Demosthenes, *Against Timocrates*, 114.]

Add Aristotle, *Problems*, chap. xxix, § 14. What the Roman law held on the subject is known to every one. Nay, Justinian, *Novels*, cxxxiv, last chapter, even forbade that a common thief be mutilated, although otherwise it would not seem inappropriate for a man to be punished in that part of the body with which he had committed the wrong. Alexander Severus ordered that a secretary who had drawn up a false petition and presented it before the emperor's council, should have the tendons of his fingers severed so that he could never write again. Lampridius, *Alexander* [xxviii]. Zaleucus¹ [Valerius Maximus, VI. v. ext. 3] made a law that an adulterer should lose his eye, because it is the eyes which first lust after married women, and to have once looked upon them is a great incentive to forbidden pleasure. So also the law of God commands that if a woman in bringing aid to her husband in a quarrel seizes his adversary by the privates her hand shall be cut off. [Deut. xxv. 11 f.] Vulcatius Gallicanus [vi] tells that Avidius Cassius cut the sinews in the upper and lower legs of many deserters. Add Cujas, *Observations*, Bk. VII, chap. xiii. The real reason for the law of Justinian is well explained by Ant. Matthaeus, *De Criminibus*, I. ii, on *Digest*, XLVII: Since most cases of robbery are due to laziness or poverty, he did not want thieves punished by the loss of their hands, so that they would not lose the instruments necessary for the relief of their evil condition, because a more appropriate thing would be to put them to some labour. In Germany Frederick II issued a law that thieves be hanged (*L. 2. F. tit. de pace tenenda*), and after him Charles V, in his *Constitutio Criminalis* [Art. 160], although the latter may appear to have been more severe than Frederick because he took no account of the depreciation of the currency. And yet we must confess that some judges are too free in using the noose, and that it is sometimes better for the state to condemn thieves to labour (see Herodotus, Bk. II [cxxxvii], and Diodorus Siculus, Bk. I, chap. lxv, on Sabaco, king of Egypt, who set all who were condemned to capital punishment at work, through whose labour he greatly improved his country; also Thomas More, *Utopia*, Bk. I), although we are fully persuaded that capital punishment can properly be inflicted upon thieves. From what has so far been presented it is not difficult to devise an answer to the reasons offered in opposition, especially by Ant. Matthaeus, *loc. cit.*

27. Neither is it necessary, finally, that a man suffer exactly what he has done to another, that is, that crimes be always punished by talion, which was the opinion commonly attributed to the Pythagoreans, who defined punishment by the term ἀντιπεπονθός, that is to say, a 'corresponding hurt'. This end of punishment is confirmed

¹ [For *Saleucus* read *Zaleucus*.—Tr.]

829 by the saying attributed to Rhadamanthus: 'If a man should suffer what he has inflicted then would fitting justice be done.' [Aristotle, *Nicomachean Ethics*, V. viii.] Ovid, *Art of Love*, Bk. I [655-6]: 'No law is there more righteous than that the contrivers of death should perish by their own contrivances.' (R.) Quintilian, *Declamations*, xi [5]: 'Tis the shortest way of doing vindictive justice when the offence and punishment are commensurate. And if you will consider the nature of a compensation, a man is best avenged in the same way and method he was wronged.' (W.) M. Seneca, *Controversies*, Bk. V, Pref. [X. vi]: 'By a very just shift in punishment a man often expiates in his own case the penalty which he had designed for another.' Polybius, Bk. XII, in *Excerpta Peiresciana* [xi. 4]: 'Himself a most bitter and implacable critic of others, he can but expect to meet with implacable criticism at the hands of others.' (P.) Yet Aristotle, *Nicomachean Ethics*, Bk. V, chap. viii, proves the absurdity of the Pythagorean theory of the ἀντιπεπονθός [corresponding hurt], in this fashion: 'If a person who strikes another is a magistrate, he ought not to be struck in turn, and if a person strikes a magistrate, he ought not only to be struck but to be punished.' (W.) Add *Idem*, *Magna Moralia*, Bk. II, chap. xxxiv. On the laws of *Exodus*, xxi. 23; *Leviticus*, xxiv. 50, the Hebrew doctors unite in saying that no strict retaliation was taught, but that such hurts could even be redeemed by a fine. See Bodin, *On the Republic*, Bk. VI, last chapter, who denies that there was ever in use such a law, for instance, that whoever broke another's leg should have his own broken. He adds that there should be no idle arguing over the formula, 'An eye for an eye and a tooth for a tooth', since such a proverbial expression, as it were, only means that punishments should be in proportion to crimes; that we should not scourge one who deserves no more than a whipping, or give no more than a whipping or severe reprimand to one who should feel the axe. He infers this from the fact that the divine law does not punish theft with theft, adultery with adultery, or wound with wound, but theft by a two or fourfold payment, adultery by death, a wound by a fine; and from the further fact that the divine law also had respect to persons, for instance, if a man cursed a private person, no heavy penalty is required of him, but if a man cursed a prince, or a son his father, it was a capital offence. On the other hand Constantine l'Empereur, *Baba Kama*, chap. viii, § 1, defends the literal interpretation of those words. It is not our task to settle these disputes. But it is at least generally agreed that the judge was empowered under certain circumstances to transmute a corporal punishment of retaliation into a fine, by virtue of the law of *Exodus*, xxi. 29-30, which allows the alternative of a more weighty punishment. Josephus, *Antiquities*, Bk. IV, chap. viii [35]:

He that maimeth any one, let him undergo the like himself, and be deprived of the

same member of which he hath deprived the other, unless he that is maimed will accept of money instead of it, for the law makes the sufferer the judge of the value of what he has suffered, and permits him to estimate it. (W.)

A defence of the law of retaliation is found by some in *Deuteronomy*, xix. 19. Compare *Code*, IX. ii. 17; IX. xlv. 10; IX. xii. 7. Josephus, *Antiquities*, Bk. IV, chap. viii [34]: 'Let no one of the Israelites keep any poison that may cause death.' (A law of the Egyptians, exactly like this, is given by Diodorus Siculus, Bk. I, chap. lxxvii.) 'But if he be caught with it, let him be put to death, and suffer the very same mischief that he would have brought upon them for whom the poison was prepared.' (W.) But it can be replied that these laws of *Deuteronomy* cannot properly be brought into the case, since the punishment there set forth for defaming another exceeds the measure of retaliation, by returning a completed act for an attempt; although in general the punishment is not unjust, for as Quintilian, *Institutes of Oratory*, Bk. VII, chap. ix [XII. ix. 9], says: 'For an evil speaker differs from an evil doer only in opportunity' (W.); and again, *Declamations*, cccxxxi: 'It (looks like) a sort of murder to make an attempt upon the life of any man who does not deserve to be killed.' And Pliny, *Panegyric* [xxxv. 3], is justified in his judgement on calumniators: 'Let them expect punishments as great as their expected reward, that their hopes may be no greater than their fears, and that they may fear as much as they were feared.' Thus the divine law passed the same judgement on him who defamed a virgin and him who used violence. *Deuteronomy*, xxii. 19, 29. Isocrates, *De Permutatione* [18]:

What can be more maleficent than calumny? It causes us to think well of liars, to regard the innocent as evildoers, and judges to be false to their oath. In a word, it extinguishes the light of truth, involves all who listen to it in a mist of error, and puts citizens without discrimination unjustly to death. 830

Quintilian, *Declamations*, xi. 6:

The villainy of false accusers can do no harm but by and through the judges' act. Good night to all human safety, if lies may be so bald with your accusation; nor was there ever any innocent yet so happy as to be able to baffle the diligence of knights o' th' post. (W.)

Constitutions of Sicily, Bk. II, chap. xiv. A law of the Twelve Tables [VIII. ii. Bruns] runs: 'If physical injury be done some part of the body, unless the matter is settled out of court, let the same injury be inflicted on the assailant'; on which one should by all means read the argument of Favorinus and the Jurisconsult Sextus Caecilius, in Gellius, Bk. XX, chap. i. But it is clear from *Institutes*, IV. iv, § 7, that the law of retaliation had fallen into utter disuse at Rome. Add Ant. Matthaeus, *De Criminibus*, IV. ii. 2 and 3, on *Digest*, XLVII. We find in Diodorus Siculus, Bk. XII, chap. xvii, the following law of Charondas as passed by the Thurians¹:

¹ [For *Turios* read *Thurios*.—Tr.]

He who struck out the eye of another, should have his own eye plucked out. It happened that one who had only one eye (by the injury of the other) lost that also, so that he was altogether blind. In this case, although the offender was to lose his eye for the injury done to the other, yet the punishment was not thought equivalent to the nature of the offence; for he who made his fellow citizen wholly blind, although (by the loss of) one of his eyes he satisfied the letter of the law, yet the loss and prejudice was not equal; and therefore it was conceived to be most equitable and just, that he who deprived another of his sight wholly, should lose both his eyes, if the punishment were proportional to the offence. The blind man therefore, moved and heated with the pain and indignity of the thing, complained to the people of his sad condition, and made his address to them for the amendment of the law. At length, having the rope about his neck, he prevailed and the law was abolished, and another made more effectual in its place, and so he escaped hanging. (B.*)

The same law is mentioned by Demosthenes, *Against Timocrates* [139 ff.]. Aristotle, *Rhetoric*, Bk. I, chap. vii [41]: 'Blinding a one-eyed man inflicts worse injury than half-blinding a man with two eyes.' (R.) Add Petrus Gregorius Tholosanus, *Syntagma*, Bk. XXXI, chap. x.¹

However this may be, it is certain that a law of talion so crudely understood as this, is not a just measure of all punishments. Because, in the first place, it is certainly not applicable to most crimes. For how could it be applied to such crimes, for instance, as adultery, rape, copulation with beasts, *laesa maiestas*, reviling, calumny, sorcery, falsification, imposing of false children, abortion, kidnapping, bribery, incest, sacrilege, the moving of landmarks, violation of tombs, trickery, falsehood, and the like? All of which, by the way, makes it clear that the emperor Theodosius was justified in doing away with the punishment of women taken in adultery, then in use in Rome, whereby they were forced to enter a house of prostitution and to play the whore, while a bell was rung whenever they were suffering that disgrace. For although so great ignominy may serve for the most severe punishment, yet it appeared to increase rather than remove the offence, since such a punishment could not be inflicted without further sin. Socrates, *Ecclesiastical History*, Bk. V, chap. xix. And yet we confess that the actual laws which appear to sanction retaliation apply it only to physical injuries or hurts.

In the second place, even if we imagine a case where the crime that has been committed can serve as a punishment, and where neither the persons, place, time, quality, nor cause increase or aggravate the crime, yet not even under such happy conditions will simple retaliation be of sufficient worth. Suppose one rustic has given another a blow in some private part. If the other must return the blow, how will he be able to keep it within fair bounds? Add *Law of the Visigoths*, Bk. VI, tit. iv, chap. 3. But if a third party is to give the blow, how will he be able to know how heavy the first was? Furthermore, in the case of

831 many crimes retaliation would be too severe, if no distinction were

¹ [For a. read c.—Tr.]

drawn between what is done accidentally and what is done maliciously, or if no distinctions of persons were observed. For instance, in case a man intends to give another a cuff and entirely without purpose puts out his eye with the set of a ring on his hand, it would surely go too hard with him if his eye were in turn put out. Again, if a gentleman should strike a porter, it would be too severe a punishment for him to be returned the blow, which is an insult to one of his position, but not to a porter. Finally, retaliation in most offences appears too light a punishment. And this is especially true by reason of a disparity in the persons who wrought or suffered the injury, or in the place, the time, and other circumstances.

In general that crudely conceived theory of retaliation is overthrown by the arguments of Grotius, Bk. II, chap. xx, § 32, where he justly denies that a man who injures another deliberately, and without grounds which greatly mitigate his guilt, should get off with just as much injury as he has done and no more. Add *Revelation*, xvii. 6. For it is repugnant to equity that the injurer suffer no more than the injured, nor is the security of men sufficiently provided for if scoundrels stand under no greater fear of the laws than honest men do of their knavery, since there lies before them the hope of concealment, flight, or escape from the severity of the law, in some manner or other, as a kind of additional expectation of gain. And what shall we say of the fact that sometimes the most holy laws of God ordain the same punishment for attempted as for completed crimes? See *Deuteronomy*, xix. 19; *Exodus*, xxii. 9; *Edict of Theodoric*, chaps. xiii and l. A law of the people of India, found in Strabo, Bk. XV [i. 54], deserves mention: 'Whoever maims any one else, experiences not merely talion himself, but in addition has his hand cut off. But if any one destroys the hand or eye of an artisan, he is punished with death.' By a law of Solon, preserved in Diogenes Laertius, *Solon* [I. lvii], whoever had put out another's eye should lose both of his. Thus whoever 'went armed with the intention of killing a man' was reached by the law of *Digest*, XLVIII. viii. 1. And although the consequence of this be that the punishment should be greater to correspond with accomplished crimes, yet since with mankind there is no greater punishment than death, which cannot be repeated, punishment must needs stop with that, although tortures may sometimes be added as the crime demands, or such ignominy as may precede or follow death.

28. We should also add, in this connexion, some remarks upon the punishments which are commonly required by human justice¹ for a crime committed by another. Yet in such cases there is no question but those who actually share in the guilt of the misdemeanour can be punished in proportion to their contribution to any villainy, since they

¹ [For *forro* read *foro*.—Tr.]

would be paying not for another's crime but for their own. Now what persons can participate in another's crime, and how they may do so, has been shown above [I. v. 14]. Add Jacques Godefroy's discourse on *Code*, IX. viii. 5, §§ 9, 10. But it should be noted that this distinction is observed between a restitution of damage and a punishment, namely, that it is usually easier for a human court to make one pay for the loss than to bear a punishment along with it, since imprudence or minor guilt can more easily beg off from punishment than from making good the loss. There is a memorable law of Thomas Randolph, Regent¹ of Scotland, in Buchanan, *History of Scotland*, Bk. IX:

In order to stop the robberies, still so common because of the war, he passed a law that farmers should leave their agricultural implements in the fields, and should not lock their houses or out-buildings at night. They should require compensation for any loss they might suffer from the justices, who in turn should require it of the king, while he would reimburse himself from the property of the robbers whom he apprehended.

Regarding crimes of corporations it should be observed, that, although decisions to which the majority agrees are regularly held
832 to be those of the whole body, so that even the minority is required to agree to and execute them (see Polybius, Bk. V, chap. xlix; Pliny, *Letters*, Bk. VI, ep. xiii: 'When a question is under debate², each member is at liberty to have his own opinion; but once settled by the majority, it should be the common concern of each to support it.' (B.*)), still in any case arising out of some guilt attaching to such decisions, only those who gave their consent to the act are to be held liable, while he who both dissented at the outset and consistently maintained his position, will be judged innocent. See *Luke*, xxiii. 51. Therefore, when Alexander took Thebes and sold all the inhabitants into slavery, he excepted those who had opposed the decision to break away from Macedon. Plutarch, *Alexander* [xi]. Nay, it is customary to excuse, at least from the full penalty, such as at first dissented, although they afterwards yield to the will of the majority and give their entire support to the prosecution of the offending decision. Thus it is said that the Greeks spared Antenor and Aeneas, who had favoured restoring Helen, although the latter afterwards performed notable deeds of arms for his country.

We should also observe that a corporate body, as such, is punished differently from individuals. The punishment of individuals is sometimes death, which in the case of a corporation is accomplished by dissolving the body. Add *Constitutions of Sicily*, Bk. I, tit. xlvii. So also, as Modestinus has said in *Digest*, VII. iv. 21, when a state no longer exists, all the usufructs from it cease. Sometimes individuals suffer slavery as punishment, and the same is the lot of a body when it loses its former position of dependence upon the state alone, and is subjected to some other similarly subordinate body or citizen.

¹ [For *protégis* read *proregis*.—Tr.]

² [For *integrare* read *integra re*.—Tr.]

Finally, individuals are also punished by the confiscation of their property. So for the crimes of a state that body is also deprived of public holdings such as forts, naval bases, ships of war, arms, treasure, public¹ lands, and privileges. Theodosius punished the public offence of the people of Antioch, who had cast down the statues of the emperor in the forum when new taxes were laid upon them, by forbidding them the use of the theatre, and the baths, and depriving the city of the name it had formerly² borne of 'metropolis'. Libanius, *Orations*, xiii. The emperor Marcus Aurelius had also taken from the same people the shows and other³ ornaments of their state, but had later returned them. Vulcatius Gallicanus, *Life of Avidius Cassius* [ix]. Thus Severus almost entirely destroyed Byzantium, taking away the enjoyment of the theatre, the baths, and every dignity and honour, reduced it to the rank of a village, and handed it over to the Perinthians. Herodian, Bk. III, chap. vi. The emperor Constantius, as a punishment to the people of Constantinople for having slain his general Hermogenes, deprived them of their usual dole of grain. Socrates, *Ecclesiastical History*, Bk. II, chap. x. Although it is reasonable in the crimes of a multitude to punish principally its ring-leaders. See Livy, Bk. XXVIII, chap. xxvi, at the beginning. And so the following principles set forth by Quintilian, *Declamations*, xi [7], are of considerable value in estimating the offences as well as the punishments of corporate bodies:

What the generality of a city does, proceeds from the ascendancy that seducing orators have over them; whatever the commonalty does, they are never angry, but according as they are exasperated. Thus our bodies receive no motion but from our spirit, and our limbs lie quiet till our minds use them. There is nothing more easy than to work the common people to any passion whatsoever. When we meet together in our assemblies, nobody brings his own private thoughts, his private sentiments, private persuasion or reason along with him. Nor has any convention the wisdom or humour of single persons; whether it be that the public interest doth not enter so much into us; or else, because a man is more negligent when he thinks he is not to give a reason alone; and therefore when many are gathered together, we vote things in confidence of the whole. (W.*)

Cicero, *For Cluentius* [xlvi]: 'Our ancestors established a rule, that, if in military affairs a crime had been committed by a number of soldiers, a few should be punished by lot, that so fear might have its influence on all, while the punishment reached only a few.' (Y.) Tacitus, *Annals*, Bk. I [xliv], advises in the case of soldiers: 'Punish the guilty, forgive those who had been led astray.' (R.*) Add Polybius, Bk. XI, chap. xxvii, at the end, and in *Selections on Embassies*, XXVIII, chap. iv; Bodin, *On the Republic*, Bk. III, chap. vii, p. 527 ff.; Ant. Matthaeus, *De Criminibus*, XVIII. iv. 30, on *Digest*, XLVIII; *Constitutions of Sicily*, Bk. I, last title.

¹ [For *publici* read *publici*.—Tr.]

³ [For *alia* read *alia*.—Tr.]

² [For *antena* read *antea*.—Tr.]

833 29. In this connexion the question arises as to whether a punishment should be required in every instance of evil practice by a corporate body; in case, for instance, the offence was publicly committed two or three generations before that time. Whoever would affirm this might use the argument that, during the life of the body, it remains the same, even though its individual members may change as they succeed one another. The lines of Plutarch, *De Sera Numinis Vindicta* [xv], bear on this position:

For a city is a kind of entire thing and continued body, a certain sort of creature, never subject to the changes and alterations of age, nor varying through process of time from one to another, but always sympathizing and in unity with itself, and receiving the punishment or reward which makes it a body and binds it together with the mutual bands of human benefit, preserves its unity. [...] <In the same manner does a city still remain the same;>¹ and for that reason we think it but justice, that a city should as well be obnoxious to the blame and reproach of its ancient inhabitants, as participate in the glory of their former puissance and renown. (G.)

But the question is to be answered in the negative, if it is a case of human punishment. For it is not necessary even with individual men to punish old faults so much as those which are recent and still, as it were, offensive. Therefore, there is good reason in what the Roman Law sets forth concerning exceptions of crimes. See Anton. Matthæus, *De Criminibus*, XVIII. iv. 30, on *Digest*, XLVIII. Furthermore, it should be carefully observed that certain things primarily and in themselves can be predicated of a corporate body that cannot of its individual members, such as having a treasury, laws, rights, and privileges. And again some things belong to a body only as derived from its individual members: That is, they first of all inhere in the individuals, and afterwards distinguish and describe the body. Thus we speak of an association² as learned, active, restrained, moral, or immoral, &c., the majority of whose members are likewise learned, active, restrained, moral, or immoral, although that does not prevent it from having some members who are ignorant, sluggish, or reckless. It is for this reason, also, that we say that a body merits punishment, for merit belongs to its members as endowed with reason, and as able to act with full knowledge and power. But a body as such and in so far as it is conceived of as something distinct from its members, has no mind or faculty by which it can perform acts primarily and immediately capable of merit, and which are entirely distinct from the acts of individuals. The consequence of this is, that, if those citizens through whose services a state gathered merit are dead, and it has not been continued by any act of their successors, the merit also is dead and with it the ability to receive punishment, which cannot lawfully be inflicted without a corresponding merit. Add Grotius, Bk. II, chap. xxi, § 8.

¹ [Not in Pufendorf.—Tr.]

² [For *societatem* read *societatem*.—Tr.]

Plutarch, indeed, in the passage just cited, finds an example of the justice of God in the record that the sins of fathers are sometimes¹ visited upon their children. But it is not permissible in every instance to argue about human justice from the process of God's tribunal. In the same way it does not follow, that, if it is just for children to receive rewards and honours for the merits of their father, it is also just for the same to be punished for their sins; because such is the nature of a kindness that it can be conferred upon a man who neither deserves it nor pays for it, while that is not true of a punishment. And Justin, Bk. XXVIII, chap. i, tells how the Romans felt they were justified in calling upon an old obligation, when they gave as their reason for undertaking the defence of the Acarnanians against the Aetolians, that the former were the only ones who in the old days did not send aid to the Greeks against the Trojans, the ancestors of the Romans. The same account is given by Strabo, Bk. X [ii. 25, p. 463]. And yet men of judgement can easily see that this was feigned, so that the Romans could have at least some sort of excuse for mixing in matters which were no concern of theirs. It is a ridiculous sentiment which we find expressed by Mahomet II to Pope Pius II, namely, that he was surprised to see the Italians join a league against him, since he also traced his line back to their common ancestors, the Trojans, and since they were both equally concerned in wreaking vengeance for the death of Hector upon the Greeks, whom the Italians were at that time supporting against him. Michel Montaigne, *Essais*, Bk. II, chap. xxxvi. 834

30. But in general it remains fixed, that one may not rightly be punished in a human court for another's crime in which he in no way participated. But since all around us we often see the crimes of some serving as the occasion for others to come to grief, we must observe, in the first place, so that no one may fall into error, that not everything that causes a man trouble or loss can be regarded as a punishment. Whoever has had his property confiscated for a misdeed, and been reduced to want, suffers a punishment, but how many men come into this world with no inheritance beyond that of a physical body! How many lose all their worldly possessions by fire, shipwreck, or the attack of enemies! And yet their poverty is not a human² punishment, but an evil of fate, or, as others would call it, a turn of fortune. Therefore, if, for example, subjects experience evils because of the waywardness of their prince, they should look upon them as upon other inconveniences which attend the life of all men, such as bodily weakness, infirmities of age, inclement weather, sterility, and the like.

31. In the next place we should recognize that a loss directly inflicted is one thing, while one which results as a consequence of something else, is quite another. It is the former when something is taken

¹ [For *aliquando* read *aliquando*.—Tr.]

² [For *humana* read *humana*.—Tr.]

from a man to which he has a right in the proper sense of the term; it is called the latter when that condition is interfered with, without which he could not enjoy his right. An instance of this last is in *Digest*, XXXIX. ii. 24, § 12; XXXIX. ii. 26; XXXV. ii. 63. Thus when the goods of their parents are confiscated, of course the children also feel some loss therefrom, but this is not properly a punishment with respect to the children, because that property would not have been theirs had their parents not held it until their death; and so the confiscation only interferes with the condition without which no right, in the proper sense, to the property of their parents would have belonged to the children. See *Digest*, XLVIII. xxii. 3. Yet the law of Mogald, king of Scotland, 'That the property of criminals should be confiscated and that their children and wives should be admitted to no share in it', is rightly called unjust and inhuman by Buchanan, *History of Scotland*, Bk. IV. Add Grotius, Bk. II, chap. xxi, § 10.

32. Finally, it should also be observed that occasionally some evil is imposed upon one party, or some good taken from him, by the occasion of the crime of a second, or because the latter has not satisfied his obligation, and yet that sin, or failure to meet an obligation, is not the proper and immediate cause for the former suffering an evil, nor does a third party acquire directly a right from that sin whereby he can justly punish the first for that evil. Thus sureties often suffer some loss because the debtor on whose behalf they intervened, breaks his pledge. But the immediate cause of the obligation whereby a surety¹ is obligated to pay² another's debt, is his own promise. For just as he who acts as surety for a buyer is properly not obligated by the thing bought,³ but by his promise, so whoever acts as surety for a malefactor is properly obligated not by the other's offence but by his own act of promising. It follows from this, that, when the surety must suffer some loss or evil, it should be measured not by the crime⁴ of the other, but by the power which he himself had in making the promise. And so when the guilty party has vanished, and the payment of the bail falls upon the surety, no concern should be given to the consideration of how much evil could rightfully have been meted out to the criminal, but how much the surety could obligate himself, by his mere promise, to bear for another. It can also be gathered from this how far bail should be granted in capital offences: Only to the extent that a bondsman may
 835 good the damage he has done, or guarantee to produce the defendant, this being done in order that the man, already made prisoner, may be freed from the hardship of a jail, and not be forced to plead his cause in chains, or that sentence be not passed upon him as though he were

¹ [For *fidejussor* read *fidejussor*.—Tr.]

³ [For *exemptio* read *ex emptio*.—Tr.]

² [For *luere* read *luere*.—Tr.]

⁴ [For *delicte* read *delicto*.—Tr.]

convicted, while he is absent and undefended. But no bondsman can obligate himself to suffer death for a criminal, since a man has not so much power over his own life nor does the process of human justice allow the requirement of such a penalty. Because punishment is inflicted for a crime with the purpose of restraining the wickedness of men; and yet neither has the surety himself been guilty of wrongdoing, nor did he by going bail draw upon himself the guilt of the crime. For it is no crime in him to wish that the defendant plead his cause in a fairer place, or be more at ease until sentence is passed upon him, or to promise that he will pay the fine laid upon the defendant in whatever manner and to whatever amount the magistrate may determine, in view of the fact that the power to inflict a punishment has been lost by the flight of the defendant. Nor will the end of human punishment be obtained by the punishment of the surety. For he would be punished, not because he had sinned, but because he had exposed himself to so great a peril by trusting in another's good faith. And the result of such a punishment would only be that other men would for the future not be so quick to intervene in behalf of their fellows, not that they would be restrained from the crime which the defendant had committed. Therefore, such a punishment would not be concerned with the sin of the principal offender, but with the rash credulity of the surety. And so a magistrate who punishes a surety like an offender has not properly understood the nature of punishment or his duty in requiring it, unless it appear that the surety had acted with guile, so that in this way he could make a mockery of the force of public discipline. So also since no man has such a right over his members that he can destroy them at his pleasure, it is likewise patent that one cannot obligate himself to bear for another a punishment of mutilation.

But it is another matter if the guards of prisoners who have allowed them to escape through negligence or collusion, are put to death. Because they are punished not for another's offence, but for their own. See 1 *Kings*, xx. 39 ff.; *Acts*, xii. 19.

Nay rather, although free fathers of families have the right to make the final decision touching their form of government, yet it does not seem that they can rightfully banish a bondsman, both because banishment can scarcely pass as a punishment, and because it is not to the interest of a state to drive away such a citizen. Under this point comes the account in Garcilaso de la Vega, *Comentarios Reales*, Bk. VI, chap. iii, to the effect that the towns which were near the capital city of Cuzco, in Peru, formerly had to furnish the royal court with servants by way of tribute, and if any of these was recreant in his services, the town for which he served made it up.

There are also other cases in which a man suffers¹ because of

¹ [For *in commodum* read *incommodum*.—Tr.]

another's offence. For instance, if I were living in another's house without rent, and it should be confiscated because of an offence of the owner, I also should suffer some inconvenience, since I would have to move, although he might have allowed me to live in it longer. Yet I am not properly affected by the punishment. For the government, now that it has taken over the ownership of the dwelling, can rightfully put an end to my precarious use of the building at its pleasure. Thus the children of traitors and rebels are often excluded from public office, which properly acts as a punishment for the parents, in that those who are dearest to them must on their account live without glory. And yet this is not really a punishment in the case of the children, since a state always may decide to whom it would offer honours, and so it can by its own right deprive of honours even such as have not offended against it, when such a course is judged to be to the advantage of the state.

33. It is clear from these distinctions that in a human court no man who is untouched by any charge can rightfully be punished for another's offence, the reason for this being that a man can be subject to punishment only because of desert, the foundation of which is each man's will, which is pre-eminently a man's own possession, and can contract a
836 vice only by its own intrinsic motion. For the example cited by Grotius, Bk. II, chap. xxi, § 12, who feels that an instance can be found, beyond the person of a guilty man, in the person of one for whom he holds a most singular affection, is false. Nor is the case given by Plutarch, *De Sera Numinis Vindicta* [xvi], to the point: 'A schoolmaster, by chastising one, admonishes all the rest of his scholars, and a general, condemning only one in ten, reduces all the rest to obedience,' (G.) for both the youth who is whipped and the soldier who is executed were guilty.

It follows from this that innocent children should not be punished for the sins of their parents. See *Code*, IX. xlviii. 22; *Digest*, XLVIII. xix. 26; *Decretum*, II. i. 4. 6, 7, 8. Therefore, some take the passage of *Joshua*, vii. 24, to mean that the children of Achan were brought out that they might be instructed by Joshua along with all the people, and be warned to refrain from such acts, not to be killed with their father, and that the following words, 'and they stoned them', are therefore to be understood only of Achan and his herds. But if this interpretation is not allowed, recourse must be had to the reply by Grotius, *De Jure Belli ac Pacis*, Bk. I, chap. iii, § 8, at the end. Ovid, *Metamorphoses*, Bk. IV [669-670]: 'There unrighteous Ammon had bidden Andromeda, though innocent, to pay the penalty of her mother's words.' (M.) Statius, *Thebaid*, Bk. I [688 ff.]:

Cease then to lament and to ascribe to yourself the misfortunes of your forbears. [. . .] Guilt is no obstacle to a man's descendants. Only be yourself different, and with blessed² deeds earn the forgiveness of your ancestors.

² [For *secundus* read *secundis*.—Tr.]

Thus the law of the Persians, as given by Ammianus Marcellinus, Bk. XXIII [vi], is called by him an abomination, surpassing all known laws in its ferocity, namely, that when one man has offended against the king all his kinsmen must perish for his sin. See Herodotus, Bk. III [cxviii], on the case of Intaphernes; Justin, Bk. X, chap. ii. On a similar law of the Macedonians see Curtius, Bk. VII, chap. xi; Bk. VIII, chap. vi. It is, of course, perfectly clear that kings undertook to protect their safety by such cruel executions. We are told by Justin, Bk. XXVI, chap. i, that Hellanicus was moved to murder the tyrant Aristotimus, because he himself was advanced in years and childless, and so had no fear because of his age, or for the sake of his family which would be held for his deed. Add *Idem*, Bk. XXI, chap. iv,¹ n. 8. A. Caesellius speaks to the same purpose in Valerius Maximus, Bk. VI, chap. ii. But he who can thus despise his own life is made more apprehensive, when he realizes that all who are dear to him must perish with him and because of his deed. Furthermore, such kings wished to take the precaution that the sons should not avenge their father's death. Aristotle, *Rhetoric*, Bk. II, chap. xxi [II]: 'He is a fool, who would kill a father and spare his sons.' So also it is not easy to believe that a man would attempt such a deed without taking his kinsmen into his confidence. It was for this reason, according to Arrian, Bk. III [xxvi], that Parmenio was put to death by Alexander. There is something in the remark of Cassius in Tacitus, *Annals*, Bk. XIV [xliiv]: 'Some inequality there must be in every notable punishment; but what is hard for the few is compensated by the benefit to the whole.' (R.) Compare *Digest*, XXIX. v. The judgement is given in *Code*, IX. viii. 4, that the sons of traitors should suffer the same punishment as their fathers, when there was fear that they would repeat the offences of their fathers. See Ant. Matthaeus, *De Criminibus*, II. v. 10, on *Digest*, XLVIII. Thus Ammianus Marcellinus, Bk. XXVIII [ii. 11], records that the young children of the Maratocupeni (a name given to robbers in Syria from the village which was their headquarters) were all killed along with their parents, so that they would not grow up to continue the calling of their forbears. Hobbes, *Leviathan*, chap. xxviii, advances the following reason. Those who are guilty of treason are confessed enemies of the state, and so can be dealt with by the law of war; and in war neither the sword nor the victor makes any distinction, so far as past time is concerned, between the guilty and innocent, nor is mercy granted any one save in so far as it conduces to the safety of the citizens. Moreover, he adds, sentences for treason have this distinction, that the prince can act as judge in his own case, and the execution may be carried through at once without the delays of legal process (add Grotius on *Joshua*, i. 18), although a pious prince would do well always to hold before his

¹ [For 'lib.' read 'c'.—Tr.]

eyes the speech of Tiberius in Tacitus, *Annals*, Bk. III [xii], delivered in the case of Cn. Piso. And yet not even in war is it right to take vengeance with the sword upon the innocence of youth. And since those who are born in a state are by that fact citizens, there appears to be no way in which they can be treated as enemies unless they have become such by an act of their own doing.

Therefore, an innocent son can pay for the rebellion of his father in no other way than by being cut off from those possessions which would otherwise have passed to him from his father. Although it used to be the custom among the Peruvians, under the rule of the Incas, that if a Curaca had been executed for a crime, his son was not for that reason denied the right to succeed to his father's position, but was pointed out the crime and the punishment of his father in a graphic manner, so that he would avoid them for himself. Garcilaso de la Vega, *Comentarios Reales*, Bk. II, chap. xiii. It is not, properly speaking, a punishment to be shut out of unowed honours, and yet no other reasons than can be alleged can remove the unfairness of this punishment. For example, Dionysius of Halicarnassus, Bk. VIII [lxxx], writes that the Greeks who had either killed the sons of tyrants along with their fathers, or had exiled them, were persuaded, 'As if it was contrary to the course of nature for virtuous sons to be the offspring of wicked fathers, or wicked sons of virtuous fathers.' (S.) Add Philo Judaeus, *On Special Laws*. The saying of Marcus in Vulcatius Gallicanus, *Avidius Cassius* [xii], deserves praise: 'Therefore, you will pardon the children of Cassius, his son-in-law, and his wife. Yet why do I say "pardon", when they have committed no crime?' Nor can such deeds plead as an excuse the threats¹ of God, since our discussion concerns only human justice. Add Grotius, Bk. II, chap. xxi, § 14. We may rightly approve a law of the Egyptians which forbade the execution of a woman with child until she had brought forth (Diodorus Siculus, Bk. I, chap. lxxvii), which other nations also have adopted. Aelian, *Varia Historia*, Bk. V, chap. xviii; *Digest*, XLVIII. xix. 3; I. v. 5, § 2; I. v. 18; Plutarch, *De Sera Numinis Vindicta* [p. 552 v]. Yet add Quintilian, *Declamations*, cclxxvii. On the severity of punishments among the Japanese we are informed by Bernhard Varenius, *Descriptio Japoniae*, chap. xviii; Ferdinando Pinto, *Itinerarium*, chap. lv; Bernhard Varenius, *De Religione Japoniae*, chap. xi, p. 192.

In this connexion it should be observed that those legislators abuse their power who seize the occasion of one or another man's sin to pass some severe law against a whole class, even though in the course of time such a death may take on some appearance of glory. Such is the case with the law of some sections of India, to the effect that a wife be burned upon the pyre with her deceased husband, the original purpose

¹ [For *cowminationes* read *comminationes*.—Tr.]

of which was to prevent wives wanting to poison their husbands when wearied of them, so as to make way for others. See Cicero, *Tusculan Disputations*, Bk. V [xxvii]; Solinus, chap. lxv; Diodorus Siculus, Bk. XVII, chap. xci; Bk. XIX, chap. xxxiii; Strabo, Bk. XV [p. 1041]; Abraham Rogerius, *De Braminibus*, Pt. I, chaps. xix, xx. It is also clear from what has been said that an heir is not obligated to suffer any punishment that would touch the body or reputation of the delinquent. *Digest*, XLVIII. xix. 20. But he is responsible for a fine, although if we would respect the principle of equity, it should not exceed the resources of the inheritance. See *Digest*, XLVII. i. 2.

CHAPTER IV

ON THE POWER OF CIVIL SOVEREIGNTY IN DETERMINING THE VALUE OF CITIZENS

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| <p>1. The definition and division of esteem.</p> <p>2. Simple natural esteem,</p> <p>3. Which is either entire,</p> <p>4. Or impaired,</p> <p>5. Or entirely lost¹.</p> <p>6. Simple civil esteem is wanting either from one's status,</p> <p>838 7. Or from a former offence.</p> <p>8. It is not dishonourable to refuse a duel when it is forbidden by the laws.</p> <p>9. Simple esteem does not depend upon the whim of those who are in power.</p> <p>10. Nor can it be used up in their interest.</p> <p>11. Intensive esteem.</p> <p>12. Its foundation.</p> <p>13. Whether the foundation of honour is power alone.</p> <p>14. Such foundations produce only an ability to receive honour.</p> <p>15. Who may by his own right have precedence over another?</p> <p>16. The arguments on which a claim is made to precedence.</p> <p>17. A glance over the custom of antiquity.</p> | <p>18-19. The quality and titles of power.</p> <p>20. One king is not obligated to give way to another king.</p> <p>21. How kings may meet without contention.</p> <p>22. On rank among allies.</p> <p>23. It is an attribute of supreme sovereignty to fix the rank of citizens.</p> <p>24. How citizens of different states are compared.</p> <p>25. Nobility is not born with one by nature,</p> <p>26. But it is due to the imposition of states.</p> <p>27. Yet it usually is and should be based upon merits.</p> <p>28. The nature of the Roman nobility in the early period.</p> <p>29. Afterwards it was accorded to honours borne in the state.</p> <p>30. What is the nature of nobility to-day over most of Europe?</p> <p>31. In some places little store is set upon nobility of blood.</p> <p>32. How far do civil honours depend upon the judgement of a state?</p> |
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ALTHOUGH there exist outside a state even in natural liberty some bases upon which one man can properly be preferred above another, yet since it depends upon a pact or definition of civil sovereignty whether those bases shall yield any man a right, it appears, accordingly, the most convenient thing, at this point, to set forth all the reasons for distinctions among men according to esteem. Now esteem is the value of persons in common life, in accordance with which they can be equalled or compared with other persons, and ranked either before or after them. Of a truth those two most noble species of moral quantities, esteem and price, have no little relationship to each other, of which the former has regard to persons and the latter to things, because in common life persons are valued by the former and things by the latter. And as prices are set upon things chiefly to the end that in their exchange or transfer from one to another they can be correctly compared with each other, so also esteem serves the end, that, by it,

¹ [For *consumma* read *consumia*.—Tr.]

as by value, men can be compared with one another, so that a decorous order can be set up in case they happen to be united, when it was found that a general equality among mankind could not be conveniently preserved. Esteem can be divided into *simple* and *intensive*, each of which comes in for consideration both in those who live in natural liberty, and in those who are members of the same state.

2. *Simple esteem* among those who live in natural liberty seems to consist primarily in this: That a man deport himself and be regarded as a person with whom you may treat as with a good man, who is also inclined to accommodate himself to the laws of human society, and therefore ready, to the best of his ability, to observe natural law in his relations with others. That is, as we say that a thing which is of some use in human life is of value, and that which is useless is of no value, 839 so you may say that at least some value attaches to him with whom one can at any rate treat as with a social being. But if a man plainly shows his unfitness for society, as he does when he shamelessly spurns and tramples under foot the law of nature, and the duties owed other men thereby, you may rightly conclude that he is a man of no value.

3. Such esteem can be considered either as *entire*, or *impaired*, or entirely *lost*. It is entire when a man has not yet knowingly and willingly, by a malicious and outrageous villainy of deliberate malice, violated the law of nature toward another. For the sins of human infirmity are forgiven, in view of man's frailty, and they do not at once extinguish the opinion of a good man, provided his mind remain honourable and desirous of doing what is just; and this esteem is presumed to remain with every man so long as his own wickedness does not utterly destroy it. And so it must be said to belong by nature to every man in equal share, and, when no evil deed has preceded, all men must be judged to be equally honourable. Pliny, *Letters*, Bk. V, ep. iii: 'Goodness knows no distinction of rank or title'. (B.) On this principle is based the old saying: 'Every man is presumed to be good until the contrary is proved.' Nor is this conclusion at all disproved by what Hobbes, *De Cive*, chap. i, sets forth regarding the evil of human nature and its lust to injure others. If this were absolutely true, a man would be presumed evil until the opposite were proved, or rather until his ability to injure has been taken away.¹ But, as has been shown before, the principle which he presupposes, namely, that 'All men are able and willing mutually to injure one another', is not universally true. Yet because men 'are able to will' to injure each other, all men, therefore, will naturally be held to be good, but capable of becoming evil, and to be friends, but such as you may not safely trust too far.

4. Such esteem is *impaired* by evil deeds and especially by outrageous deeds, committed upon others undeservedly and contrary

¹ [For *edemta* read *ei demta*.—Tr.]

to the law of nature, which make it unsafe for others to put any trust for the future in such a deceiver, and to associate with him in any business undertaking without some substantial precaution. Now a man's esteem is impaired by evil deeds, but not entirely lost, for although I may suspect with some probability that a man will act toward me as he has toward others, yet it is not always so certain that the contrary will not happen. For there may be some special causes which led him to deceive others that are not found in my case, and a man could have been moved at one time by evil passions, by which he is not affected at another. Yet that blot upon a man's esteem, caused by evil deeds, can be removed when a man voluntarily makes reparation for a damage, or some equivalent, and shows signs of a change of heart. For such actions when spontaneously offered, can furnish sufficient proof of a mind that has seriously reformed.

5. But this esteem is entirely *lost* by a type and pattern of life which has the direct purpose of promiscuously harming others and profiting from their manifest injuries. Indeed, there are callings even in states which openly admit the exercise of some certain vice, such as those of harlots, panders, sturdy and vagabond beggars, whom Plato, *Laws*, Bk.¹ XI, orders thrown out of his state, and by whom Isocrates, *Areopagiticus*, declares the state to be *κατασχύνεσθαι* [disgraced]. Atticus, Bishop of Constantinople, in Socrates, *Ecclesiastical History*, Bk. VII, chap. xxv, advises: 'You should choose to bestow your alms, not on those who make an occupation of begging for their bellies' sake, and devote
840 their whole life to it, but on such as are ashamed to ask for aid.' Thus not only were beggars not tolerated in Peru under the rule of the Incas (see Garcilaso de la Vega, *Comentarios Reales*, Bk. V, chap. ix), but whoever was prevented by some physical deformity from maintaining himself, was supported by the state. *Ibid.*, Bk.¹ V, chap. xi. Likewise, there were in Egypt professional thieves, of whom Diodorus Siculus, Bk. I, chap. lxxx, writes as follows:

Those who enter into the list of thieves are to give in their names to one who is their chief and head, and whatever they steal, they engage to bring to him. They that have lost anything are to set down in writing every particular, and bring it to him, and set forth the day, hour, and place, when and where they lost their goods. Everything being thus readily found out, after the things stolen are valued, the true owner is to pay a fourth of the value, and to receive his goods again. For since it was not possible to restrain all from thieving, the law-maker found out a way that all might be restored, except a small proportion for redemption. (B.*)

Yet it would be my feeling that such a class of men could be gotten rid of at less expense to the citizens by an energetic use of workhouses, stripes, and gallows.

¹ [For I. read I.—Tr.]

How little esteem should belong to such men is a matter for the decision of the state which tolerates them, although he who is allowed the open exercise of a vice should at least enjoy the common right of men. This is illustrated by the expostulation of the pander in Terence, *Brothers*, Act II, sc. i [188 f.]: 'Slave-dealer I am, the common bane, I own it, of youth, liar, and nuisance; still I didn't start outraging you.' (S.) See *Constitutions of Sicily*, Bk. I, tit. xx. All would agree that natural esteem is seriously prejudiced by a type of life which confesses any kind of vice, and yet unless that vice is connected with an injury to others, it does not appear that such persons can be treated as the common enemies of all. But those whose calling in life has as its end the injury of others, and such as promiscuously use the same licence against all men, or at least against those who are outside their circle, as they do against beasts, and thus carry on war not against their special enemies but against their fellow men—such men entirely lose that esteem by which we rank and grade all other men. To their number belong pirates, freebooters, highway robbers, assassins, cut-throats, and the like. Nor are they removed from that class if they do not regularly wreak the worst villainy they can upon all persons promiscuously, if, for instance, they rest content with robbery, and do not commit murder, or go away after relieving one of his purse and cloak. For there is no justice and praise in not committing every excess known to injustice. And, in fact, under this head should undoubtedly be classed whole bands of pirates and highwaymen, so long as they have not renounced that kind of life, however¹ much they may seem to observe the forms of justice within their own number. Thus mention is made in Heliodorus, *Ethiopica*, Bk. V [31], of a 'law among the pirates, that he who was the first to board an enemy's vessel and exposed himself to the greatest danger in behalf of all, was to have his choice of the booty'. Also in the same chapter [V. 20]: 'Even pirates retain some conscience and affection towards those whom they know.' Indeed, I should not exclude entire states, should there be any such, which men have formed so as to enjoy the benefits of law among their own number, but in which they otherwise act like enemies of all other men, and pay no regard to pacts and their pledged word. And if there are states which observe the pacts which they actually make with others, but either against all other men, or at least against certain other peoples, have acquired the practice of conducting themselves, without just cause, in opposition to the law of nature, it will scarcely be permissible for them to lose all esteem, although it cannot but be very considerably lessened.

Now the effects, as seen in others, which attend such men who have lost all esteem, are in general these: That unless they go about to

¹ [For *ut ut* read *utut*.—Tr.]

841 renounce that fierce and bloody manner of life, others must show no more mercy on them than on wolves and other savage animals. And when they have been apprehended they are usually treated more cruelly than other enemies, even though the latter also threatened us with utter destruction. They are also held unworthy to receive any office even of simple humanity, since they are bent upon the injury of others. Nay, just as no trust can be placed in their word, should they wish to give it, since any value it may have had with others is destroyed by the ferocious character of their lives, so it can apparently be said with reason that they are unable to receive the pledge of others so long as they openly continue in their villainous occupation, which is presupposed in our discussion. For I agree with a man either voluntarily, or because I am compelled by his unjust use of force. I do not see how I could do the first without catching the disease of his villainies, since I would be treating with one as a friend, who acts like the common enemy of all men except his own accomplices. In fact, to keep faith with a thief is frequently connected with the injury of others, for example, in the case of some booty which he has stored with me. See *Digest*, XVI, iii. 31, § 1.¹ But if a robber has done me some good turn, such as I could accept from such a person without disgrace, it is only just for me to pay him the price agreed upon. Although in that case he will no longer be a robber, as we suppose him to be in our discussion, the common enemy of all save his associates. As regards the second case we have already shown that pacts extorted by force are invalid². But, after all, such men can recover their lost esteem³ if they leave off their evil way of living, and take up another which is honourable; and this is possible not alone to individuals, but also to whole bands of robbers and highwaymen. And from the moment that change is effected they will have to be treated like honourable men, provided, of course, they have made reparation or secured forgiveness for the injuries which they had formerly done.

6. *Simple esteem among those who live within states* consists in a man being held to be, at the least, a common but a full and entire member of a state, or, in other words, in his not having been declared by the laws and customs of the state to be a vicious member of the same, but in his being held to be one of its number and a unit in its composition. Furthermore, this esteem in a state is wanting by reason either of a man's *mere status* or of a *crime*. The first comes about in two ways: That status may in itself have by nature nothing base about it, or it may be connected with some actual vice, or something that is regarded as such. Their mere status, although by nature it contains nothing vicious, in some states takes away simple esteem from slaves, who are

¹ [For *de positi* read *depositi*.—Tr.]

³ [For *estimatio* read *existimatio*.—Tr.]

² [For *in válido* read *invalida*.—Tr.]

not considered civil persons, being understood, in other words, to be such as have no civil standing (*caput*) and are not numbered in the state. How low was their condition among the Romans is well known, an instance of which is to be seen in *Digest*, XLVIII. v. 6; *Code*, IX. ix. 23, 29. Nor were the Gentile slaves among the Hebrews esteemed any more highly. Josephus, *Antiquities*, IV. viii [15]: 'Let no servants be admitted to give testimony, on account of the ignobility of their soul; since it is probable that they may not speak truth, either out of hope or gain, or fear of punishment.' (W.) Add Selden, Bk. IV, chap. iii; *Law of the Visigoths*, Bk. II, tit. iv, chap. 9. In some states, also, practically no esteem is enjoyed by bastards, despite the fact that the manner of their birth is not a matter of their own guilt but of that of their parents. See *Code*, VI. lvii; Stobaeus, *Anthology*, lxxv. Unless it be that there is something to be said for the remark of Procopius, *Secret History* [II]: 'The crimes of women are carried over not only upon their husbands, but touch even more heavily their children, whose fate it is to bear the stigma of their continued disgrace, as though they bear by nature the blemish of their mother.' Among the Hindus a certain race of men, called the Peneaës, is considered infamous, on whom see Abraham Rogerius, *De Braminibus*, Pt. I, chap. ii.

Status destroys or diminishes civil esteem, in the second manner 842 outlined above, when those who are in it are engaged in such occupations as cannot be carried on without vices, or such as, because of their base nature, are confined to men of the vilest and lowest type. What position men engaged in the affairs first named are accorded, will be clear enough from the laws and customs of every state. Here belongs what is told by Valerius Maximus, Bk. VII, chap. vii, of Q. Metellus the praetor urbanus, 'who did not grant the pimp Vecilius possession of Juventius' property, although his will so stipulated, because he refused to approve the latter's act in throwing away his wealth into such a slough of lewdness, or to allow Vecilius the right of a full citizen, since he had divorced himself from every honest pursuit in life.' And again, when a certain Genucius, an emasculated priest of the Great Mother, had received of Gnaeus Orestes the right to have restored to him the property of Naevianus, the consul Aemilius Lepidus overruled the praetor's decision, 'in order that the tribunals of the magistrates might not be polluted, under the pretence of his suing for his right, by the vile presence and contaminated voice of Genucius.' Another case is found in *Digest*, XI. v. 1, where the judge refuses to allow an action 'if anyone beats a man in whose house it appears that a game with dice has been carried on, or damages his property, or, on a similar occasion, something has been taken out of his house¹ by anyone.' (M.)

To the second class belong in many states executioners, bailiffs,

¹ [For *tempore dolo* read *tempore e domo*.—Tr.]

vault-renters, and men of such stamp, who are debarred from association with more honourable citizens. And this is expressly stipulated in the laws of some states. Thus Cicero, *For C. Rabirius* [v], says that formerly at Rome 'The laws of the censors considered an executioner ought not only to be ejected out of the forum, but even to be deprived of the sight of the sky, of the breath of the atmosphere, and of a home in the city, (as if the public assemblies would be defiled by contact with such a person).' (Y.)¹ In other places only custom and public opinion attach shame to any association with such people, and this both because their manners usually correspond to the vileness of their services, and because only vulgar minds volunteer for such tasks. Although among the Romans the soldiers were often called upon to perform public executions, not only in the field, but in the city as well, without their esteem suffering any infamy or loss (see Peter Faber, *Semestria*, Bk. II, chap. vi), because it is one thing to act as executioner at the special command of a superior, and another to make that one's calling. So also among the Jews criminals were stoned by the entire people. Michel Montaigne, *Essais*, Bk. III, chap. i, writes that De Witold, Duke of Lithuania, introduced the custom of condemned men serving as their own executioners, because it was improper to use an innocent man in such a task, and stain his hands with homicide. And yet this reason is silly, since an executioner certainly does not commit murder by inflicting a punishment. Some advance the reason that, in the performance of this task, they are presumed to witness only the suffering of him who is punished, which is a sight repugnant to the compassion of man's nature.

The Roman laws branded with infamy those who appeared upon the stage for pay (see *Digest*, III. ii. 1), or who hired themselves out to fight with beasts (*Digest*, III. i. 1, § 6). Here the basis for this judgment lay not so much in any wickedness in the act, since such acts could be performed without guilt, but in the fact that the peculiar dignity of the Romans held it disgraceful to do such things for money. For often the mere fact that a thing is paid for makes a task ignoble. By the same laws, if a man allowed a widowed daughter to marry another within the period allotted for mourning, or himself married such a person, or allowed one who was under his authority to marry or be married under such circumstances, he was suspected of being light-minded and branded as a man of inconstant faith and love. We are told by Aloysius Cadamus, *Navigatio*, chap. viii, that among the ancient inhabitants of the Canary Islands it was held highly disgraceful and unbecoming for a man to follow the trade of a butcher, and Th. More, *Utopia*, II, makes his Utopians feel the same way. Selden, *De Jure Naturali et Gentium*, Bk. IV, chap. v, writes that the Hebrews refused to allow the members of

¹ [This last clause is not in Cicero at this point.—Tr.]

four professions to give testimony and participate in judicial matters, 843 to wit, gamblers, usurers, those who made a profit from the fruits of the seventh year, or year of remission, and those who taught pigeons to fly, giving as their reason that no one of such men was engaged in undertakings which in any way concern the stability of the generation, that is, the public good, or enhance the well being of men.

7. Simple esteem is entirely wanting *by reason of a former offence*, when a man is branded by the laws with infamy because of a certain kind of offence, for not all offences destroy civil esteem. See *Code*, I. liv. 1. The result of this is that a man loses his natural life at the same time as his memory is execrated, or he is banished in disgrace, or is left in the state, yet not as a healthy member but as a plague upon it, so that although he has his residence in the state and enjoys the common protection of its laws, he is shut out of a public career and from the honourable associations of men, and is unfit to exercise lawful acts which presuppose unimpaired esteem, as well as unable to make a will or serve as a witness. What the crimes are which bring¹ such infamy upon a man, must be learned from the laws of each particular state. See *Digest*, L. xiii. 5, § 1, 2, 3. On this law we should observe, that, in some of the instances which it cites, a careful enough distinction is not drawn between simple and intensive esteem. We should notice in this connexion a law of the Egyptians given by Diodorus Siculus, Bk. I, chap. lxxviii:

Soldiers who ran away from their colours, or mutinied,² though they should not die, yet should be otherwise punished with the utmost disgrace imaginable; but if they afterwards wipe out their disgrace by their valour, they are restored to their former post and trust. By thus inflicting a punishment more grievous than death, the lawgiver designed that all should look upon disgrace and infamy as the greatest of evils. Besides it was judged that those who were put to death could never be further serviceable to the commonwealth, but such as were degraded only, through a desire to repair their reputation, might be very useful, and do much service in time to come. (B.*)

We should observe, furthermore, that according to the Roman Jurisconsults evil deeds which give rise to infamy are so branded either directly by the law itself, or at the cognizance and sentence of a judge, or, finally, by a kind of censure³ on the part of honourable men, which last they call in general *infamy of the deed*. See *Code*, II. xi. 13; add *Digest*, XXXVII. xv. 2; III. ii. 20; *Code*, IX. ix. 25. You may also refer to this head the account of the Apalchitae in Rochefort, *Descriptio*⁴ *Antillarum*, Pt. II, chap. viii, to the effect that thieves suffer no other punishment among them than to be censured in all meetings, but that most of them take this so hard that they flee into the wilds. Yet it would be my opinion upon this 'infamy of the deed', that it is not so much the

¹ [For *concilinantia* read *conciliantia*.—Tr.]

² [For *imperatorum* . . . *ex sequentibus* read *imperatorum* . . . *exsequentibus*.—Tr.]

³ [For *sensura* read *censura*.—Tr.]

⁴ [For *de scripti*. read *descripti*.—Tr.]

immediate result of the opinion of judicious men, as a punishment of the law as well, because of the fact that such deeds are always condemned and held disgraceful in the opinion of judicious men. For although it is a disgrace for a thing not to receive the approbation¹ of men of good repute, yet unless this be seconded by a further pronouncement of the law, no man experiences such a loss of esteem at the mere judgement of private citizens, that he is excluded from those benefits and rights which accompany unimpaired esteem by virtue of the civil laws. Therefore, it is obvious that a man does not at once suffer in reputation when he has only been accused of or charged with a crime which carries infamy with it. For when the orator Delphidius cried out: 'But will anyone ever be found guilty if it be enough to deny the charge?' it was with justice that Julian replied: 'Can anyone be judged innocent if it be enough to make a charge?' (Y.) [Ammianus Marcellinus, XVIII. i]. Here can be applied the saying in Plautus, *Trinummus* [81 f.]: 'I am the keeper of my own heart, so as not to admit guilt there; suspicion is centered in the heart of another.' (R.) But a crime carries infamy with it only when a man has been condemned for it, or has acknowledged it, which latter thing a man is understood to
 844 do when he agrees with the prosecutor to drop the case, since a man who makes such an agreement is understood to confess the crime. *Digest*, III. ii. 5. Unless it can, perhaps, be shown that it was not so much a consciousness of his guilt as other likely causes, such as the nuisance of a trial, or the severity or hostility of the judge, that induced a man to settle with the prosecutor out of court. In the oration of Isocrates, *Against Callimachus* [xviii. 10], certain men advised the defendant to settle the case out of court with the plaintiff:

For in trials many things turn out in an unexpected way, and when the ballots are cast chance rules more than equity. Therefore, it is more advantageous and more easy to avoid important suits at a small expense, than to pay out nothing and yet run so great a risk.

And although a man is regarded as retaining his esteem unimpaired if the judge has declared him innocent of the charge, yet in order that his innocence may be given greater publicity, and that calumny be punished, it is customary in many states to require the plaintiff to recant, and force him to confess and repent of his falsehood, do honour to the defendant, and the like. It appears from Josephus, *Jewish War*, Bk. IV, chap. xxxix, that the disgrace which attaches to chains was removed if they were not unloosed but cut in two, and he adds that the Romans followed the same practice with such as had been wrongfully bound.

8. Another conclusion from what has been said is, that no true infamy can attach to a man from the fact that he has not wished to

¹ [For *propari* read *probari*.—Tr.]

avenge injuries done him by word or deed with his own sword, as has come to be the custom in some places, especially among nobles and men of military training, but to leave that to a judge, or to bear them in silence; provided that restraint does not imply confession to a base villainy. Of course it implies a high degree of slothfulness and cowardice for a man to swallow every kind of disgraceful injury and insult and not gird himself to a strenuous defence of his liberty or right. And most men would make the statement of Neoptolemus in Quintus Calaber [Smyrnaeus], Bk. IX [283]: 'Ere I be called war-blencher, let me die!' (W.) And yet if a man chooses with judgement rather to scorn revenge for certain injuries than to turn from them in fear, he shows proof of a lofty mind, nor is there anything in such an act that would destroy natural or civil esteem. Hobbes, *Leviathan*, chap. xxvii:

A man receives words of disgrace [...] for which they that made the laws had assigned no punishment [...] and is afraid, unless he revenge it, he shall fall into contempt; and breaks the law and kills him. This is a crime, and such a fear will not excuse him. Why is this so? Because the commonwealth would have the words of the state, that is, the laws rate higher with citizens than the words of an individual for whose words it refused to set any penalty, for the reason that the state holds men who cannot abide only words the most mild of all its citizens.¹

See, however, the *Salic Law*, tit. xxxii. Much less is it infamy in those states where private revenge of injuries is expressly forbidden by the laws, for a man to obey the laws rather than to desire under cover of his honour to expose himself to the peril of an uncertain struggle, as well as to the severity of the laws. 'A stubborn sword metes out unjust justice.' Ovid, *Tristia*, Bk. V, el. vii [V. x. 43]. Nor is it always a proof of cowardice for a man to refuse to descend to combat with another for every quarrel, and to engage rashly in a struggle that involves his life and fortune, since there can be other occasions for him to show his bravery in a manner far more safe and entirely blameless. There is an illustration of this in the case of the centurions Pulsio and Varenus in Caesar, *Gallic War*, Bk. V [xliv]; see also Busbecq, *Letters*, iii, on the case of Velibegus. In Plutarch, *Pyrrhus* [xxx], that general called Antigonus a scoundrel and challenged him to come down into the plain and fight it out with him for the kingdom, to whom Antigonus replied: 'In conducting a campaign he relied more upon opportunities than upon arms, and that many roads to death lay open to Pyrrhus if he was tired of life.' (P.) In the same author's *Life of Antony* [lxxv], Augustus, when challenged by him to a duel, sent back the same answer: 'Antony had many ways of dying.' (P.) Alexander of Rhodes, *Divers Voyages*, Bk. II, chap. vi, writes of the soldiers in the kingdom of Tonquin, that they show all bravery with no concern at all for their lives when opposing an enemy, but among themselves they love each other like brothers and

¹ [Much of this is not in Hobbes at this point.—Tr.]

never draw their swords upon their fellows; and that when they once saw a Frenchman and a Portuguese fighting a duel, they were astonished, and said that they had never witnessed such barbarity. Nor should a wise man under such conditions pay any heed to the remarks of the common sort, since every citizen's esteem stands and falls by the judgement of his supreme sovereign and the laws, and virtue lies in being willing and obedient to the laws, without regard for the empty opinion of idle and mischievous men.

It appears from this what reply should be made to Hobbes, *Leviathan*, chap. x, who thinks it scarcely possible for it not to be glorious and honourable to join at once in a duel, since that is a proof of power. For why may it not be a proof of excellence for one to know how to temper with reason the urge of his mind and his strength, and to give them rein only in accordance with the laws? Although we should not hold irrelevant what he suggests¹ in the same work (chap. xxx), that the further law should be added to those upon duelling, namely, that those who are noble and desirous of being accounted such should bind themselves with an oath never to challenge a fellow citizen to a duel, or take up the sword when thus challenged, for in this way those who declined a duel would have an excellent excuse for their action.² The *Constitutions of Sicily*, Bk. III, tit. xxxiii, § 4, endeavour to meet this evil by imposing the severest penalties on such as offer another an affront.

We may mention, in passing, that information upon the antiquity of duelling and the customs from which it arose, is given by Diodorus Siculus, Bk. V, chap. xxviii, on the Gauls: 'In the very midst of feasting, upon any small occasion, it is ordinary for them in a heat to rise, and without any regard of their lives, to fall to it with their swords.' (B.) The reason advanced for this is their belief that their souls took up their dwellings in other bodies. 'Thence have the people spirits ever ready to rush to arms, and souls that welcome death; and they deem it cowardice to be sparing of a life destined to return.' (R.) Lucan, Bk. I [460 ff.]. The same reason is assigned for the bravery of the Germans in Appian, *The Gallic History* [IV. iii].

9. Furthermore, it is also obvious that a man's simple natural esteem cannot be taken from him at the mere pleasure of his sovereign, save for some previous sin on his part, which, because of its own depravity, or the express sanction of the laws, is accompanied with infamy. For since such a power can in no wise make for the preservation or betterment of the state, that power is never understood to have been conferred upon sovereigns. Yet just as a sovereign can injure a citizen by banishing him from the state, so he can do the same by depriving him of civil esteem, in so far, at least, as to deprive him of

¹ [For *suadeat* i read *suadeat*.—Tr.]

² [For *pugnant* read *pugnandi*.—Tr.]

those advantages which in a state attend unimpaired esteem. But his own natural esteem can no more be taken from a man than his honourable character. Moreover, it is a contradiction, out of mere desire to declare a man infamous, that is, to accuse a man of being privy to base crimes, not because he actually committed them, but because it pleases a sovereign to treat a man in this manner, as though he were guilty. And it appears certain that no citizen is obligated to sacrifice his own simple esteem to the state, or to undergo actual infamy for its advantage. For the evil deeds from which actual infamy arises, can neither be commanded by a state nor should they be performed by a citizen.

10. It is not so clear whether it can be demanded of an honest citizen that he take upon himself the infamy of his prince or state, or give himself up as if guilty of their crimes. Now although it may seem in such a case that a man practically commits a crime in feigning guilt, yet it would be my feeling that a distinction should be drawn between 846 the domestic or private crimes of a prince, and his public crimes, or such as concern the entire state. Regarding the former, neither can a prince honourably demand that a citizen take up himself the sins of his prince, nor can the citizen in the case honourably do so, to the end that he may either supply some plausible excuse for the prince's villainy, or take upon himself the guilt which would have impaired the natural esteem of his sovereign. For no one may deprive a prince of his civil esteem, since he is placed above civil judgements. Nor do I believe that any wise man will approve the deed of Anicetus, who claimed that he had been guilty of adultery with Octavia, in order that Nero might have an excuse to divorce her. See Tacitus, *Annals*, Bk. XIV, chap. lxii. Euripides, *Helena* [1000-1]:

I will not [. . .] show my brother grace
Wherefrom shall open infamy be mine. (W.)

Add the story of Antonius Perezius in De Thou, Bk. CIV. But it happens fairly often that when a minister is treating with other nations on orders from his prince, or is opposing them in matters the public discussions of which would be prejudicial to the state, this prejudice may be avoided by laying the blame for it upon the minister, as though he had undertaken it on his own responsibility. In such a case I do not feel that a good citizen will refuse to ward off a great evil from his state by pretending that he acted without a mandate of the state; provided he may suffer no more than the punishment of a feigned disgrace (add Marselaer, *Legatus*, Bk. I, chap. xxxiii, p. 200); for surely it would be too severe for him to suffer death, or be turned over to the enemy on that score. And whatever be the nature of the pretended punishment, it can be easily removed or offset in another way, since it is obvious that he who has the power to inflict civil infamy, can also remove it. See

Cornelius Nepos, *Alcibiades*, chap. vi; Justin, *Orat.*, VII [*Histories*, V. iv]. [Libanius, *Orations*, VII. xiv. 21]: 'To dissolve and undo things which have already been done is one of those things that is impossible. But entirely to remove the mark of disgrace from such as have received it is always possible—and there is no other physician to remedy this defect than you alone' (he is addressing the emperor Julian). Yet it should be remembered that when any punishment has been inflicted for serious offences, the restoration of a man's reputation only produces the external civil effects in the entire esteem, and does in no way remove the stain upon natural esteem.

II. *Intensive esteem* is that in accordance with which persons, who are otherwise equal in respect to simple esteem, are preferred one to another, according as there reside in one more than in another those things towards which other men usually show honour and respect. Now the honour which corresponds to various degrees of esteem is an expression of our judgement of another man's excellence; and so honour does not actually reside in him who receives it, but in him who pays it. Aristotle, *Nicomachean Ethics*, Bk. I, chap. iii: 'Honour seems to depend more upon the people who pay it than upon the person to whom it is paid.' (W.) For although every man put any value upon himself that he chooses, just as a merchant can rate his wares as highly as he pleases,¹ yet as the price of wares is set by the ultimate purchaser, so the worth which a man bears in the eyes of others is for them to determine. See *John*, viii. 54. 'However highly a man values himself, he is actually only as valuable as others think him.' Hobbes, *Leviathan*, chap. x. Yet every man is affected by the honour which is offered him at the hands of others, in the measure with which it corresponds to the value which he has set upon himself. And yet, by the figure of speech of metonymy, esteem itself, that is, that which is the object of and deserves honour, is distinguished by that word, just as certain positions which are attended with honour are commonly given the special designation of 'honours'. And it is rightly observed by Hobbes, *De Cive*, chap. i, § 2, that since glory and honour consist of comparison and pre-eminence, if the cause for these resides in all men it is present in no one man among them; and that no society or state can be formed by many men or endure for long, when entered into for the sake of glory, that is, in order that the members may give mutual aid to one another in attaining glory and honour, since the worth of every man is judged by his fellow men in accordance with what he can do apart from the aid of other men. See Seneca, *Letters*, xxvii, on Calvisius Sabinus. On the other hand, the more people touched by ignominy, the more lightly it is borne.

Now this intensive esteem can be considered as it resides either

¹ [For *quantivult* read *quanti vult*.—Tr.]

in those who live in natural liberty, or in those who reside in the same state. We shall next have to consider the foundations of that intensity, and these as they produce either only an *aptitude* to expect honour from others, or else a *right*, properly so called, by which it can be demanded of others as a thing which they owe.

12. The foundations of intensive esteem in general are held to be all those things which possess a remarkable excellence or perfection (Cicero, *On the Nature of the Gods*, Bk. I [xvii]: 'Whatever excels has a right to veneration' (Y.)), or are judged to imply the same; and such an excellence as that its effect agrees with the end of natural law, or that of states. For you may sometimes see much ado made by the common sort over men who show unusual ability only in the practice of some vice, such as men who can toss off a gallon or two at a single drink, and earn¹ the praise of Juvenal, *Satires*, Bk. IV [139]: 'No one in my time had more skill in the eating art than he.' (R.) Aristophanes, *Acharnians*, Act I, sc. ii [77-8]:

For only those are *there* accounted MEN
Who drink the hardest, and who eat the most. (R.)

Others are bold warriors in love, *ῥυποκίνδυνοι* [reckless], clever thieves, and all such as tower above their comrades in vice. Yet the more highly they shine in their calling the more worthless they are in the sight of upright men. Philo Judaeus, *De Migratione Abrahami* [xxix]: 'To be pre-eminent² in what is not honourable is the most conspicuous disgrace, just as it is a lighter evil³ to come off second best in such a contest.' (Y.) Arrian, *Epictetus*, Bk. III, chap. xiv: 'If you say to me, "I am great in kicking", I shall answer, "That is the boast of an ass".' (M.) And even though such powers prove a strength of body or an active spirit, yet the more vehemently he who has turned to base things revels in his vices, the greater vigour they develop. It is easy to gather from all this that praise and glory are measured by the men who accord them, and so the only praise of value is that given by men who themselves deserve it, while on the contrary a wise man 'takes no account of praise from such men, who in fact cannot even win their own approval'. (H.) Marcus Antoninus [Aurelius], Bk. III, § 4.

Now among these foundations in particular are keenness of intelligence and the capacity to improve the mind by wide observation, especially when a man has actually measured up to such capacity; a judgement fitted to control affairs and to detect inconsistencies (see *Ecclesiasticus*, ix. 15; 1 *Kings*, iii. 28); a firm mind, undisturbed by outside influences and above enticements and threats; the ability to make one's meaning clear in choice and fluent speech; and finally

¹ [For *gous* read *quos*.—Tr.]

² [For *miseriae* read *miseria*.—Tr.]

² [For *excellere* read *excellere*.—Tr.]

strength, dignity, and outstanding physical dexterity in so far as such are held to be conspicuous indications or instruments of the mind. See Vergil, *Aeneid*, Bk. V, line 344; Isocrates, *Praise of Helen*, although here he savours too much of the orator; Bacon, *Essays*, chaps. xli-xlii. However, the common sort feel that physical height betokens something godlike and magnificent, and so it was customary in the theatres for gods and heroes to be made taller by the use of buskins, while there are many who would have something added to their stature and none would have it decreased. Yet even worse than simple is the account of Themistius, *Orations*, xiv [p. 36 B], drawn from Herodotus, Bk. III: 'The Ethiopians elect their king on his breadth and stature, measuring by such means his virtue.' This agrees with the opinion expressed by an American Indian from New France, who was in France during the reign of Charles IX, and said that of the many strange things there, he marvelled that the French chose that slight lad as their king, and not one of his tall and strong and bearded attendants, referring to the Swiss body-guards. Michel Montaigne, *Essays*, Bk. I, chap. xxx; add 348 1 *Samuel*, x. 23-4. This view may be strengthened by the remark of Oppian, *The Chase*, Bk. III, line 68, applicable on this point: 'It is larger for the smaller ones, and smaller for the larger ones.'¹ And often 'small was his stature but great his soul'. Claudian, *Gothic War* [584]. Quintus Calaber [Smyrnaeus], Bk. V [263 ff.]:

Valour is a deedless thing;
And bulk and big assemblage of a man
Cometh to naught, by wisdom unattended. (W.)

Furthermore, what are called the 'goods of fortune' imply either unusual skill in their acquisition, or the faculty or means to accomplish worthy things. But esteem is enhanced most of all by worthy accomplishments, because these both presuppose some intrinsic merit and show that it was directed to legitimate use and ends. Aristotle, *Rhetoric*, Bk. I, chap. v [9]: 'Honour [...] is chiefly and most properly paid to those who have already done good; but also to the man who can do good in future.' (B.) Pindar, *Olympian Odes*, vi [123-4]: 'This is proved by all their acts.' (S.) And as one's excellence or accomplishments come to the notice of many people, they are given the special designation of 'renown'. When in the eyes of others a man is attended with a special reputation for prudence and wisdom in wisely deciding perplexing questions of daily life or theoretical truths, it is given the name of 'authority', which some define more generally as a 'reputation for higher learning, linked with probity'. Nor are advanced years judged to raise esteem, for any other reason than because they are held to have begotten wisdom by an extended contact with affairs and a

¹ [Speaking of the tails of two varieties of panthers.—Tr.]

daily contemplation of the business of life. See *Digest*, L. vi. 5. Quintus Calaber [Smyrnaeus], Bk. V [155 f.]:

[. . .] in counsel ever the old man

Who knoweth much, excelleth younger men. (W.)

Diodorus Siculus, Bk. XIX, chap. xxxiv: 'For in all other cases the constant rule is to yield more honour and respect to the elder than to the younger.' (B.*) Oppian, *On Fishing*¹, Bk. I [683]: 'Old age renders a man venerable.' Although there are not wanting such as are hoary in years but not in wisdom, to whom may be applied the words of Ovid, *Metamorphoses*, Bk. IX, fab. xi [437-8]: '[. . .] Who, because of the galling weight of age, is now despised and no longer reigns in his former state' (M.); and 'the shadow of a glorious name'. (R.) Lucan, Bk. I [135]. For this reason the advice of Horace, *Satires*, Bk. II, sat. viii [*Epistles*, I. i. 8-9], is timely: 'Be wise in time and turn your horse out to grass when he shows signs of age, lest he end in a ludicrous breakdown with straining flanks.' (W.) Antiphanes [III, p. 116, no. 240 A, Kock]: 'Very much like wine is our life: when only a little is left, it turns to vinegar.' Add Charron, *De la Sagesse*, Bk. I, chap. xxxv, n. 5. Strabo, Bk. XV [i. 54]: 'The Indians give no special privilege to age, except it be wiser.' Philo Judaeus, *On Abraham* [xlvi]:

For he who is really an elder is looked upon as such, not with reference to his length of time, but to the praiseworthiness of his life. Those men, therefore, who have spent a long life in that existence which is in accordance with the body, apart from all virtue, we must call only long-lived children. (Y.)

There are times when the saying of Varro, *On Farming*, Bk. II, chap. ii, is applicable: 'That is a better age which is attended by hope than that which is attended by death.' Quintilian, *Institutes of Oratory*, Bk. II, chap. i. [7]: 'It is not to be considered of what age a boy is, but what progress he has already made in his studies.' (W.) Isocrates, *Archidamus* [4]: '[. . .] It is not by length of years that we are distinguished from one another in regard to soundness of judgement, but by our natural gifts and the attention bestowed upon their cultivation.' (F.) Philostratus, *Life of Apollonius of Tyana*, Bk. VI [xvi]: 'You must not reject the claim that youth makes, that in some way it assimilates an idea more easily than old age.' (C.) But in general women would rather be commended for the bloom of their youth than for old age. And so when *Lais* was advanced in years she dedicated her mirror to Venus, her reason being, as it runs in the epigram of Plato in [*Greek Anthology*, Bk. VI [1]: 'Since I do not want to see how I now look; and to show me as I was the glass is unable.' Quintilian, *Declamations*, cccvi: 'And no old woman is loved except in memory.' Add Bacon, *Essays*, 84¹ chap. xl. But *Digest*, I. ix. 1, apparently accords greater dignity to men than to women. Yet add Jacques Godefroy, *De Praecedentia*, Pt. I,

¹ [For *halicut.* read *halieut.*—Tr.]

chap. v, § 35. And still, in general¹ women have some foundations of esteem in common with men; some that are their own, such as pre-eminence in virtues and functions which are judged to fall in a special sense to their sex; and some that are only borrowed, as when they are said to shine from the rays of their husband (see *Digest*, I. ix. 8), or, when they boast loudly of the number and excellence of their offspring. See Ovid, *Metamorphoses*, Bk. VI, fab. iv, lines 127 ff.; Valerius Maximus, Bk. IV, chap. iv, § 1; Plutarch, *C. Gracchus* [iv], on Cornelia; add also the speech of Kennedy in Buchanan, *History of Scotland*, Bk. XII, towards the beginning.

13. It is patent from what has been said, what conclusion is to be reached regarding the views of Hobbes, *Leviathan*, chap. x, whose position is like this: He reduces all the foundations of honour or intensive esteem² to *power*, which is defined as the possession of present means to obtain in all likelihood³ some good. This power he makes either 'natural' or 'instrumental'. The former consists of excellence of the faculties of the body or mind, such as remarkable strength, marvellous beauty, prudence, eloquence, liberality, nobility, and the like. The latter is such as either by the use of these faculties, or of things secured through fortune, serves as the means of acquiring more, such as riches, honours, friends, good fortune, and in general any quality which begets the love or fear of many men, or the reputation for such a quality. In the next place *dignity* is defined as the value or price of a man, that is, as much as a person would be willing to give for the use of his power. To declare that value, or to make known how much we value him at, is what is meant by 'honouring' and 'dishonouring' a man, since to value a man high is to honour him, and low is to dishonour him. He then enumerates the natural signs of honour, such as to ask aid, to obey, to give one large and valuable gifts (for this reason, although with questionable taste, the prince of Zanaga in Africa, according to Leo Africanus, Bk. I, killed a great number of camels and ostriches for his guests, and when they begged him not to, replied, 'I would not be acting civilly if I only set common animals before guests who are so noble and come for the first time to my kingdom'), to be quick to advance another's good, to yield in any matter that he desires, to give proofs of love or fear, to praise, to magnify, to call blessed, to speak considerately⁴, to approach decorously and humbly, to believe, to trust, to give counsel or discourse on any subject, to agree with another's opinions, to imitate, to honour whom he honours, to make use of a person's aid in taking counsel, or in difficult matters. Furthermore, civil dignity to him is that value which a state sets on a man in conferring upon him by way of honour, sovereignty, or office, or the handling of

¹ [For *universum* read *universum*.—Tr.]

² [For *propabiliter* read *probabiliter*.—Tr.]

³ [For *estimaoionis* read *estimationis*.—Tr.]

⁴ [For *considerare* read *considerate*.—Tr.]

any public undertaking, or even a name or title. And he correctly observes, in this connexion, that a state can establish anything as a sign of honour, even though it otherwise appears by its own nature indifferent. So, for instance, it was a sign of honour among the Persians, according to *Esther*, vi. 8, to be led through the streets seated upon the king's horse, as it is also to wear certain badges and decorations. Thus the Chinese salute with their head and hands, the Japanese by taking off their shoes; the Chinese rise before such as they wish to honour, while the Japanese sit upon the ground, holding it unbecoming for a man to stand upright in the performance of this duty. Bernhard Varenius, *Descriptio Japoniae*, p. 21. Add also, Neuhof, *Generalis Descriptio Sinae*, chap. iv. Also in Rochefort, *Descriptio Antillarum*, Pt. II, chap. xix, are to be found some rather unusual signs of honour.

Yet although what has so far been said is true enough, still his 850 following statement cannot be dismissed without censure, where he maintains that 'honour consisteth only in the opinion of power', and infers therefrom: 'Nor does it alter the case of honour, whether an action, so it be great and difficult, and consequently a sign of much power, be just or unjust. [...] Therefore, the ancient heathen did not think they dishonoured, but greatly honoured the gods, when they introduced them in their poems, committing rapes, thefts, and other great but unjust, or unclean acts.' For although we might concede that the foundations of honour may justly be reduced to power, in so far as they naturally produce some effect in human life, since whatever among men lies like a dead thing, with no effect either of good or evil, can apparently be valued neither one way nor another, yet that power alone, without any union with goodness, is a true foundation of actual honour, is opposed both to Hobbes himself and to sane reason. For the same writer in his *De Cive*, chap. xv, § 9, defines honour as nothing else but an opinion of another's *power* joined with *goodness*, and therefore 'three passions do necessarily follow *honour*: *love*, which refers to *goodness*; *hope* and *fear*, which regard *power*.' In other words, that is true honour which is attended by those three joint emotions. Fear alone, as aroused by a power determined upon evil, can in no way be held a proof of honour, since it always carries hatred with it, and whoever fears another would encompass his ruin. Silius Italicus, Bk. I [149]: 'He madly thought it an honour to be feared.' Thus we Christians are convinced of the great power of the devil, yet that is such a power as is wanting in goodness, and is bent only upon evil, while no man in his senses would consider that personage worthy of honour on this score. When he asked our Saviour to worship him, he showed Him not his claws but gifts (*Matthew*, iv. 8-9), and no one of us approves the custom of certain barbarous nations who excuse the reverence they show the devil on the ground that they would avoid his wrath.

And so we are also unable to agree with Hobbes, *loc. cit.*, when he includes in the signs of honour 'flattery of another'; for all flattery presupposes a fault either in him who bestows or in him who accepts it, is a form of derision, and absolutely lacking in sincerity. And so Lucan, Bk. V [385-6], calls it 'the expressions by means of which now for long we have lied to our rulers'. (R.) See Plutarch, *How to Tell a Flatterer from a Friend*. Wisely did Pescennius Niger, in Spartianus [xi], reply to a man who wished to recite a panegyric upon the occasion of his being made emperor: 'Write praises of Marius or Hannibal, or of any pre-eminent general now dead, and tell what he did, that we¹ may imitate him. For the praise of the living is mere mockery, and most of all the praise of emperors, in whose power it lies to kindle hope or fear, to give advancement in public life, to condemn to death, and to declare a man an outlaw.' (M.) As to the fables of the poets, there are some, of course, who feel that they would merely suggest that the gods are above the laws, although the philosopher Sallust, *De Diis et Mundo*, chap. iii, offers another reason:

But why do such stories include adulteries, thieving, the enchaining of parents, and other such wicked deeds? Surely even this is not unworthy of wonder: that by means of an obvious absurdity the mind is quick to recognize the tales as chaff, and realize that the truth in such things should be buried in silence.

However this may be, it is my opinion that we can no more yield honour to Jupiter for his adulteries and violations of maidens, than we can to Messalina because she left the stews 'wearied of men, but not yet satisfied'. [Juvenal, VI. 130.] It is a worthy saying of Pindar, *Olympian Odes*, i [55 f.]: 'In truth it is seemly for man to say of the gods nothing ignoble.' (S.) And Isocrates, *Busiris* [228], calls those tales

blasphemies (in which) men have told such lies about the very gods as they would never dare spread against their enemies. For they have not only accused² them of thievery, adulteries, and periods of slavery with mortals, but have invented tales about their devouring their children, emasculating their fathers, lying with their mothers, and many other
851 frightful deeds. The authors of such stories were never worthily punished, and yet they did not escape entirely some retribution. For some of them became vagabonds and beggars, others were stricken blind; yet others were banished and waged perpetual warfare against their families. Orpheus, the chief inventor of such tales, was torn to pieces.

Seneca, *On the Shortness of Life*, chap. xvi: 'Is it not adding fuel to our vices to name the gods as their authors, and to offer our distempers free scope by giving them deity for an example?' (S.) Fulgentius, *Mythology*, Bk. I [55-7]: 'If gods presided over thievery, crimes would have no need of a judge, since misdemeanours would have divine authority.'

14. Furthermore, all these foundations of intensive esteem in

¹ [For *non* read *nos*.—Tr.]

² [For *exdobarunt* read *exprobrarunt*.—Tr.]

themselves produce nothing more than an imperfect right to receive honour and respect from others, and so if a man has denied them to others, even when they have well deserved them, he cannot be said to have done these men an injury, but only to have laid himself open to the censure of inhumanity or, if we may so speak, of incivility. For it does not appear how, among those who live in a state of natural liberty and so are naturally equal to each other, one man can by any right of his own demand honour of another, since by reason of the natural love which every man entertains for himself and his own, he is perfectly free to feel that his own endowments are in every respect as good as those upon which another preens himself, or even superior. For instance, one man calls attention to his grey hairs. but another holds that his youthful vigour more than counteracts them. Pindar, *Olympian Odes*, IV [26 f.]: 'Even young men full often find their hair growing grey, even before the fitting time of life.' (S.) One person is as proud of his hopes as another of his accomplishments. Ajax is emboldened by his physical strength, but Ulysses holds that he himself is far to be preferred by reason of his prudence and persuasiveness, for, as he says in Sophocles, *Ajax* [1251 f.]:

'Tis not the brawny, big,
Broad-shouldered men who prove the best at need;
The wise and prudent everywhere prevail. (S.)

One man boasts of his wealth, while another holds his mental endowment worth as much as the treasures of kings. This man glories in his learning, another replies in the words of Plato, *Epistles*, x [p. 358 c]: 'Steadfastness and loyalty and sincerity, that, say I, is the genuine philosophy.' (P.) This man boasts of the honours which he has won, another rejoins with the remark of Cicero, *Letters to Friends*, Bk. III, ep. xiii: 'The outward rewards of virtue many have attained without possessing virtue.' (S.) Still another chants the saying of Euripides, *Phoenician Maidens* [442]:

For the high-born in poverty is naught, (W.)

and laughs at those whose endowment the same writer, in his *Electra* [37-8], describes as

Noble in line, but poor in this world's goods. (W.*)

Nay, finally, wise men think it just as foolish to rate men by their wealth, dignities, honours, and everything that lies outside the man himself, as to value a horse by his saddle and bridle.¹

Furthermore, since a man accords honour by reason of the fact that he recognizes some outstanding excellence in another, and voluntarily submits to him for that reason, and since he cannot be made by

¹ [Derived probably from Epictetus, *Discourses*, III. xiv. 12 (cf. fr. 18), in the Loeb Classical Library edition.—Tr.]

force to do so, that method being more inclined to confirm him in his resistance, it is obvious that it is inappropriate to accord to such foundations in themselves the force of a perfect right, which can be asserted even by violence and the sword. For the respect which is forced from a man by the power of sovereignty, is a sign not of any real honour for him, but of a fear of death. Again, the mere external signs of honour, unless they arise from submission of the mind, are empty things, which savour more of mockery than of honour, and it would be folly to rush to arms merely because of their refusal; especially if the other claims that his failure to show respect is not due to contempt, but to his desire to enjoy his liberty, which allows him not to be forced to such things as should depend upon his own discretion and humanity. And so the Scythians once said to Alexander: 'Living in vast¹ forests, may we not remain ignorant who you are, and whence you come?' [Curtius, VII. viii. 16.] And in Caesar, *Gallic War*, Bk. I [xxxiv. 2], Ariovistus replied to Caesar: 'If he had need of aught from Caesar, he would have come to him, and if Caesar desired aught of him, he ought to come to him.' (E.) In much the same manner Vologeses, king of the Parthians, when summoned into the presence of Nero, replied to him: 'It is far easier for you than for me to traverse so great a body of water. Therefore, if you will come to Asia, we can then arrange when to meet each other.' (F.*) Xiphilinus, *Epitome of Dio* [LXIII. vii].

From all this it seems patent, that, even if it be agreeable to natural reason for honour to be accorded to outstanding individuals (nay, if any one so desires, we would list the according of honour to the more worthy as one of the precepts of natural law), that duty should, none the less, be included among those which a man cannot require by his own right, but any praise which he gains from their being performed in his behalf must be left to the goodwill of the other party. But if a man is to be able in his own right to demand of another honour, or some sign of respect, he must either hold sovereignty over him, or have secured such a right by pact or law which has been issued or approved by their common lord. This is illustrated by the account found in Mandelslo, *Itinerarium*, Pt. II, that when the Portuguese and the king of Cochin were arranging terms of peace after a long war, the parleys were delayed for a long time, because the Indian nobles, called Nairi, demanded that the Portuguese make way before them as their common folk in India are forced to do. When the Portuguese held that to be unworthy of them, the issue was finally left to a single combat. This was won by the Portuguese warrior, and as a result the Nairi were obliged to make way before the Portuguese and to stand until they had passed by.

15. Yet the most worthy contest between private citizens over

¹ [For *vaestis* read *vastis*.—Tr.]

honours and eminence, would be for them to contend as to which would be the more quick to pay honour, and which the more modest in declining it. And fun is very properly made of those who strive about such honour with great heat, especially when it is an empty distinction and connected with no substantial return. He is a foolish person who 'struggles for the distinction of walking foremost through the midst of the mud'. (A.) Martial, Bk. X, ep. x [8]. Seneca, *On Anger*, Bk. III, chap. xxxvii:

When you are not given a sufficiently distinguished place at table you have begun to be angry with your fellow guests, with your host, and with him who is preferred above you. Idiot! What difference can it make what part of the couch you rest upon? Can a cushion give you honour or take it away? (S.)

Worthy of commendation is the remark of that prince to two of his meanest slaves who were contending for the first seat in a temple, that the one who surpasses the other in folly should have it. Add Michel Montaigne, *Essais*, Bk. I, chap. xvi. For when Quintilian, *Declamations*, cclii, calls honour 'the most precious possession of the poor', that is to be understood only of simple esteem, since we are well aware that no better excuse has been found in any generation for struggles between princes and entire nations, than that about the degree of dignity, and its natural consequence, precedence. So that to practically every man is applicable the saying of Ovid, *Fasti*, Bk. V [298]: 'We that inhabit the heavens are an ambitious set.' (R.)

The arguments which are usually advanced in such quarrels deserve a little closer consideration. This much is beyond question, that, if one prince is dependent upon another as his superior, the latter is the more noble, and deserves by perfect right precedence over the other, even though they both may enjoy an equal title. Thus there are instances of greater kings who have under them others entitled kings, although they are really no more than magistrates and governors of provinces. Some acknowledge their kingdoms to be under the feudal overlordship of others, while some hold them under one title, some under another. Thus in Tacitus, *Agricola* [xiv], it is called an 'old and long received principle of Roman policy, which employs kings among the instruments of servitude'. (H.) Adherbal says in Sallust, *Jugurtha* [xiv]: 'My sire Micipsa admonished me on his death-bed to consider that I was only a steward of the kingdom of Numidia, but that the right and authority were in your (the Fathers of the Senate) hands.' (R.) And whoever is leagued with another by an unequal treaty, acknowledges through that act that the dignity of the other is superior, 853 because he pledges that he will give due respect to the other's majesty. And it is, furthermore, unquestioned, that, when a prince in his own person, or as the head of his state, has secured over another a right of greater dignity and precedence, whether by a pact, or when the other

has allowed it for some time, and has submitted to it (for which right no more likely reason can be advanced than that the inferior recognizes the other as more worthy), the former can maintain it so long as he lives, since he embodies the dignity under which that right was acquired. See Jacques Godefroy, *De Praecedentia*, Pt. I, chap. i. Add also the arguments presented by the French and Spanish speakers in Andr. Maurocenus, *Historia Veneta*, Bk. VIII, pp. 301 ff., and the anonymous¹ work entitled *Mémoires touchant les Ambassadeurs*, p. 328, where the writer correctly observes that a third party should not take to himself to settle controversies which are concerned among other things with matters of precedence.

16. But when a man has not as yet secured such a right as we have just described, various arguments can be urged for a greater dignity. Among these first place is usually accorded the great age of the kingdom and its ruling house, the extent and wealth of its possessions and their power, the quality of the power whereby the prince holds sovereignty in his kingdom, and the splendour of his title. Age is commonly held to add a certain veneration to state and ruling lines, and those who rest upon such claims boast that they already enjoyed their dignity when other kingdoms constituted but an humble portion of the subject population of a foreign empire, or when that family which now glories in its newly acquired crown, lay lost in the obscurity of the common sort; that it is forbidden to contend with the dignity of a prince whose ancestors could have used those of rival princes as their servants; that it is a kind of natural and common law for things of later origin to be subject to those of earlier. From such claims they pass to a magnificent recital of the mighty deeds wrought by that kingdom or ruling house in war and peace, of the like of which those upstarts can show little or nothing. Might also adds terror to veneration, and it seems not only imprudent but even rash to undertake to challenge the dignity of one who holds in his hands the power to aid us as well as to do us harm; and it is regarded as a most effective way to secure honours for one to be able to point to his sword and say, 'If you will not grant them, *this* will' [Suetonius, *Augustus*, xxvi. 1, inexactly].

Moreover, it is considered a greater honour for one to enjoy full liberty, and be subject to none but God, than to live under the control of the laws and pacts of men. And, finally, since a thing itself is usually expressed by a title, the splendour and greatness of such a title is held to establish a dignity that is its equal. See also Andr. Maurocenus, *Historia Veneta*, Bk. XII, p. 484, where he describes the rivalry of the princes of Italy upon the occasion when Pope Pius V granted Cosimo the title of Grand Duke, and Petrus Suavis, *History of the Council of Trent*, Bk. V, p. 402.

¹ [By Abraham de M. Wicquefort. See § 24 below.—Tr.]

17. Now although these and similar arguments can be advanced with great plausibility, it must be confessed that they all of themselves produce but an imperfect right, unless they are supported by some express or tacit pact, which is understood to reside in an established custom. Nor are there wanting considerations which can lessen the force of arguments like those which we have just set forth. It may be urged that mere age of itself has no dignity, since it means nothing but a passage of time, which can be as true of a trifling matter as of a nobler one. That all kingdoms enjoy the character of being free and independent of one another, and that how long they have been that way is of little importance. That it is true, that, for a kingdom to have flourished over a long period of time, is proof that its structure was well knit together, and that it has enjoyed an efficient administration, and that due to the kindness of fortune or the bravery of its citizens, external foes have either not arisen, or else have been repelled successfully and bravely. But that states of recent origin can be ordered and administered as successfully as old ones; nay, perhaps, even more successfully, because the good institutions of the latter have often arisen at the cost of perilous experiments, while the former can take over for their own uses the best of what has been discovered by others. That no man can secure to himself the continued kindliness of fortune, although a state may do so much as to see that evil institutions do not pave the way to its downfall. In brief, that every man should be judged by the present. The past concerns us no longer, the future not yet. That states never form into a system or council where the most recent arrival must take the lowest place, but that each of them enjoys its own liberty. That for one house to hold the sovereignty in a state over a long period, is often only a proof that the new rulers have emulated the virtue of their ancestors, and that in general its resources have made it so powerful that another has not dared to hurl it from the throne. That sometimes a family is indebted for its long possession of power to the genius of the people, which avoids revolutions and a change in the established order. Now and then the credit must go to heaven alone that 'the Metelli are consuls at Rome'. [Naevius, frag. 63 Baehrens.] Such men as have recently attained that eminence can return the old answer: 'For as to race and ancestry and the deeds that other than ourselves have done, I call these in no true sense our own.' (M.) [Ovid, *Metamorphoses*, [XIII. 140-1.] Likewise 'Fortune furnished the family.' Statius, *Silvae*, Bk. III [iii. 45]. That nothing is easier than to enter into a rich inheritance won by one's ancestors, while to win a patrimony for one's self is a task for the strong. That the first speakers owe the grandeur which they have received to the accident of birth, while they themselves owe it to their own superiority; the first speakers harp upon the past glories of others, while they themselves win renown by such as are of their own making

and belong to the present. Finally, that to be king is regarded as the highest degree of nobility, and this claim can be advanced as well by a recent king as by an ancient family. It is the conclusion of Ovid [*Fasti*, Bk. V. 26], upon majesty: 'Of full growth was she on the very day on which she was produced.' (R.)

To all this can be applied the words of Arnobius, Bk. II [71]: 'Is it a new thing that we are doing? Well, the day will come when it will be old. Is it an old thing that you are engaged in? Yes, but when it started, it was fresh and novel.'

18. Of course power can call forth certain signs of veneration from the weaker, because it is folly in them not to yield to such as can do them harm. Thus in Spartianus, *Hadrian* [xv], Favorinus very wittily replied, when his friends reproached him for having done wrong in yielding to Hadrian in the matter of a word used by reputable authors: 'You are urging a wrong cause, my friends, when you do not suffer me to regard as the most learned of men the one who has thirty legions.' (M.) For as Juvenal, *Satires*, v [130-1], says: 'There's many a thing which a man whose coat has holes in it cannot say.' (R.) Yet if any king has sufficient strength to be able to defend his kingdom without trouble, he has no cause to yield to another, however superior the latter may be in resources, since he need neither fear the latter's hosts nor solicit aid for his own preservation. Liberty is something that all men have equally who have it at all, and it is not divided into degrees which are distinguished by extent and resources. Therefore, although one sovereign's kingdom may stretch out six hundred miles and another's but a hundred, yet the latter holds the same sovereignty in his little realm as the other does in his larger, nor does the latter attain the end of established states any less than the former. Nor need I mention the fact that mere power, as it signifies the power to injure others, does not of itself denote any such excellence as deserves to attract true veneration. For the latter carries with it a certain affection, while power to inflict injury begets hatred. Add Jacques Godefroy, *De Praecedentia*, Pt. I, chap. iii.

19. Furthermore, although the possession of a power that is absolute and unlimited by laws may arouse among subjects a greater respect mingled with terror, such is not the case with other princes, 855: who measure another's absolute power in relation to themselves by mere natural liberty, which of itself confers no pre-eminence upon him who has not sovereignty over another. And since a prince is to be measured not by his own rights alone, but by the condition of the state over which he rules, a prince², although limited, can enjoy such rights from the latter source as to be far more powerful than another who is absolute. Finally, titles and all kinds of words acquire their value, like

¹ [For '825' read '855'.—Tr.]

² [For *principes* read *princeps*.—Tr.]

money, from use, and since nothing can be found¹ in a king more excellent than supreme sovereignty, it is enough if they express that sovereignty in its native sense or common usage. The pomp or the modesty of words neither adds nor takes away anything from a fact. (Yet add George Bate, *Elenchus Motuum Nuperorum in Anglia*, Pt. II, pp. 246 ff., and the anonymous work, *Cardinalismus*, Pt. I, bk. iii, pp. 375 ff.) Thus the mere fact that the Turkish monarch is commonly called 'emperor', and the Persian 'king' in no wise² makes the former superior to the latter. To append a boastful³ string of high-sounding titles to a proper designation, although it smack of barbarity, may still, perhaps, lead more simple subjects to respect, but not others. And what did it matter, for instance, to a Roman emperor, whether Sapor, the Persian king, chose to designate himself as 'brother of the sun and moon', or of Saturn and Venus? See Ammianus Marcellinus, Bk. XVII, chap. v; compare Bk. XXIII, chap. vi. Add Grotius, Bk. I, chap. iii, § 10.

20. From all this we can assert, apparently with all confidence, that no perfect obligation, which presupposes a right, properly speaking, in another, obligates a lawful and true king⁴ to yield place to another king as more honourable, even though the latter excel in the conditions just stated, or one free state to another free state, even though the latter be older and more powerful. Nay, a state governed by the people does not in itself appear inferior in dignity to a monarchy, although no one man may be found in a democracy to be compared with a king. As also the ambassador of a free state is not necessarily required to yield place to the ambassador of a king. But since there cannot be so much splendour in a vicarious and delegated dignity as in an original, nor as much dignity in a minister as in a prince, and since free states cannot meet in the same place with kings, save through ambassadors or representatives, it is evident, surely, that in every case the ambassador of a free state should yield to any king or prince who holds supreme sovereignty.

21. Yet this equality among those who are invested with supreme sovereignty does not prevent them from being able to meet, when necessary, in person or else through their representatives, or even to organize into an established council. For if one of the kings⁵ comes into the territory of another, at least the law of civility requires the latter to yield the first place to the guest in his house, unless the former happen to come as a temporary subject. For although every prince is supreme in his own territory, yet kings themselves, like ambassadors, by a kind of fiction seem to have their existence outside the territory of the king to whom and with whose consent⁶ they come, and do not

¹ [For *in veniri* read *inveniri*.—Tr.]

² [For *ambitio sam* read *ambitosam*.—Tr.]

³ [For *regumad* read *regum ad*.—Tr.]

⁴ [For *inse* read *in se*.—Tr.]

⁵ [For *reverera* read *re vera*.—Tr.]

⁶ [For *concensu* read *consensu*.—Tr.]

put off the splendour of their fortune. For I should not advise any prince to go into another's territory incognito, and without first securing permission. To be sure, Gramondus, *Historiarum Galliae*, Bk. III, says with all confidence: 'It is no sin against public law to seize a disguised prince,' and yet I fail entirely to comprehend his reason, unless it be that such a visit may seem to indicate a suspicion of and contempt for the lord of that land.¹

When two or more princes meet in a third place, care may easily be taken that one does not appear to be preferred before another. For the rooms may be so arranged that no one can conclude what place in them is first or more honourable. With this end in view it is common
856 to use circular tables at such meetings. Ausonius, *Ludus Septem Sapientum* [78-80]: 'Justly did the Delphian god once mock at a silly man who asked who was the first of wise men: "Write all their names in a ring that no one shall be first or last"².' The princes may also declare at the outset that they will gather without respect to precedence, and will seat themselves promiscuously as their pleasure or chance may dictate. Thus Philostratus, *Life of Apollonius of Tyana*, Bk. III [xxvii], recounts of the Brahmins, wise men of the Hindus: 'The sages [. . .] paid no special honour to the king, although great importance would be attached to him among Greeks and Romans, but each took the first place that he chanced to reach.' (C.) Lucian, *Epistolae Saturnales* [xxxii]: 'For mirth and good-fellowship it is essential that all the company be on the same footing.' (F.) Add Athenaeus, *Banquet³ of the Learned*, Bk. I, chap. iv. The easiest course of all is for the princes to lay aside their dignity and meet without their accustomed pomp, for in this way they show that they will neither care nor contend about their dignity. If they do not agree to this, the matter can be left to lot, on the understanding either that a member will keep the seat which he has received, or that the order thus secured shall pass around. This course is the easier if only ambassadors meet, especially since in their case there is yet another way of avoiding rivalry, if they have not all received the same but unequal ranks or powers from their princes. For when those degrees arise from mere imposition they allow most easily the greatest variations in dignity. See the anonymous work, *Mémoires touchant les Ambassadeurs*,⁴ p. 428. Worthy of mention is the shrewd device of Abbas, king of the Persians, who at a banquet put his Persian guests on his right and his Turkish on his left, because with the Persians the right hand is more honourable and with the Turks the left. Petrus de Valle, *Itinerarium*, Pt. II, ep. v. Add Jacques Godefroy, *De Praecedentia*, Pt. III, and the account of Petrus Suavis, *Historia Concilii Tridentini*, Bk. VIII, of the rivalry over precedence between the French and

¹ [For *territorii* read *territorii*.—Tr.]

³ [For *Dipnosoph.* read *Deipnosoph.*—Tr.]

² [For *velimus* read *vel imus*.—Tr.]

⁴ [M. Wicquefort. Compare § 24 below.—Tr.]

Spanish representatives at Rome and at Trent. But it should be noted in this connexion that the value of such ranks should be defined by the common consent of the princes. For if one prince would wish to invent a new rank on his own initiative, and to confer it on his representative, who would thereby undertake to claim a specific honour among other people, all the rest of the representatives will be justified in claiming that they are not bound by his pleasure. See the anonymous work just cited, pp. 534 ff. Although we must confess that a certain nonchalance in such matters is often a worthy thing: such as Agesilaus showed when he took an obscure seat in a gathering: "It is all right," he says, "I'll show that it is not the places that grace men, but men the places." (G.*) Plutarch, *Laconian Apophthegms* [p. 208 D]; or Damonidas, who said in a similar situation: 'Well done, you have found a way to make this place also honourable.' *Idem*, *Apophthegms* [p. 191 F]. Add the remarks of the same author in his *Symposiacs*, Bk. I, chaps. ii, iii, and his *Banquet of the Seven Wise Men*.

We may add, in passing, a device of Alphonso XI, who, in order to settle an old quarrel between the states of Burgos and Toledo over precedence, said before any mention had been made of the dispute, and while he was in the act of canvassing the wishes in the council: 'I know that the people of Toledo will gladly do whatever is decided upon, and so let the people of Burgos speak.' Both sides were pleased with this speech of the king, since each felt that it was preferred above the other: the people of Toledo because the king mentioned them by name before all the rest, those of Burgos because they were the first of all to state their case. The account is in Jerónimo Osorio, *De Rebus Gestis Emanuelis*, Bk. I. Add also Gramondus, *Historiarum Galliae*, Bk. III, at the beginning.

22. But if any society composed of equals is destined to stand for any time, and the individual members wish to retain their equality, while there is no desire to settle the matter of position by lot or by sequence in places, one more plan is left which is something like that of lot, and cannot work to the injury of any man's dignity, namely, let every member sit in the company in the order in which he entered 857 it. This method takes place especially in the case of such as enter an organization some time after its founding, for those who are the first to form a company have their places fixed by lot or agreement. And since so many gatherings and colleges have adopted the rule that every member take his place in the order of his reception, Grotius, Bk. II, chap. v, § 21, lays it down as a universal rule, that "The natural order followed with associates is that in which each member enters the association." Add Boecler on the passage; *Digest*, L. iii. 1; *Code*, XII. iii. 1; XII. xliii. 3; XII. v. 1; XII. iv. 2; X. liii. 10; Jacques Godefroy, *De Praecedentia*, Pt. II, chap. iii, §§ 17-18. In this connexion we should

bear in mind that in such societies a higher or lower position in no way denotes a higher or lower dignity, but forms a mere order of precedence among such as are equal in dignity, to whom can be applied¹ the old verse: 'First and last are equal in honour.'² For the observation of Ausonius, *Panegyricus ad Gratianum* [xxiv]: 'There is no disgrace in being the second of two, but great glory in being the first,' applies only when the preferment is given because of greater excellence in the one preferred. But Grotius has remarked, in the passage just cited, that the same custom prevailed in early time in the assemblies of Christian rulers and peoples, as was observed in shaping the body of the entire church, namely, that those who were the first to profess Christianity took precedence over all the rest in the ecumenical councils. Some have seen fit to make this their first claim to a pre-eminence above all others, even in certain other councils and assemblies, as though it were rightfully due them.

Now although there may have been some reason for the order just mentioned in those religious gatherings, yet it does not seem necessary that the same rule be observed in all other assemblies, or that an early profession of Christianity may allow a man a dignity above others. For besides the fact that one of the precepts of the Christian faith is 'in honour to prefer one another' (*Romans*, xii. 10; compare *Philippians*, ii. 3), even in many church councils the priests have played the first role, while secular representatives have usually taken an accessory place and been bidden to observe the decrees of the others. But however this may be, the fact that in a certain assembly one man yields to another, because of a certain respect or situation which does in no wise affect his dignity in general, does not mean that he is obligated to yield to him everywhere, and in cases where that respect or situation is no longer considered. In the same way we observe that in states men belong to several organizations, and in one of them one man yields to another, while outside it or in another organization he keeps his previous position above the other.

23. Now it is perfectly obvious that sovereignty is endued with the power to assign by way of a perfect right a preferment which will prevail against him over whom it is exercised. For just as to command is a nobler thing than to obey, so it betokens a greater dignity to have another's will at the service of your will, than to adapt your way of living to another's, while I must of necessity show respect for him to whom I am indebted for my protection, and who can compel me by fear of punishment to obey his orders. And so sovereignty of itself introduces inequality among men. However, the respect due to such a rank and office may be increased by a special regard that arises from some outstanding excellence in the sovereign. Thus Nestor says in

¹ [For *tinere* read *tenere*.—Tr.]

² [Modified from Aeschylus, *Agamemnon*, 314.—Tr.]

Homer, *Iliad*, Bk. I [277 ff.]: 'Nor do thou, son of Peleus, think to strive with a king, might against might; seeing that no common honour pertaineth to a sceptred king to whom Zeus apportioneth honour' (L.L. & M.), although Achilles recognized more the leadership of Agamemnon than any sovereignty in the proper sense of the term.

But it is also obvious that the more ample and effective sovereignty 858 is, the greater the dignity with which it envelops the sovereign in the eyes of his subjects. Nay, the very duration and age of sovereignty, although of itself adding nothing to its force, increases to no little extent the dignity of a sovereign, even though that does not make it impossible for a subject to excel his lord in those¹ foundations of honour which² produce but an imperfect right. And so it was arrogance on the part of the emperor Hadrian to claim that he was the peer of all who had gained distinction in any art, or for Alexander to exclaim, upon reading in Homer that the Greeks prayed for the lot to leap forth of Ajax or Diomedes or Agamemnon: 'I would have killed the man who named me third!' [Ausonius, *Panegyricus ad Gratianum*, xxv.] For it is no reflection upon the glory of a general to have in his command more robust warriors than himself. And yet the reflection of Domitian in Tacitus, *Agricola* [xxxix], was not for nothing, namely, that 'The qualities of a good general were Imperial qualities'. (H.) But it lies within the power of the one who holds the supreme sovereignty in the state to establish a certain measure, as it were, of intensive esteem among those who dwell in his state, and to grant one person a perfect right to take precedence over another; and just as a citizen can rightfully guard that position, which has been accorded him in this way, against his fellows, so he is obligated to acquiesce in it in every respect. See *Digest*, I. xiv. 3. Every right attaches to the statement of the veteran centurion in Livy, Bk. XLII, chap. xxxiv: 'You ought to think every post honourable in which you act for the defence of the commonwealth.' (M.) And although one man or another may appear to have been unworthily raised above his betters, yet the man who undertakes to request another station for such, or to be restive in his own, can be punished as no better than a rebel to the supreme power of the land. See *Code*, XII. viii. 1. It was for this reason that, according to Diogenes Laertius, Solon likened courtiers to 'pawns'. We can well bring under this point the remark of M. Terentius in Tacitus, *Annals*, Bk. VI [viii]: 'It is not for us to appraise those whom you exalt above all others, or to ask why you have exalted them. To you the gods have given the supreme direction of affairs; to us has been left the glory of obedience' (R.); and that of Lucian, *Judicium Vocalium* [iv]:

Surely it is best for each of us to stay in the place which belongs to him: to go where no one has a right is the act of a law-breaker. The man who first framed these laws for

¹ [For *hicee* read *hicee*.—Tr.]

² [For *quae quae* read *quae*.—Tr.]

us [. . .] decided the order in which our places are now fixed, and also the qualities and powers that each of us has. (H.)*¹

Pliny, *Letters*, Bk. IX, ep. v: '⟨There are proper⟩ distinctions of rank and dignity, and if these are once confounded and all thrown upon a level, nothing can be more unequal than that kind of equality.' (B.)*

Yet a prince may well play his part in removing the complaints of ambitious men, by not dismissing offhand, in his assignment of a more honoured position, the foundations of dignity already enumerated, and especially particular merits toward the commonwealth, which wiser princes know how to honour with a more eminent degree of esteem than money or similar rewards. See Xenophon, *Training of Cyrus*, Bk. VIII [iv. 2], where he describes the order which Cyrus assigned to his companions. And they will be the more careful in this matter by reason of the fact that, unless the dignity and prerogative of eminent citizens are measured by the benefits and aid which they do or can render the more needy, they are to be regarded as silly and idle. But since if princes were always to assign every citizen a place in keeping with his intrinsic dignity, it would be a nuisance to them to go so often over the lists of their citizens and give them a new order, in which undertaking the larger part of them could not help being offended, since most men as a rule only take into account their superiors, and pay no heed to those who are beneath them, the most convenient course seems to be that of according distinction, at least to the outstanding citizens, by the offices which they perform in connexion with the commonwealth. Add Bacon, *Essays*, chap. liii. In such case no room will be left for complaints, if such offices are bestowed upon the worthy and fit (for if that is not done, the saying of Claudian, *Against Eutropius*, Bk. II [321-2], will be in place: 'Under such a consul what honour would not
859 be a disgrace?' (P.)), and if the order of such offices is carefully arranged. And the order of the offices in a commonwealth seems in general most proper when greater distinction is attached to a man, according as he undertakes tasks that are more serious and important, which contribute directly to the real act of governing, and that call into play the most noble arts of the mind. Ovid, *Metamorphoses*, Bk. XIII [366-7]: '[. . .] He who directs a ship surpasses him who only rows it.' (M.) In Homer, *Iliad*, Bk. I [280-1], distinction of office is preferred to lineage and bravery, for Nestor addresses Achilles: 'Though thou be strong, and a goddess mother bare thee, yet his is the greater place, for he is king over more.' (L. L. & M.)

But it is sometimes the case that the greater honour attaches to some offices in a state, the less sovereignty and power are accorded it, and *vice versa*, lest wealth added to dignity may arm magistrates to the destruction of the commonwealth. See Bodin, *On the*

¹ [Scarcely more than a paraphrase of Lucian.—Tr.]

Republic, Bk. III, chap. vi, p. 501. Yet in individual undertakings the nobler the task which a man performs the more worthy he is esteemed. Yet it may very often be the case, that, although one office be by nature more noble than another, not each and every man who is concerned with its functioning is preferred before each and every man in the other; for instance, he who is the chief in the second office may give way before him who is head in the first, and yet be preferred before all the latter's subordinates. It is the more rare occurrence for an office to gain dignity from an incumbent, as was the case in Thebes with the position of Telearch after Epaminondas had served in that capacity. See Plutarch, *Praecepta Gerendae Reipublicae* [p. 211 B]. And yet on the intrinsic esteem of the trappings and dignities of honour, the statement of Sallust, *Jugurtha* [iv], holds true: 'Just as if a praetorship, a consulship, or anything else of the kind were distinguished and illustrious in and of itself, and were not valued according to the merit of those who live up to it.' (R.) Nor was point lacking to the story of Antisthenes, as given by Diogenes Laertius, Bk. VI [viii], who once urged the Athenians to pass a law decreeing all asses to be horses, and when they said such a proposition was silly, replied: 'And yet you make men generals who have never learned anything, and are such only by virtue of your action.'

But if the citizens themselves come to an agreement on a position, or if a certain class is introduced in a state by custom, both of these cases will have the force of law, provided they have not been contravened by the supreme sovereign. See *Code*, XII. viii. 2. A passage in Suetonius, *Vespasian*, chap. ix, deserves our notice:

To let it be known that the two orders differed from each other not so much in their privileges as in their rank, in the case of an altercation between a senator and a Roman knight, he rendered this decision: 'Unseemly language should not be used toward senators, but to return their insults in kind is proper and lawful.' (R.)

And this is in keeping with the lines of Sophocles, *Ajax* [1322-3]:

For my part I can pardon one
Who when reviled retorts in angry words. (S.)

24. But if a comparison must be made between eminent men of different states, it is clear that in their case the foundation of intensive esteem can be caused by nothing other than their worthiness to be accorded respect by those who fall below them in the possession of such foundations. And this remains true, whether the nobler one come as a foreigner into the other's state, or they meet on neutral ground, unless in the former case the sovereign has commanded his subject to yield to the alien, or the ruler of the neutral soil where they meet has defined the order of preferment, or it has been fixed by agreement or custom. And so the eminence of an office which a citizen holds in his

own state, does not of itself give him the right to rate himself above citizens of another commonwealth who enjoy the same position as he, because he had precedence in his own state, for a right which prevails against fellow citizens does not for that reason prevail against
 860 others, just as the laws of other states do not bind us. Add Wicquefort, *Mémoires touchant les Ambassadeurs*, pp. 519 ff.

Nor is it any obstacle that this foreigner's title in his own state is superior to that of the one with whom he is contending, for it remains at the pleasure of every state to determine what value it will set within its own borders on titles and other emblems of honours which are conferred by it on others. Nay, offices by the importance of which dignities are usually measured, may have one value assigned them in one state, and another in another. Also certain sound arts are esteemed more highly in one place and less so in another. Thus everyone knows that in one country the arts of peace are rated high, in another those of war. Especially should it be observed with regard to certain words which express degrees of honour, that not only do they denote different dignities in different states, but that they rate sometimes higher and sometimes lower in the same state, just as conditions commonly raise or lower the prices of other things as well. In other words, the external signs of esteem have their value determined by the imposition of individual states, even though the foundations of intensive esteem, in themselves and as they are measured by wise men, have everywhere their own value. And so there is no place in which virtue and outstanding arts or functions have not their meed of honour. And yet no one can claim of his own right, by virtue of them alone, specific insignia of honour among foreign peoples, unless he has acquired that right by the methods described above. Yet since it is presumed that insignia of honour are everywhere accorded men by reason of their reputation for outstanding virtue, all of the most cultured nations usually accord practically the same respect to the honours of foreigners as do their native states, but they would have it appear that they do so because of civility and humanity, and not by reason of any perfect obligation. And yet there are peoples who set practically no store upon honours conferred by other nations. For Cicero [*Against Verres*, III. xxiii] does not directly call some foreigners, sprung of worthy families, nobles, but always designates them as such 'at home', or 'among the nobility of their land', because foreign nobility were not rated so highly at Rome as in their own state. The same orator's language is highly insolent when in his oration, *For M. Fonteius* [viii, at end], he says: 'If it is proper to have a regard to the men themselves, [...] is anyone, the most honourable man in all Gaul, to be compared¹ [...] even with the meanest of Roman citizens?' (Y.) Thus what man does not know

¹ [For *comparandus* read *comparandus*.—Tr.]

how highly the ancient Greeks honoured the victors in the Olympic Games? And yet Cicero, *For L. Flaccus* [xiii], uses this very custom in order to criticize their frivolity¹. But the Greeks would have deserved to be laughed at if they had required that such athletes be accorded the same honour among peoples who did not rate physical strength or skill so high.

25. Finally, since most nations hold that some dignity attaches to birth, it would not be beyond the scope of our task to inquire with a little more care, in this connexion, as to what basis there is for nobility of blood, and what value should be put upon it, considered by itself. I suppose that nowhere is it rated higher than among the inhabitants of India, who are described by Jerónimo Osorio, *De Rebus Gestis Emanuelis*, Bk. II:

They believe that if a common man touches noblemen, their nobility is defiled and their caste polluted, and they avenge so slight an injury by putting to death the miserable men who have brushed against them. For this reason those who are not of the nobles are required to cry out whenever they pass down the street, while the nobles, on perceiving their approach by their cries, command them to turn off from the street, so that in this way the base-born avoid the danger of death and the nobles that of lasting pollution. Nor is it ever possible among that people for one to becloud his nobility by an evil life, or to dignify obscurity of origin by deeds of virtue, but all must of necessity remain in the same class in which their parents were.

The same nobles who are called in the Malabar tongue Nairi, claim the special privilege of lying with the wives of others when and where they please, and if anyone of them is thus engaged he makes it known by hanging a shield on the door, and the husband dare not enter his own house. Phil. Baldaeus, *Description of the Island of Ceylon*, 861 *Malabar, and Coromandel*, chap. xxvi, and *De Idololatria Indorum*, Pt. II, chap. xvi; Mandelslo, *Itinerarium*, Bk. II, chap. x. Add Abraham Rogerius, *De Braminibus*, chaps. i, ii; Diodorus Siculus, Bk. I, chap. lxxiv.

Now it is perfectly clear that noble birth of itself does not impart a more excellent bodily frame (although often enough good nourishment may have some effect), or a more outstanding mind and remarkable force of character, but that all these qualities can come just as well from common birth. Nor does nature vary her process in the creation of nobles and commons, but the marriages of commons can, or should be, attended with the same sanctity as those of nobles. Nor can one easily show that the canopied couches of the rich are less defiled by adulteries than the simple beds of the poor. Nay, Euripides, *Hippolytus* [409-410], says of adulteries:

Ah, 'twas from princely homes
That first this curse on womankind had birth. (W.)

¹ [For *leviatem* read *levitatem*.—Tr.]

And so, even if the virtue of parents were always passed on to their offspring, many would still have the greatest difficulty in proving that their blood had been passed down to them from the founder of their family uncontaminated and without mixture with that of others. See Dio Chrysostom, *Orations*, XV [lxv], near the beginning [4]; Grotius, Bk. II, chap. vii, § 8. Nor is the common saying: 'The brave are begotten of the brave and good,' so inviolable a rule that the opposite saying may not hold as good, namely, that 'The children of great men are their undoing'. It is a saying of Marius in Sallust, *Jugurtha* [lxxv. 38]:

Their ancestors have left them all they could—riches, portrait busts, their own illustrious memory; virtue they have not left them, nor could they have done so; that alone is neither bestowed nor received as a gift. (R.)

Furthermore, commoners are not always less educated than nobles; nay, often the more advantages the latter have been granted by fortune for the superior cultivation of the mind, the worse they abuse them in luxury, idleness, and the service of other vices. With justice does Plato, *Alcibiades*, I [p. 120 E], say: 'Those who are well-born and well-bred are most likely to be perfect in nature' (J.), and experience records that many degenerate nobles have sullied the glory of their ancestors. Aristotle, *Rhetoric*, Bk. II, chap. xv [3]: 'Being well-born, which means coming of a fine stock, must be distinguished from nobility, which means being true to the family nature—a quality not usually found in the well-born, most of whom are poor creatures.' (R.) Add Stobaeus, *Anthology*, lxxxiv–lxxxv. It is well known that many men of obscure birth have by their virtue attained the highest pinnacle of success: The son of Tydeus was not the only one to be 'greater than his father'. Although Isocrates, *Praise of Helen*, commends nobility for the reason that it does not, like other¹ blessings of fortune, either quickly pass or else pass on to others, but always remains in the same hands, and for that reason is the fairest heritage one may leave his sons; still we may add that unless a man builds his nobility upon his own virtue, or by reason of it enjoys special rights in a state, it must justly be counted an empty thing. Therefore, there appears no necessity in nature itself why a son should succeed to the offices of his father, or enjoy his degree of esteem because of birth alone, especially since in the last analysis we all trace our family to the same stem. Marius says in Sallust, *Jugurtha* [lxxxv. 15]: 'For my part, I believe that all men have one and the same nature, but that the bravest is the best born.' (R.) And a man will be rated not by the excellence of his ancestors so much as by his own, if he follows the advice of Tibullus [*Elegies*], Bk. IV [i. 25 ff.]:

For though thou hast distinctions abundant in thy ancient family, thy thirst for fame is not to be sated with the renown of ancestors, nor dost thou ask what saith the scroll

¹ [For *uticas* read *ut i cetera*.—Tr.]

beneath each mask; but thou strivest to surpass the olden honours of thy line, thyself a greater lustre to posterity than ancestry to thee. (P.)

26. Nevertheless, many states have seen fit to allow citizens of outstanding merit to pass down to their descendants by birth, or some manner of inheritance, that status in which the commonwealth has placed them, along with its special privileges and degree of esteem. Lesbonax, *Oratio Hortatoria* [II. 12, 13]: 'The children of men who show their mettle in the face of adversities are called well-born.' For it is certain that noble birth has by nature no excellence above common, but its prerogative springs from the imposition and endowment of a state, to which are attached certain rights, and a certain degree of esteem, when once conferred upon a man, can be handed down to his posterity by birth alone, without any renewal of the grant. And when this imposition is done away with, even the most splendid birth will in no wise differ from that of a commoner. Add Huarteres¹, *Scrutinium Ingeniorum*, chap. xvi, p. 488 ff. Therefore, when a prince transfers a commoner to the nobility, he works no change in the man's nature and origin, nor does he endow his mind with any new vigour, but he merely commands that the man be put in a class distinct from the commons, which together with its rights he can in the future hand down to his posterity. This may be well illustrated by a device of Amasis, king² of Egypt, who, in order to prove that the obscurity of his birth was no reason why he should not be accorded honour, now that he was king, had a gold basin made into an image of a god and set up for worship. Herodotus, Bk. II [clxxi]. On the other hand, if a noble is deposed from his rank by reason of his crimes, or because he had not conformed to the laws ordained for nobles in his state, it is equally certain that neither his nature nor his mind are changed, nor the blood which he received from his ancestors, and that his noble parentage is not done away with, but he loses only his status and the right accorded to nobility in that commonwealth. When this is done, he becomes at once a commoner. In the same way neither legitimation nor restitution of birth works any change in a man's nature, but only gives rise to moral effects. This is the sense in which the lines of Euripides, *Phoenician Maidens* [814 ff.], are to be understood:

Nay, not the unblest spousal's fruit
Are sons true-born, but with stain they pollute
Their begetter, the stock that sprang from the self-same root. (W.)

See *Code*, VI. viii. A case in point is given by Niccolò Machiavelli, *Storie Fiorentine*, Bk. III: After the Duke of Athens had been overcome, and the government of Florence had been taken over again by the commons, and the nobles had been forbidden by law to hold any office,

¹ [For Huarterus read Huarteres.—Tr.]

² [For regiae read regis.—Tr.]

a certain Benchi of the family of the Boundelmonti, of knightly rank, was granted the special favour, because of his excellent services performed in the war with Pisa, of being enrolled among the people, that is, of being regarded as a commoner. There is an account, in Book V, of the same privilege being accorded to other nobles, and among the Romans P. Clodius passed by adoption from the patricians to the plebeians, so that he could become¹ tribune of the plebs.

27. But it must be confessed that, in conferring nobility, most nations have had regard to certain outstanding arts and unusual merits. And just as he who had distinguished himself in them justly surpassed all others in dignity, so it was held that his virtue was accorded greater distinction when its rewards were also passed on to those whom every man holds most dear, especially since it was hoped that such a course would arouse the virtue of citizens, by inciting them to a more eager pursuit of such rewards. At the same time it was believed that their children would be quickened by the examples within their family to rival the virtue of their parents, and to guard that splendour by the same achievements with which it was won. No less did they feel that parents would concern themselves, so far as in them lay, to return to the state children which would not disgrace them. The result of all this was, that after it became customary for nobility to be acquired by mere fortune of birth, nobles became exacting in the choice of their wives, in order that they might not prejudice those rights of their offspring by uniting with persons of inferior rank, and this either in order that the daughters of equals rather than of inferiors should be called to share in that dignity, or that those of poverty-stricken nobles should not
863 be passed over for the heiresses of wealthy merchants. Moreover, there was reason to keep an accurate record of a long series of ancestors, lest questions some day might be raised about the birth of their descendants, while, on the contrary, it would be idle for the commons to keep a careful register of their ancestors, since no privilege attaches to their birth, and every man is thrown upon his own virtue and industry.

28. To illustrate these points it may not be amiss to inquire with some care into the Roman institutions on nobility. When Romulus undertook to reduce that well-known medley of men of his into the form of a real people, he chose out of the entire body one hundred men to serve as his immediate council, whom he saw fit to denominate *Patres* [fathers], in order to signify either their position or age, while all the others remained the plebs. The descendants of the former were called patricians, a very simple designation, signifying the offspring of the 'patres', or, as others hold, because they alone were able to point out their fathers, while the rest was a band of renegades who could not show that their fathers were free born—in a word, they were children

¹ [For *fiere* read *fieri*.—Tr.]

of the soil. See Plutarch, *Romulus* [xiii]; *Roman Questions* [p. 278 c d]. They offer as proof of this that whenever the patricians were summoned by the kings, criers called each of them by his own and his father's name, while certain officers called the plebeians to assembly as a body by blowing of trumpets made of ox-horns. Yet Dionysius of Halicarnassus, in his usual fashion, *Roman Antiquities*, Bk. II [viii], gives a kinder turn to this institution, by saying that the patricians were summoned by criers, as a point of honour, and the plebs by a horn to save time. But the statement of Decius in Livy, Bk. X, chap. viii, seems to outweigh that of Dionysius:¹

Have ye never heard it said, that the first created patricians were not men sent down from heaven, but such as could cite their fathers, that is, nothing more than free born? I can now cite my father, a consul; and my son will be able to cite a grandfather. (S.)

Juvenal, *Satires*, viii [272 ff.]:

Yet, after all, however far you may trace back your name, however long the roll, you derive your race from an ill-famed asylum: the first of your ancestors, whoever he was, was either a shepherd or something that I would rather not name. (R.)

And so it appears that what was sufficient to obtain primitive nobility in the city of Rome, was that a person be born of lawful wedlock and of free parents, for, as Livy, Bk. I, chap. xxxiv, says: '[. . .] Amongst a new people, all rank is of sudden growth and founded on worth.' (F.) And that was the reason why the patricians claimed that they alone had any family (*gens*), and were related by family (*gentiles*) to one another. For the term *gentiles* is thus defined by Cicero, *Topics* [vi]:

Those are *gentiles* who are of the same name as one another [. . .] and who are born of noble blood [. . .] who have never had any ancestor in the condition of a slave [. . .] who have never parted with their franchise. (Y.)

And Boethius, *On Cicero's Topics*, says as much:

The *gentiles* are such as bear the same name, such as the Brutuses and Scipios; but if they are slaves they cannot be *gentiles*. Yet the descendants of freedmen are not *gentiles*, even though they all go by the same name, since *gentilitas* is derived from a long line of free-born² citizens.

Gaius the Jurisconsult says in the *Institutes*: 'There is no *gentilitas* among freedmen or slaves.' Although it is well known that in later times the plebeians also laid claim to *gentes* or families. Add François Connan, *Commentaria Juris Civilis*, Bk. II, chap. xi. And so to this day, in the languages which have come down from the Latin, nobles are commonly called gentlemen (*gentiles homines*). But when the plebeians later began to contract lawful marriages with the nobility, and in the course of time that blemish, if there ever was such, of low origin began to disappear, the patricians undertook to distinguish themselves from

¹ [For *Dioneysium* read *Dionysium*.—Tr.]

² [For *ingeniorum* read *ingenuorum*.—Tr.]

the plebeians in another way, and to surround the sacred institutions of their families with a peculiar sanctity. On this score they claimed that they alone could hold the magistracies, because they alone could hold the auspices. See Livy, Bk. IV, chap. ii; VI. xlii; X. vii. But this pretence the plebs later justly exploded, although certain plebeians as well, in order to set at naught that prerogative of the patricians, established their own religious institutions. But since these involved some burden, as they passed down in the family, they were done away with by the process of mock sales, which is explained by Cicero, *For Murena* [ii]. Add Godefroy on Cicero, *Letters to Friends*, Bk. VII, ep. xxix.

29. But afterwards, when the senatorial dignity and the magis-
 864 tracies, both of which had up to that time been held only by patricians, were thrown open to plebeians, it came about that the Romans began to measure nobility not so much by the age of the family and its patrician origin, as by the number of images of illustrious members of the house, and from that time on noble families began to be distinguished as patricians and plebeian. Livy, Bk. X, chap. vii: '[. . .] There might be numbered triumphs of the plebeians; the commons had now no reason to be dissatisfied with their own nobility.' (S.) *Idem*, Bk. VI, chap. xxxvii: 'From that day everything in which the patricians surpassed them, would flow in on the commons, power and honour, military glory, birth, nobility.' (S.) Now the knights were not, properly speaking, nobles by the institutions of the Roman commonwealth, for the statement of Tacitus, *Agricola*, that both of Agricola's grandfathers had been procurators of Caesar, 'which is the nobility of the knights', means only, that, as the nobility of those who belong to the families of senators is judged by occupation of the curule magistracies, so to have been a procurator of Caesar constituted a claim to nobility among the knights, since after the prefecture of the pretorian guard no more splendid office fell to that order as such. And so in later times the nobles at Rome did not form a special order, distinguished from the others by distinct rights, but if a man had lined the atrium of his home with 'grimy Dictators and Masters of the Horse', (R.) [Juvenal, *Satires*, viii. 8], or had raised himself to honours by his own virtue, he was held noble by the merits of his ancestors, or his own, respectively. On this point bear the lines of Claudian, *Panegyricus de Probinus et Olybrii Consulatu* [13 ff.]: 'Select what man thou wilt from their family, 'tis certain he is a consul's son. Their ancestors are counted by the fasces¹, the same recurring honours crown them.' (P.*)

Now although many magistracies at Rome were no less important in war than in peace, such as that of the dictator, master of the horse, consul, and praetor, yet because peace is, as it were, the ordinary state of a commonwealth, and war the extraordinary, and so those magistracies

¹ [For *perfasces* read *per fasces*.—Tr.]

both in their name and nature seemed to breathe a spirit of peace rather than war, it appears that the Roman nobility owed its origin to peace more than to war. Nor, indeed, would it have been appropriate for a virtue that was concerned only with war and not connected with the position and skill of the commander, to give rise to a nobility which would have established a peculiar order, and one distinguished by many rights, in a state where practically the common profession of all the citizens was military. And so we may conclude that among the Romans nobility did not establish a peculiar order in the state, and conferred practically no other privilege than that the images of ancestors rendered the passage to positions of honour more easy.

30. It is obvious from all this, that the character of the Roman nobility was different from that which now obtains in most of the kingdoms of Europe. For with us the nobles form a special order, distinguished from the rest of the citizens in dignity and peculiar rights. Furthermore, our nobility is not dependent upon public office, but is conferred by him who wields the supreme sovereignty in the commonwealth, not so often with regard to the virtues of peace as those of war, one proof of which, among others, is that noble families usually distinguish themselves from one another, as well as from the commons, by signs borne upon a shield underneath a helmet, which are for that reason called 'arms'. The antiquity of these can be established by a passage in Diodorus Siculus, Bk. V, chap. xxx:

The defensive arms of the Gauls are a shield, proportionable to the height of a man, garnished with their own designs. Some carry the shapes of beasts in bronze, artificially wrought, as well for defence as ornament. Upon their heads they wear helmets of bronze, with large pieces of work raised upon them for ostentation's sake, to be admired by the beholders; for they have either horns of the same metal joined to them, or the shapes of birds and beasts carved upon them. (B.*)

Add Hobbes, *Leviathan*, chap. x. On the reasons why these nations have laid such emphasis upon martial bravery, while among the Chinese, on the other hand, scholars take precedence over soldiers, our conclusion must be as follows. Certainly the contributions in themselves made by civilians to the state can be as valuable as those made by men in uniform. To formulate beneficial laws, to deliver justice without favour, to increase the resources of a state by the arts and by commerce, to calm by one's eloquence the inflamed minds of a people and turn them into a better course, to study in advance and evade with wise counsel the attempts of other nations upon us, are surely works worthy of distinction and all honour. And yet these accomplishments are not always rated high enough, especially among the uninstructed, both because the arts from which they flow are not so apparent to the eyes, and can scarcely be understood by the common people, and because they seem to unfold themselves with a certain calm and peace, and

without violence and peril. It is entirely different with martial virtue. And so, although civil administration cannot be undertaken without strength and firmness of mind, yet peoples of warlike spirit, and such as have chosen to gain what they have by blood rather than sweat, hold it far more glorious to offer an intrepid breast and expose to peril man's most precious possession, life itself, to the terrors of battle, where every moment threatens instant death, so that the rest of mankind may spend their days the more securely. Add Aristotle, *Problems*, Sec. xxvii, qu. 5. And so in most of the kingdoms of Europe nobles hold their lands by feudal right, and enjoy immunity in their possessions from many burdens which weigh upon the possessions of the commons, so that they may be of military service to the state. A suggestion as to the origin of this custom is to be found in Lampridius, *Alexander Severus* [lviii]:

The lands taken from the enemy were presented to the leaders and soldiers of the frontier-armies, with the provision that they should continue to be theirs only if their heirs entered military service, and that they should never belong to civilians, for, he said, men serve with greater zeal if they are defending their own land too. (M.)

It is for this reason as well that nobles rarely turn to business occupations; not because such imply in themselves anything dishonourable or base, but that they may avoid being drawn away from their military studies thereby, and thus from possessing their fiefs and privileges gratis. And wherever there are states in which the noble turn to trade without losing any of their dignity, you may safely conclude that such a nobility does not owe its origin to military distinction. Compare Bodin, *On the Republic*, Bk. III, chap. viii, p. 560, although some find the reason for this in *Ecclesiasticus*, xxv. 29, and from the fact that, as Cicero, *On Duties*, Bk. I [xlii], expresses it: 'They never can succeed unless they lie most abominably.' (E.) It may be observed that, according to Herodotus, Bk. II, among the Egyptians, Scythians, Persians, and Lydians, and in fact among practically all non-Greek peoples, those who have acquired the manual arts, and their children, were considered citizens of a baser breed, while those who refrained from manual labour, and especially such as did so because of duties in war, were accounted more noble. Add *Code*, XII. i. 6; IV. lxiii. 3; Aristotle, *Politics*, Bk. III, chap. iii; *Ecclesiasticus*, xxxviii. 25 ff.; Cicero, *On Duties*, Bk. I [xlii]: '[. . .] Ungenteel and mean are the gains of all hired workmen, whose source of profit is not their art but their labour; for their very wages are the consideration of their servitude.' (E.) Nay, Livy, Bk. XXI, chap. lxiii, records that the tribune Q. Claudius passed a law at Rome, that:

No senator, or he who had been father of a senator, should possess a ship fit for sea service, of more than three hundred amphorae burden. This size was considered sufficient for conveying the produce of their lands: all traffic appeared unbecoming a senator. (S.)

Juvenal, *Satires*, xiv [269], speaks with scorn of the 'contemptible trafficker in stinking wares'. (R.) And, in fact, it is at times regarded as ignominious to undertake to get something from a man by paying him. Yet add Bodin, *On the Republic*, Bk. III, chap. viii, p. 546 ff.

31. Yet in some states little heed is given to birth, and every man's nobility is derived from his own virtue, and what he has done for the state in private and public capacity. Diodorus Siculus, Bk. I, chap. xcii, in speaking of the funeral orations among the Egyptians, says:

They say nothing of his birth, as is custom among the Greeks, because they account all in Egypt to be equally noble. But they recount how the deceased was educated from a child, his breeding till he came to man's estate, his piety towards the gods, and his justice 866 towards men, his chastity and other virtues, wherein he excelled. (B.*)

Dionysius of Halicarnassus, Bk. III [xi], ascribes these words to Tullus Hostilius: 'For we look upon the nobility of men to consist in nothing but virtue.' (S.) It is the opinion of an ancient poet, that: 'A noble man may not in any wise be base-born.' [Menander, *Monostichs*, 30, p. 931.] Ogier Busbecq [*Letters of the Turkish Embassy*], i, says of the customs of the Turks: 'They rate no one of their nation by anything but his own virtues; only their ruling house is excepted, and allowed preferment of birth.' Add what he records there of the Janissaries. Add also Bodin, *On the Republic*, Bk. III, chap. viii, p. 557. Martinius, *Historia Sinica*, Pref.: 'This nation accords no nobility to mere family lineage. The poorest man may by learning make his way to the pinnacle of fame.' Even the emperor of the Chinese and his children pay no heed to family in choosing their wives, but look to their beauty alone. Neuhof, *Legatio*, p. 280.

Now such customs may perhaps be abhorrent to ours, and yet wise men teach that nobles should not depend upon lineage alone, but much more upon virtue. Seneca, *Hercules Raging* [339-340]:

He who boasts
His noble ancestry exalts a thing
Which is not his to boast. (M.)

Boethius, *De Consolatione Philosophiae* [III. vi]:

Why brag you of your stock? Since none is counted base,¹
If you consider God the author of your race,
But he that with foul vice doth his own birth deface. (S.)

Horace, *Satires*, Bk. I, sat. vi, To Maecenas: 'You say that if a man be himself free-born it matters not what his parents were.' (W.) Claudian, *De Laudibus* [*Consolatu*] *Stilichonis*, Bk. VII [II. 122 f.]: 'Thou exaltest men of all countries, asking what are their merits not their place of birth, what their character not whence their origin.' (P.) Add Seneca, *On Benefits*, Bk. III, chap. xxviii; *Letters*, xlv. Canuleius

¹ [For *de genere* read *dégener*.—Tr.]

says, in Livy, Bk. IV, chap. iii: 'Whilst no class of persons is disdained, in whom conspicuous merit may be found, the Roman dominion increased.' (S.) Herodian, Bk. V, chap. i:

The gifts of fortune adorn even those who are far from worthy of them, but mental and moral virtue wins for any man glory as his own abiding possession. So a distinguished family, wealth, and everything else of that sort, although people are congratulated for them, are not made the subject of praise, because they have been given by another.

It was a harsh answer of Antigonus to the worthless son of a brave captain, when he aspired to honours: 'It is my way to reward my soldiers for their valour not their parentage.' (G.) Plutarch, *De Vitioso Pudore* [xiv], and *Apophthegms* [183 D]. Plato, *Theaetetus* [p. 175 A]: '[. . .] Every man has had thousands and thousands of progenitors, and among them have been rich and poor, kings and slaves, Hellenes and barbarians, many times over.' (J.) A similar thought is found in Dio Chrysostom, *Orations*, XV [xi]:

It is impossible [. . .] that from the beginning of the world there was ever a race of men in which there was not an infinite number of men born free, and a number no smaller than that who have been slaves; and tyrants, kings, bond, branded, tradesmen, cobblers, and of every other station that there is among men; who have had experience of all the activities and kinds of lives, as well as all the fortunes and misfortunes that there are.

He adds that the reason why the poets trace the lineage of heroes to the gods was because they feared that, if they went back too far, disgraces of this kind would be uncovered. M. Seneca, *Controversies*, Bk. I, cont. vi [I. iv] [4]: 'Look up any¹ famous man you please; you will come upon a humble station.' The point is illustrated by the story of Lycurgus endeavouring to show by the example of two dogs that we are inclined to virtue more by discipline than by nature. Plutarch, *Apophthegms* [p. 225 F], and *De Liberis Educandis* [p. 3 A]. So also men who have risen from the ranks can well give the same reply to nobles of ancient but degenerate families, that Iphicrates made to a certain Harmodius, a descendant of the old family of that name, when the latter chided him upon his mean birth: 'My nobility begins in me, but yours ends in you.' (G.) Plutarch, *Apophthegms* [p. 187 B]. Add Philo Judaeus, *On Nobility*; Stobaeus, *Anthology*, lxxxiv-lxxxvii. Thomas Browne, *Religio Medici*, Pt. II, chap. i:

Neither in the name of multitude do I only include the base and minor sort of people; there is a rabble even amongst the gentry; a sort of plebeian heads, whose fancy moves with the same wheel as those; men in the same level² with mechanics, though their fortunes do somewhat gild their infirmities, and their purses compound for their follies.

- 867 There are also some who argue that it appears unjust, because of birth alone, which can of itself bestow no virtue, and can be won by no man of his own endeavour (Euripides, *Electra* [551]: 'For many nobly born be knaves in grain' (W.)), to grant a man immunity from

¹ [For *Quemcumque* read *Quemcumque*.—Tr.]

² [For *contribue* read *contribule*.—Tr.]

certain burdens of the state to the prejudice of the rest of the citizens, or open to them an easier entrance to the rewards of the commonwealth, since the arts necessary to meet such tasks are found as much or more in others than in them; and all the more if he be of the number of those to whom may be applied the lines of Aristophanes, *The Frogs*, Act III, sc. i, line 2 [739-40]:

Of course, a gentleman.

He's all for wine and women, is my master. (R.);

and those of Juvenal, *Satires*, xi [11]: 'Men whose sole reason for living lies in their palate.' (R.) They would say, in fact, that a state suffers from no light disease, if the supreme civil power is so drawn and bound to a certain social class, in assigning its affairs of state, that it cannot avail itself of the service of other citizens in matters for which they are recognized to be particularly suited; especially when that power is not allowed to choose able men for this social class. For if any prince finds himself forced to favour the nobles only in order that by their aid he may be better able to restrain the rest of his subjects, this is evidence that his power¹ is tottering and has almost completely lost control, since he is forced to join a conspiracy, as it were, with a part of his citizens, and depends no longer on open authority but on cunning designs. Add also Bacon, *Essays*², chap. xiv, and *The Advancement of Learning*, Bk. VIII, chap. iii, n. 3, where he advises 'those kingdoms which aspire to greatness to beware lest the nobles be made too numerous'.

32. We may now inquire, last of all, whether as dignity and badges of honour in a state depend on the supreme civil power for their origin, the same is true of their duration. Here it is our opinion that we must consider whether badges of honour and rights are connected solely with some office in a commonwealth, which the supreme sovereignty may confer as it sees fit, or whether they are conferred upon a citizen as his own personal possession. It is patent, when the first is the case, that the supreme³ sovereignty possesses the same power as in the appointment and removal of magistrates. So⁴ Fabius Cunctator not only showed an example⁵ of his tolerance, but also paid tribute to the power⁶ of the state, when, as Dictator, he suffered the appointment of a Master of Horse with the same power as his own. See Livy, Bk. XXII, chap. xv, xxii. Here applies a saying of Solon, in Diogenes Laertius [I. 59], which is also given by Polybius, Bk. V, chap. xxvi:

Those who had influence with tyrants were like the pebbles which are used in making calculations; for that every one of those pebbles were sometimes worth more, and sometimes less, and so the tyrants sometimes made each of these men of consequence, and sometimes neglected them. (Y.)

¹ [For *poestatis* read *potestatis*.—Tr.]

³ [For *sommo* read *summo*.—Tr.]

⁵ [For *spe specimen* read *specimen*.—Tr.]

² [For *sermou* read *sermones*.—Tr.]

⁴ [For *Si* read *Sic*.—Tr.]

⁶ [For *potestaem* read *potestatem*.—Tr.]

We should add here the act of Amasis, king of Egypt, as recorded in Herodotus, Bk. II [clxxii], when he made a statue of one of their gods out of a basin. And it is on such an understanding that we allow the statement of Cicero, *For Plancius* [iv]: 'This is the inalienable privilege of a free people, [. . .] to be able by their votes to give or to take away what they please to or from any one.' (Y.) Although the word *detrahere* appears to signify more the denial of a requested honour than the taking away of an honour already acquired.

But when such distinctions are held by citizens in the second way, they cannot regularly be deprived of them, save by way of punishment. This is illustrated by the saying of Aristotle in Aelian, *Varia Historia*, Bk. XIV, chap. i: 'It is not the same sort of thing never to take on high office, and to be robbed of it, after you have accepted of it. For it is no misfortune not to get it, but when you have once got it, to lose it again, that is a trial.' Here belongs also what is given by Dio Chrysostom, in his *Rhodian Oration*. But whatever immunities and privileges are connected with honours can be suspended or removed entirely, as the condition of the state requires, provided compensation be made so far as is possible; because all such privileges are understood to be conditioned upon the highest necessity of the commonwealth, and it would be absurd for them to be attributed
 868 such sanctity that they should not yield even to the safety of the commonwealth. It may also be gathered, from what has been set forth, as to how far any state can decree that the children of traitors shall be *ἀτριοι* [deprived of all civic rights], such as was decreed in Athens against Antiphon, as we learn from his biography, while in Rome Sulla forbade the children of the men whom he had proscribed to seek any honours. We must hold that such could be debarred from honours and magistracies, but could not justly be deprived of their simple esteem.

CHAPTER V

ON THE POWER OF SUPREME SOVEREIGNTY OVER THE POSSESSIONS BOTH OF THE STATE AND OF INDIVIDUALS

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| <ol style="list-style-type: none">1. The power belonging to a king over possessions, if the kingdom is his own patrimony.2. Citizens do not everywhere owe dominion of their possessions to the state.3. The supreme sovereignty can pass laws about the use which citizens should make of their possessions.4. It can likewise exact taxes.5. What should be observed in the imposition of customs, | <ol style="list-style-type: none">6. And of other revenues.7. On eminent domain¹.8. The rights of a king over the possessions of a state.9. On the alienation of a kingdom and of its parts.10. A king cannot enfeoff or mortgage his kingdom without the consent of his people;11. Or alienate the possessions which pass with the crown. |
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IN order to understand the power of supreme sovereignty over the property of citizens, we should observe that it flows either from the very nature of supreme sovereignty in itself, or from a special manner of acquiring sovereignty. For it is, without doubt, a matter of no little concern whether he who holds supreme sovereignty in a state has created, as it were, his own citizens and was the first to acquire all manner of dominion over the things embraced within the bounds of his state, or whether he is summoned to sovereignty by the free will of men who already had possession of all their property. It is clear that in the former case the sovereign holds over all property in the state not only such power as flows from sovereignty as such, but such as every father of a family possesses over his own patrimony, unless it be that he has relinquished some portion of his right. Therefore, if such a king has kept his dominion unimpaired, citizens will hold their property by no other right than that by which slaves in ancient Rome held their trifling possessions, and so their possession is merely precarious, revocable at the pleasure of the king whenever he so pleases. Yet so long as citizens are left in possession of such property, they will be justified in gathering from it their sustenance and whatever else is necessary to sustain life, as though in payment for their trouble in looking after and protecting it. And so what Hobbes, *De Cive*, chap. vi, § 15; chap. xii, § 7, falsely applies to all citizens, is really true only of such subjects as we have described:

Each particular citizen hath a *propriety* to which none of his fellow citizens hath right [. . .]; but he hath no propriety in which the chief ruler [. . .] hath not a right. (Just as) the sons of a family have a propriety of their good granted them by their father, distinguished indeed from the rest of the sons of the same family, but not from the property of

¹ [For *domino* read *dominio*.—Tr.]

the father himself [xii. 7]. Even as in a family, each son hath such *proper* goods, and so long lasting, as seems good to the father.

But if such a king has relinquished part of his right, subjects will then have so much right to their possessions as the concession of the
 869 king has allowed them. Thus Pharaoh, as master of the land of Egypt, used to claim for himself a fifth part of the fruits, and leave the rest to the cultivators (*Genesis*, xlvii. 23, 24, 26), although there was an exception made in the case of the fields of the priests, to whom a third of the land belonged as a gift of Isis. See Diodorus Siculus, Bk. I, chap. xxi, lxxii, and Grotius on *Genesis*, xlvii. 26. About the peasants among the Hindus we are informed by Strabo, Bk. XV [i. 40]: 'Since all the country belongs to the king, the farmers rent it and work for one-fourth of the crops.' Add Diodorus Siculus, Bk. II, chap. xl. And this continues to this day in the realm of the Great Mogul¹, where the king is actually heir of his servants and merchants. Add Garcilaso de la Vega, *Comentarios Reales*, Bk.² V, chap. v. In the kingdom of the Congo no man has anything which he can call his own and hand down to his heirs, according to Eduardus Lopez, but everything belongs to the king who assigns the oversight and use of the property as he pleases. Therefore, whatever right individuals have over property in these kingdoms, depends originally upon the indulgence of the king who has absolute power to dispose of all property within the limitations of irrevocable pacts or concessions of his own making. Although in this connexion we should not pass over an observation made by Bernier³, *De Nuperis Motibus in Imperio Magni Mogolis*, to the effect that this absolute dominion of princes in that realm and in other oriental empires is the reason why those lands, otherwise so favoured, are daily sinking lower in ignorance, barbarity, and poverty, or at least do not enjoy the prosperity seen in most of the kingdoms of Europe, where the princes encroach more sparingly upon the dominion of citizens, and where the latter have something which they can call their own even in opposition to the prince. To which we may add, in passing, a custom related by Garcilaso de la Vega, *Comentarios Reales*, Bk. V, chap. ii, that by a law of the Incas subjects had to have cultivated their own fields before they passed to the cultivation of those of the king, since they held that the property of the king could be well looked after only by those whose own affairs were properly cared for; on the other hand, they considered the poor as of no value either in peace or war.

2. Yet there are states where the citizens in no wise look upon their property as originally a gift⁴ of the civil sovereignty, and this appears to take place chiefly in two ways: Either when a people, under the guidance of a king whom they themselves had created, has sought a new

¹ [For *Mogoris* read *Mogolis*.—Tr.]

² [For *Bernier* read *Bernier*.—Tr.]

³ [For *I.* read *I.*.—Tr.]

⁴ [For *beneficium* read *beneficium*.—Tr.]

home, or when several fathers of families, who were already men of wealth, have voluntarily united into a state or joined themselves of their own accord to one already established, and have taken this way to subject themselves and their possessions to civil sovereignty. The method regularly followed in the first case is for such a people under the direction of their leader to occupy as a whole some region which is set off either by natural boundaries or according to the choice of men, which is then divided into parcels and assigned each person by lot, or at the discretion of the leader, or, more rarely, by their own choice. See Cornelius Nepos, *Miltiades*, chap. ii. We must recognize in such a case that, although the dominion of the individual settlers seems to begin not so much by their own seizure as by their leader's assignment, yet what they hold is far from being a gift of their leader, since all who joined such an expedition as voluntary partners acquired a perfect right to hold a section of the land so secured. See *Genesis*, xiv. 14, 21, 23-4; add above, Bk. IV, chap. vi, §§ 3-4.

Much less does the dominion of private individuals depend for its origin upon the desire and indulgence of a king, when, as in the second manner, free fathers of families, already property holders, have voluntarily subjected themselves to his sovereignty. For surely it is as plain as day, despite what is said to the contrary by Hobbes, *loc. cit.*, that those who live outside of states can have something which is their own. Even though we should assume that nature has given every man a right to everything, what is there to prevent every man from being able to have his portion assigned him by the intervention of a pact? And 870 although the pacts of two or a few men, which bear on a thing left open to all, work no prejudice to the rest, but leave them their original right unimpaired, yet if they all should enter a common pact, whether express or tacit, we should not hesitate to say that a true property in things is introduced. And so it is false when Hobbes says: 'The fathers of different families, who are subject neither to a father nor to a common master, have a common right over all things.'¹ See *Genesis*, iv. 4; xiii. 5 ff. Although it is certain that the dominion of those who live in states is far more firm than that of individuals dwelling in natural liberty, for the latter have only their own strength to depend upon, while the property of the former is protected against foreign foes as well as fellow citizens by the strength of the entire state. See *Genesis*, xxxiv. 30. Xenophon, *Memorabilia*, Bk. II [iii. 2], reports Socrates as saying: 'It is better to belong to a community, secure in the possession of a sufficiency, than to dwell in solitude with a precarious hold on all the property of their fellow citizens.' (M.) And in this sense we can admit the saying of Cicero, *For Caecina*² [xxv]: 'If civil law is taken away, there is no possibility of any one feeling certain what is his own

¹ [*De Cive*, vi. 15, note 1.—*Tr.*]

² [*For Caecinna* read *Caecina*.—*Tr.*]

property or what belongs to another.' (Y.) And more clearly in *On Duties*, Bk. II [xxi]:

Commonwealths were established principally for this cause, that men should hold what was their own. For although mankind was congregated together by the guidance of nature, yet it was with the hope of preserving their own property that they sought the protection of cities. (E.)

3. Therefore, in states where the possessions of citizens do not depend for their origin upon their rulers, only so much power over them belongs to the supreme sovereign as flows of itself from the nature of supreme sovereignty, unless the citizens of themselves have voluntarily given over more. A passage in Seneca, *On Benefits*, Bk. VII, chap. iv, bears on this point:

According to law everything in a state belongs to the king. Yet all that property over which the king has rights of possession is parcelled out among individual owners, and each separate thing belongs to somebody. And so one can give the king a house, a slave, or a sum of money without being said to give him what was his already, for the king has rights over all these things, while each citizen has the ownership of them. We speak of the country of the Athenians, or of the Campanians, though the inhabitants divide them among themselves into separate estates. The whole region belongs to one state or another, but each part of it belongs to its own individual proprietor, so that we are able to give our lands to the state, although they are reckoned as belonging to the state, because we and the state own them in different ways. (S.) The king possesses everything by virtue of sovereignty, individuals by virtue of ownership.¹

And Grotius on 1 *Kings*, xvi. 24. Therefore, according to Zonaras, Bk. II, when the people demanded that a charioteer, who was a slave, be given his freedom, the emperor Hadrian opposed them with these words: 'It is not fitting either for me to free a slave who belongs to another or for you to force from his owner emancipation.' And the same author tells us that the emperor Claudius issued an edict forbidding anyone to ask the emperor for things that belonged to another, for it was believed at that time that Caesar could make such gifts, and he restored to its owner a farm which he himself had received in that way when a private citizen. And for this reason we cannot give our approval to an act of the emperor Frederick, recorded by Gunther, *Ligurius*, Bk. III [480 ff.]: 'Whatever the rich stores up, whatever the miser hoards, we allow the people but its use. It is clear that money with the royal stamp belongs to the king; the gleam of Caesar's image betokens Caesar's ownership.'

Furthermore, it appears that that power can most conveniently be divided into three heads: (1) the right of passing laws on tempering the use of property to the welfare of the state; (2) the right of imposing taxes; (3) the exercise of eminent domain. Under the first head are listed sumptuary laws, or such as fix a limit upon unnecessary expenses, whereby first private houses and then the state are exhausted, since money flows

¹ [This sentence is not in Seneca at this place.—Tr.]

out of the country once luxury becomes wild for the delights furnished by foreign lands. Pliny, *Natural History*, Bk. VI, chap. xxviii:

Of all peoples the Arabians are the most wealthy, since practically all the wealth of the Romans and Parthians ends in their possession; for they sell whatever they secure from the sea or forests, and buy nothing in return. (*Idem*, *loc. cit.*, chap. xxiii): In no year of the existence of our empire does India draw from us less than 50,000,000 sesterces, while she returns to us merchandise which sells for one hundred times its cost.

Compare *Idem*, Bk. XII, chap. xviii. A further disadvantage is, that, if men have wasted their resources in luxury, they become unable to help meet the expenses of the state. For instance, if he who spends two-fifths of his annual income must give another two-fifths in taxes, he feels no inconvenience and actually increases his capital by one-fifth, while when those who make a practice of spending all their incomes have to give something to the state, they are forced either to draw from their capital or to cut down their scale of living. Of this nature were those laws in the Roman republic which are enumerated by Paulus Manutius, *De Legibus Romanis*, on the basis of Macrobius, *Saturnalia*, Bk. III. Plato, in the *Laws*, Bk. VI [p. 775 A B], would have no more than ten relatives invited to a wedding, nor more than a mina spent upon it even by the most wealthy. Add Aelian, *Varia Historia*, Bk. III, chap. xxxiv; Garcilaso de la Vega, *Comentarios Reales*, Bk.¹ V, chap. xi. To the same class also belong laws against gambling (see *Digest*, XI. v, and *Code*, III. xliii; add Gratian, *Decretum*, I. lxxxvi. 7-9), and those which everywhere restrain spendthrifts. Here belongs a law of Periander of Corinth which did not allow a man 'to spend more than his income' (Heraclides, *De Politicis* [Aristotle, *Fragments*, DCXI. xx]), a rule which should be observed especially in the case of those who have the direction of a commonwealth, as is shown by a remarkable passage from Polybius, *Excerpta Peiresciana*, Bk. X [xxii. 5]: 'It was impossible for a man to take the lead in public business with honour who neglected his own private affairs; nor again to abstain from embezzling public money if he lived beyond his private income.' (S.) A similar observation is that of Lucian in the *Anthology* [IX. 367]: 'Whoever has misused his private affairs cannot be trusted with those of others.' Likewise laws on the extent and quality of possessions, as the *Lex Licinia* in Rome, that no one should have more than five hundred jugera of land², or more than one hundred head of larger cattle or five hundred of smaller. See P. Manutius, *loc. cit.* Here belongs *Numbers*, xxxvi. 7, 9. Add Aristotle, *Politics*, Bk. II, chaps. v, vii; VI. iv (v) [VII. iv], where he gives a law³ in common usage in many democratic states, 'which enjoins the preservation of the original lots'; and a law of Oxyllus: 'There should be a certain portion of every man's property on which he could not borrow money.'

¹ [For I. read l.—Tr.]

² [But this law applied only to land which was held by the state and leased to citizens.—Tr.]

³ [For *sex* read *lex*.—Tr.]

(J.) Add *Law of the Burgundians*, Tit. LXXXIV, § 1. Another instance is a resolution of the senate, given by Pliny, *Letters*, Bk. VI, ep. xix, that candidates for public offices should invest one-third of their wealth in lands which lay in Italy. Likewise laws on the manner of donations, legacies, and on circumscribing the drawing up of wills, and setting a limit to the consecration of things to pious uses. See *Exodus*, xxxvi. 6. And such laws as forbid the possession by citizens of a certain class of things, as the one of the Hindus described by Strabo, Bk. XV [i. 41]: 'No private citizen is permitted to keep a horse or an elephant, for both are regarded as the property of the king.' Likewise laws against the idle, such as that one of the Nabateans, whereby 'a man is punished by the state for letting his property grow less' (Strabo, Bk. XVI [iv. 26]), and against those who allow their property to perish through neglect. See Gellius, Bk. IV, chap. xii. Another such was that of king Amasis for the Egyptians, whereby all the inhabitants had to show each year to the governors of the provinces by what means they made their living, upon penalty of death if they refused. Herodotus¹, Bk. II [clxxvii]. You may refer here also laws whereby citizens are forbidden to acquire certain things, or to increase their wealth in a certain manner, as Pliny, *Natural History*, Bk. III, chap. xx, remarks about Italy: 'In abundance of metals of every kind Italy yields to no land whatever; but all search for them has been prohibited by an ancient decree of the senate, who gave orders thereby that Italy should be exempted from such
872 treatment.' (B. & R.) Another instance is a law of the Venetians, given by Maurocenus, *Historia Veneta*, Bk. XVII, that no man could bequeath, sell, or alienate in perpetuity any immovable property to churchmen by testament, sale, or in any other way without the consent of the senate. And, finally, such laws as forbid money to be taken out of a state, and require that all commerce with foreigners be restricted to exchange of commodities.

4. But a further right belonging to supreme sovereignty is that whereby it is able to lay hands on a part of the possessions of citizens by way of taxation, since taxes, when levied in just measure and honestly expended, are nothing other than the price paid by individuals to the state in return for the defence of their lives and property, and to meet the expense involved therein. Therefore, when 'Nero debated whether he should not confer a magnificent boon upon the human race² by abolishing custom dues altogether, this impulse was restrained by his senatorial advisers [. . .] who pointed out that a diminution of the revenues by which the state was supported would bring about the dissolution of the empire'. (R.*) Tacitus, *Annals*, Bk. XIII [1]. And the same author, *Histories*, Bk. IV [lxxiv], quotes Cerialis as saying to the Treveri:

We have imposed upon you by the right of conquest that only which was necessary

¹ [For *Herodotus* read *Herodotus*.—Tr.]

² [For *genere* read *generi*.—Tr.]

to preserve peace. For to maintain the tranquillity of nations, arms are necessary; soldiers must be kept in pay; and without tribute supplies cannot be raised. (O.)

The following words are found in Isaeus, *Orations*, vi: 'He felt that he should be frugal on himself and reserve what was left for the state, so as to be able to meet its requirements.' Themistius, *Orations*, xiv: 'A law of Athens forbids any whose names have been given into the treasury to hold any office until they have paid that which they owe.' Whoever has given this proper consideration will agree that the complaints of the common sort, to whom the burden of taxation usually seems the greatest cause of their miseries, are often unjust and impudent, as is the principal point to what is given by Hobbes, *De Cive*, chap. xii, § 9. Although far more worthy of censure are the complaints of those to whom applies the lines of Plautus, *Cistellaria* [*Epidicus*], Act II, sc. ii [226 f.]: 'As if lots of wenches weren't parading the streets with whole estates on their backs. But when the taxes are levied the men say they can't pay; the heavier taxes levied by these wenches—that can be paid all right.' (N.) Here belongs a statement of Archidamus, given by Plutarch, *Apophthegms* [p. 190 A], who replied to his allies in the Peloponnesian war, when they asked that he stipulate a certain amount for their contribution: 'War has no fixed rations' (P.)¹; and the same author in his *Crassus* [ii] says: 'The wealth requisite for war cannot be determined.' (P.) Procopius, *Persian War*, Bk. II, chap. xxvi [22]: 'There is never a war whose outcome may be taken for granted by those who wage it.' (D.) Rarely at best is there truth in the statement of M. Cato, in Livy, Bk. XXXIV, chap. ix, to the effect that 'War maintains itself'. Nay, in general the expenses of a state cannot always be kept within a certain amount, and for various causes, which depend not upon us but upon our neighbours, who make us need money to ward them off. To every preparation for war can be applied what is recorded by Nicetas Choniates, Bk. I, on the Byzantine fleet. It seems that under the emperor Manuel Comnenus, on the advice of his secretary of the treasury, Joannes Puzenus, the levy for the navy, which had of old been spent upon the fleet, was put into the treasury, 'Because', the latter said, 'battleships were not of service to the state at all times, while their upkeep ran throughout the year and amounted to an enormous sum. Therefore, that money should be put in the treasury, and when necessity demands it, the necessary outlay can be met by the Exchequer. When he had said this, he was regarded as a remarkable man and one of consummate skill in the handling of affairs, although as a matter of fact his advice would have done credit to the most savage pirate. For he deceived the emperor on the amount of the cost, and buoyed him up by a false estimate of the expenses. The

¹ [This famous saying was attributed to many ancients. The translation is that of Perrin in Plutarch, *Crassus*, ii. 8.—Tr.]

result of this counsel, whether due to rashness or parsimony, was that the provinces bordering on the sea were harassed by pirates.' And the historian adds that the blame for the losses which followed could have been as justly laid upon him, as when 'The harvest, when we have received it, we carry to him who sowed the crop¹, and he is accused who did not cut it; and a fire is charged not merely against the man who lighted it, but also against him who was unwilling to put it out when he could have done so.' The same account is found in Nicephoras Gregoras, Bk. VI, who adds that much the same thing happened under Andronicus Palaeologus.

5. Yet a prudent governor of a state will see to it that he so adapt himself to the querulous character of the common sort, as to have the taxes raised with the least possible friction and commotion. Indeed, the mass of mankind feel it to be a far greater hardship to part with something which they once numbered among their possessions, than not to have received something at all. See Livy, Bk. V, chap. xxiii, and Plutarch, *Camillus* [p. 132-3], when the plebs accounted it a most severe hardship that they were forced to turn over a tenth² of the booty that they had already divided. Homer, *Iliad*, Bk. I [125-6]: 'What spoil soe'er we took from captured cities hath been apportioned, and it beseemeth not to beg all this back from the folk.' (L.L. & M.) Claudian, *De Consulatu Mallii* [*De Consulato Stilichonis*, I. 379-380]: 'Even so to lose a possession stirs a heavier pain than never to have had it.' (P.) Add *Digest*, XXIV. i. 5, § 13. It is a saying of Hannibal in Livy, Bk. XXX, chap. xlv: 'So far, forsooth, we are affected with the public calamities³ as they reach our private affairs; nor is there any circumstance attending them which is felt more acutely than the loss of money.' (S.) Therefore, many men have thought it the most convenient thing to get rid of that burden once and for all, and to set aside a part of their property for the permanent use of the state. See Diodorus Siculus, Bk. I, chap. lxxii, and Paul Warnefrid, *History of the Lombards*, Bk. III, chap. xvi. Some hold that the public is less affected by moderate customs or excises than by direct taxes and levies. Although a point to bear in mind in connexion with customs on imports, is whether such imports constitute necessities of life, or merely serve the requirements of luxury, for in the latter case they may properly be increased to restrain luxurious living, and because they are customarily used by men of wealth, or such as are otherwise the recipients of many privileges, and so contribute little to the commonwealth. See *Digest*, XXXIX. iv. 16, § 7. Another point is, whether the same commodities may not be raised or made at home, if native workers turn their attention to them. For this reason it is proper to lay heavy customs on

¹ [For *suevit* read *sevit*.—Tr.]

² [For *quantum* read *quantum*.—Tr.]

³ [For *pattem* read *partem*.—Tr.]

foreign goods, especially such as only serve luxury, and, as Dio Chrysostom, *Orations*, lxxix [5], says: 'They take tribute of you, through no fault of our country, or of our herds, but because of our own folly.'

With regard to exports we must see whether the commonwealth will prosper by forbidding them, or whether they must needs be sent out of the country, since that is the only means for citizens to make a living. In the first case the export dues can be increased, in the second they should be taken off. Another necessary consideration is whether foreign nations stand in great need of such commodities, or can secure them as well in other markets. For who is not acquainted with the shrewd ways of merchants? how 'You are indefatigable in sailing as a trader to the utmost Indies, for from poverty you would fly through sea, through rocks, through fire.' (W.) [Horace, *Epistles*, I. i. 45.] For it is their common practice, if they are overburdened in one place, to start on a hunt for other trading places, or to give the answer attributed to Gallienus, in his life by Trebellius Pollio [vi]: 'Can we not live without linen from Egypt? Is not our country safe without such robes of state?' And so I should judge that one of the best rules for customs is that given by Hesiod [*Works and Days*, 40]: 'A half is more than the whole' (E.-W.), for that harbour is unproductive which never sees a merchant. And in this connexion we should call attention to the rule laid down by Nero in Tacitus, *Annals*, Bk. XIII [li]: 'Merchant vessels were exempted from assessment and the payment of property tax.' (R.) It is also a duty of the supreme sovereignty to put a stop to the exactions of tax-collectors, which they make for their own profit, as well as to the ways in which they harass and vex subjects—a burden more intolerable than the very taxes. We are informed by Dio Cassius, Bk. XLII, that Caesar freed the province of Asia from the tax-collectors, who had been harassing it most grievously¹, 'and made their exactions take on once more the form of taxes'. Add *Digest*, XXXIX. iv. 12 at the beginning. So also Tacitus, *Annals*, Bk. XIII [li], praises an edict of Nero's: 'That the regulations for each tax, hitherto kept secret, 874 should be publicly posted up; that arrears should not be recoverable after one year; that suits against publicans should be heard out of the ordinary course.' (R.) No more should too great favour be shown the king's private treasury 'whose case is never a losing one save under a good emperor', which never lacks such as 'stand ready stubbornly to support its claims, and that with dignified² looks and a solemn air of moral elevation'. Pliny, *Panegyric* [xxxvi. 4 and xli. 3].

6. But in levying taxes and laying other burdens special care should be taken that subjects be given no just cause for complaints, which result, in the first place, if the burdens of the state should be laid upon citizens unequally. For, as Hobbes, *De Cive*, chap. xiii, § 10, well

¹ [For *earnacerbissime* read *eam acerbissime*.—Tr.]

² [For *ravi* read *gravi*.—Tr.]

observes, any burden which lies lightly upon all, will be irksome to the rest if many evade it, and, indeed, intolerable. For as a rule, out of grief at the injury, or from envy of others, men complain not so much of the burden itself, as of the inequality; and since whatever citizens contribute to the state is nothing other than a payment for the peace thus purchased, it is reasonable that those who share equally in the peace should pay equally for it by contributing to the commonwealth money or services, and the immunities and privileges which are enjoyed in many states by certain men or orders, can have no equity save as they are balanced by the quality of the services which their recipients furnish the commonwealth. See Diodorus Siculus, Bk. IV, chap. lxxiii, on Machaon and Podalirius, and Isocrates, *Busiris* [21 f.], on the privileges of the priests of Egypt.

But in order to discover properly this equality, it should be accurately observed that the equality which we are seeking here is not so much of money as of burden, that is, the equality does in no wise mean that all individuals should pay in equal amounts of money, but that the portion assigned each man should not lie more heavily on one than on another, which is the case if an equal ratio is maintained between the burdens and benefits of peace. For although all enjoy the peace equally, yet not all share equally in its benefits, since some have more property, others less, and again some have greater wants, others less. Therefore, Hobbes raises the question as to whether citizens should contribute to the state in accordance with their profits¹ or with their expenses, that is, whether persons should be taxed according to what they have coming in or to what they pay out. On this point we must say, first of all, that, inasmuch as every man's wealth receives its defence from the state, burdens can be laid upon him in proportion to his income. This is illustrated by the statement of Servius Tullius recorded in Dionysius of Halicarnassus, Bk. IV [ix], in defence of the institution of the census: 'And I look upon it in itself to be both just and advantageous to the public, that those who have great possessions should pay great taxes; and those who have small possessions, small ones.' (S.) So also extraordinary demands made by a commonwealth in times of stress should be based upon capital. In the second place, since it is by the resources of the state that every man's life is defended, and life is as dear to the poor as to the rich, it follows that military service can be required of the former as well as the latter, and also, on the same grounds, a small equal tax, such as the poll-tax, where a rich man pays no more than a poor.

But since it is also due to the benefit of the state that citizens have the opportunity of being able to increase their wealth by their industry, the chief difficulty that arises in this connexion is how that fact should

¹ [For *que lu crantur* read *quae lucrantur*.—Tr.]

affect the adjustment of burdens. Here the most convenient course seems to be for a man to be taxed according to his consumption and not by his profits, especially since most men usually proportion their expenses to their income. For should taxes be levied according to a man's income and should it happen that those who have equal incomes have not equal capital—which is often enough the case, since one man keeps what he has by careful spending and another wastes it in luxury—the result would be that those who share equally in the benefits of peace do not bear equally the burdens of the state. For instance, of two men with an annual income of one hundred units of value, one spends forty 875 of it and the other eighty. Now since they both share equally in the peace, it would seem but fair for them both to pay the same. And yet that would involve two inconveniences: First, it would be most difficult for the state to find out each year the amount of every citizen's income, nor could a general property census be taken so often. In the second place, if the tax should be set at the end of the year when every man would submit an account of his total receipts and expenses, and levied upon the surplus from the preceding year, one would pay twice as much as the other, notwithstanding the fact that they share equally in the benefits of the peace. And another result would be that the one would suffer for his frugality and the other profit by his luxury. Therefore, the best course is to tax what is to be consumed, so that in consuming his own property he is, without feeling it, paying his dues to the state in proportion not to what he now has, but to what he formerly possessed by reason of the protection¹ of the state, and what is paid the state is regarded as a part of the price of the thing consumed.

And the observations which we have just made on customs should also be followed in taxes and other burdens of the state. Here belongs the statement of Tacitus, *Agricola* [xix]:

Demands for grain and tribute he made less burdensome by equalizing his imposts: he cut off every charge invented only as a means of plunder, and therefore more grievous to be borne than the tribute itself. As a matter of fact, the natives used to be compelled to go through the farce of dancing attendance at locked granaries, buying grain to be returned, and so redeeming² their obligations at a price; places off the road or distant districts were named in the governor's proclamations, so that the tribes with winter quarters close at hand delivered at a distance and across country, and ultimately a task easy for every one became a means of profit to a few³. (H.)

Add Cicero, *Against Verres* [II], iii.⁴ But we feel that the reply of Pescennius Niger, in his *Life* by Spartianus [vii], was too severe, when he said to the Jews of Palestine, who had asked him to lighten their tribute: 'So you wish me to lighten the tax on your lands; verily,

¹ [For *beneficio* read *beneficio*.—Tr.]

² [For *vendere* read, with the best text, *luere*.—Tr.]

³ [For *pacis* read *paucis*.—Tr.]

⁴ [For *actione* 3 read *actionis* 2. *libro* 3. The whole of this oration, *De Frumentis*, deals with the Sicilian grain trade.—Tr.]

if I had my way, I would tax your air.' (M.) But Aristotle, *Economics*, Bk. II, chap. i, gives a full discussion of the general ways in which necessity may impel a state to raise money. We may mention, in passing, an unusual instance of taxation, whereby the Incas of Peru ordered the very poor to render each year to their governors a certain amount of the horns of vermin, in order that no one could claim that he was free from taxes, and that they might rid the country of those pests. In Garcilaso de la Vega, Bk. V, chap. vi; Bk. VIII, chaps. v, vi.

7. The right of eminent domain is condemned by some authors, not so much in theory as for the name under which it goes. Their position is that the very force of sovereignty, instituted¹, as it is, for the safety of the state, gives sufficient title to a prince to make use of the property of his subjects under strict necessity, and that for this reason he is understood to have a free hand in everything necessary for the common good, but that the term is too broad, and could be abused by evil princes to exhaust the resources and rights of their subjects. But as it is idle to quarrel over terms, so it appears reasonable enough to designate by a special name one of the lesser functions of supreme sovereignty, which is concerned with a special thing in a special manner. The force of such dominion will be clear enough from the following remarks.

Natural equity is observed, if, when some contribution must be made to preserve a common thing by such as participate in its benefits, each of them contributes only his own share, and no one bears a greater burden than another. And the same is true in states. But since there are times in the life of every state when a great necessity does not allow the collection of strict quotas from every one, or when something belonging to one or a few citizens is required for the necessary uses of the commonwealth, the supreme sovereignty will be able to seize that thing for the necessities of the state, on condition, however, that whatever exceeds the just share of its owners must be refunded them by the
876 other citizens. One or two examples may be cited: When a town must be fortified the gardens, fields, and even residences of individuals must be cleared to make way for trenches and works; in sieges the dwellings and trees of private citizens are cleared away, that they may not work to the benefit of the besiegers and the injury of the besieged. So also materials that private citizens have laid aside for their own use may be worked into the fortifications of the city. In time of famine the stores of individuals are thrown open. When necessity requires it the money which they have deposited with the state or in their private chests may be seized, in case the more civil course cannot be followed of accepting as loans the money which citizens may donate of their own accord. According to Xenophon, *Training of Cyrus*, Bk. VIII [ii. 9 ff.],

¹ [For *istituti* read *instituti*.—Tr.]

Cyrus did this, although it is questionable whether even a dubious justice can be allowed the act of Caesar, even though you assume that he was the lawful master of the state; for, according to Dio, Bk. XLII [li]:

(When Caesar returned to Rome after his victory over Pompey) he applied the term 'borrowing' to those levies of money for which there was no other reasonable excuse; for he exacted these sums also in a high-handed way and no less by force than he collected money actually due to him, and it was his intention never to repay them. (C.)

So if the enemy can be repelled in no other way, our own country is laid waste, and everything usable that cannot be carried off is destroyed. See Curtius, Bk. III, chap. iv. When war with the Romans was imminent Critolaus discussed with the officers of the Achaean League whether 'not to exact money from debtors, nor to receive prisoners arrested for debt, and to cause loans on pledge to be held over until the war was decided'. (S.) Polybius, *Selections on Embassies*, CXLIV. iii [XXXVIII. ix. 10]. Add *Digest*, XVIII. iii. 8. Here also belongs the ruling made by Julius Caesar on loans, as given in Suetonius [*Julius*], chap. xlii.

It appears from what has been said, that there is no place for eminent domain unless the necessity of the state require it, on which, however, Boecler on Grotius, Bk. I, chap. i, § 6, observes that the necessity here meant has its own degrees, and that when the term is used it is not always to be understood in its last sense. Yet, on the other hand, care should be taken that this right be not extended too far and that it be, so far as possible, kept within the limits of equity. An excellent example of this is to be found in Livy, Bk. XXXI, chap. xiii.

Another conclusion of all this is, that a prince cannot release a citizen from the force lying in eminent domain, since every privilege is understood to admit as an exception the necessity of the commonwealth, and it would appear to be a contradiction for a man to want to pose as a citizen and yet to claim a right, the observance of which involves the destruction of the state. Yet the claim that those who have in this manner paid out or lost their fortune for the public weal, should, so far as possible, have it restored them, or be properly recompensed by the entire state, rests on the most manifest equity. Some men offer an exception to this, namely, if the damage involved was inevitable and could be seen to be so, as when dwellings outside the walls of a city are torn down in war. For no compensation can be asked for such, since their owners were aware that a condition of this kind was annexed to such places, and in building there notwithstanding, they tacitly confirmed it beforehand. Much the less can compensation be sought if the same necessity lies upon all or involves an equal damage. For it is all that can be expected if the state allows no one to become worse off by its own fault, while it has never obligated itself to bear the losses of its subjects. Johann Christoph Becmannus, *Meditationes Politicae*, XXI, § 8.

8. Regarding property which belongs to the state as such, it should be observed that in some kingdoms a distinction is drawn between that which is¹ reserved for the support of the king, and that which has been set aside to meet the expenses concerned with the preservation of the kingdom. Thus Dionysius of Halicarnassus, Bk. III [i], distinguished between 'public property' and 'permanent royal patrimony'.

877 According to Martinius, *Historia Sinica*, Bk. IV, chap. xxiv, the Chinese allot one-ninth of all the land to the king. Our meaning is that in some states certain state property is made over to the king, with the income from which he is to meet the expenses of his court. Of all of this the king enjoys the full usufruct, so that he can dispose of its income as he pleases, and if he has any surplus therefrom it goes into his own personal estate, unless the laws of the commonwealth may have ruled otherwise. The statement of Seneca, *On Benefits*, Bk. VII, chap. vi, bears on this point: 'Everything belongs to Caesar, yet he has no private property beyond his own privy purse; as Emperor all things are his, but nothing is his own except what he inherits.' (S.) In Herodian, Bk. II, chap. iv, Pertinax forbade his name to be inscribed on the royal possessions: 'Maintaining that such possessions did not belong to sovereigns but were common and public possessions of the Romans.' Thus in Peru under the rule of the Incas the land was divided into three parts, of which one was assigned to the king, one to the sun, their god, and the third to the state, as a result of which the citizens paid no taxes on their portion. Garcilaso de la Vega, *Comentarios Reales*, Bk. V, chap. iv. But of those possessions by the income from which the expenses in connexion with the preservation of the state are to be met, the king has no more than the mere administration, which should have for its end the safety of the state, and be carried on with no less scrupulousness than a guardian observes in the affairs of his ward. Paul Warnefrid, *History of the Lombards*, Tit. III, chap. xvi:

In the days of Authar those who were dukes then, in order to restore the kingdom, gave a half of their substance to the services of the royal house, so that there could be something for the king himself, as well as his immediate followers, and those who attended upon him in different ways, by which to maintain themselves.

It is easy to infer from what has been said, to whom belong the possessions laid up by a king during his reign, that is, whether they belong to the king or to the state. For if they are laid up out of the possessions assigned to the state, or by taxes and the blood of the citizens as well as by such service as they owe the state by virtue of their common obligation, it is clear that they belong to the kingdom, and not to the private fortune of the king. Although it may happen that a king will meet all the cost of a war without entailing any burden or peril upon the state, not out of the treasury but his own patrimony,

¹ [For *sit* read *sint*.—Tr.]

or the income from that which belongs to the throne. Whatever a king has secured in such a war he can rightfully claim as his own and not the state's. For the income from any thing the usufruct of which I enjoy, is mine by full right, and can be disposed of at my pleasure. Add Grotius, Bk. I, chap. iii, § 12.

9. Our next task is to inquire as to how much right belongs to a king to alienate his kingdom or parts of it, and such a kingdom as does not belong to a king's patrimony but was given him by the free consent of a people. This point is discussed by Grotius, Bk. I, chap. iv, § 10, Bk. II, chap. vi, §§ 3 ff., where the comments of Boecler should be read, and Bk. III, chap. xx, §§ 5 ff. The matter may be stated in brief thus: A king has no right to undertake to transfer his kingdom to another on his own authority; and the subjects are not bound by such an act of a king, but the consent of the people is quite as much required as that of the king. For just as a kingdom cannot justly be taken from a king without his consent, so another king cannot be placed over a people unless it also agrees to it. But in the alienation of a part of a kingdom there is required, in addition to the consent of the king, not only that of the subjects remaining to him, but also, and in all circumstances, that of the inhabitants of the section which he has alienated. The reason for this is that those who first united to form a state, or later joined one of their own volition, bound themselves by a mutual pact that they would agree to be ruled by one and the same sovereignty, so long as they saw fit to dwell within the borders of the same state. And so just as each of them secured by that pact a right whereby they cannot be ejected from that state against their will, or handed over to the sovereignty of another, save by way of punishment, so the whole body of citizens acquired by the same pact a similar right over the individual citizens, whereby no one of them may subject himself to another's sovereignty, or renounce the sovereignty of that state, so long as he chooses to live within its borders. And so since states, like moral bodies, were formed with the consent of their parts, we must measure what power in the matter before us belongs to the whole state over its parts by virtue of the original will of those who formed it. Now this will cannot be presumed to have been such as to give a right to the body to cut off parts from itself and to hand them over to the jurisdiction of another at its mere pleasure. Thus it is reported in Frossardus, Bk. IV, and Polydorus Virgilius, *Historia Anglica*, Bk. XX, that the inhabitants of Aquitaine were unwilling to be treated like a present by Richard II, and separated from England. 878

But the statement that a part may not withdraw from the body while it remains within the same borders, admits of this one exception: Provided it is not forced to do so by extreme necessity, and cannot protect its life save by acceding to another's jurisdiction. For in all

agreements of this nature an exception appears to be made in the case of extreme necessity, which allows one to provide for his safety in every way at his disposal. Therefore, no one may justly blame cities which, after resisting a foe with all their might, have finally chosen surrender to destruction. In other words, those who were originally united to form a state already possessed by nature the right to defend their safety by every means possible, and entered into states only in order that they might the better attain that end. And when the state can no longer secure for them that end, it is held that they are freed from the obligation by which they were bound to the state, and have recovered their right to consult their interests as best they can. All would agree that as for the state, it has no other right over its members than what is granted it by those who formed it in the first place. And just as it promises defence to its individual subjects with the exception or condition, 'except it be hindered by a compelling necessity', so when this does press upon a state, it is no longer understood to forbid them to look to their safety as best they can. For¹ it is just, of course, that a member of a physical body be allowed to perish in order that the whole body may be saved, because the member has no life save by the life of the body, but the members of moral bodies can exist and live to themselves, and so a body will not have such power over moral as over physical members. But if a king is forced by necessity to make peace with a stronger foe on the condition of granting him a certain region, which, however, is opposed to that cession, it is our opinion that he should withdraw his garrisons from the region, and in no way oppose the victor in taking possession of it, but that he will not be able to compel it to submit itself unreservedly to the other's jurisdiction. Nor does any obligation appear to prevent that territory from resisting him who would seize it, if it sets any store in its own strength, or from setting itself up as a separate commonwealth. Thus when the emperor Jovianus ceded Nisibis to the Persians, the citizens prayed for permission to defend the city of their birth with their own strength. In Ammianus Marcellinus, Bk. XXV, chap. xii; Zosimus, Bk. III. By such a pact, therefore, the king and people lose their right over that territory, while the victor, by its consent and pledge of faith, acquires legitimate sovereignty over it.

For the rest, the statement which some advance either about all kingdoms, or one only, namely, that property once ceded to, or, as they say, incorporated in the crown, can in no way be alienated, and that not even the longest period of time or the peaceful possession of it by another can prevent the possibility of its being reclaimed, is plainly untrue. And much more foolish is their attempt to assert for some particular kingdom this privilege: That it can seize the possessions of

¹ [For *Nam* read *Nam.—Tr.*]

others and yet what it has once seized can never in any way be taken back from it.

10. All this makes clear, that it is not lawful for a king, without the consent of the people, to acknowledge his kingdom to be the fief of another's, with the added condition, that, if he fails in his feudal obligations, or has no heirs, it shall belong to his lord. For when a kingdom is enfeoffed on such a condition, it is the same as a conditional alienation. 879 So also if a king has remitted to a vassal, without the consent¹ of his people, his service of homage, the people can for their part render such an act null and void. But it also follows that a king cannot mortgage a part of his kingdom to another, with the result that its administration and natural possession lie for a time at least in the hands of the creditor, without the consent of his people and of the part mortgaged, and much less if there be some clause of forfeiture (*lex commissoria*) attached. The reason for this is not merely that alienation only too frequently accompanies the giving of a mortgage, but the further one, that a people, in setting up a king of their own accord, wished to be under his rule and not another's, while it is presumed that those who united to form one people had no desire to be broken up into several.

11. Furthermore, it is clear that a king cannot without the consent of his people alienate possessions which have been assigned him in order that the income from them might meet the burdens of the state or royal dignity, for there belongs to the king from such possessions only the usufruct, which in no wise includes the right of alienation. Even though a king may feel that he has provided well enough for his own lifetime, yet the people must need have another king after him, who will also have to be maintained as his dignity requires. Yet we must carefully distinguish on this point between the possessions themselves, that is, the patrimony of the people, and the income from them, for a king is forbidden to alienate the former, but he has full power to dispose of the latter. Thus when the right to alluvial lands belongs in the patrimony of the people, the king may not make that right over to another, but there is nothing to prevent a king from disposing of articles brought down by floods, since they are like the fruits of the same. Thus the right of confiscation lies in the patrimony, the articles confiscated belong to the fruits, and so the former belongs to the state, the latter to the king. Nevertheless, a king who is empowered for cause to levy new taxes at his own judgement, can mortgage portions of the state's patrimony when necessity requires it. For just as a people is obligated to pay the taxes levied by such a king for cause, so it must redeem the article thus mortgaged for cause, since it amounts to the same thing whether the citizens make up the money to prevent the necessity of such a thing being mortgaged, or redeem it with money

¹ [For *consensu* read *consensu*.—Tr.]

that is contributed later. Although it is obvious in such a case that individual citizens are not debtors for that money, even though every one must contribute his quota for its payment. See Seneca, *On Benefits*, Bk. VI, chap. xx. So also when a king has drawn upon his personal fortune for some need of the commonwealth, it will be right for the property of the state to be mortgaged to him for that sum, until the nation has paid it. Yet all these principles hold good only if no basic law or ruling has made a contrary disposition, and enlarged or restricted the right of the king or the people. Add Grotius, *loc. cit.*

CHAPTER VI

ON THE LAW OF WAR

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| <ol style="list-style-type: none"> 1. The subdivision of the chapter. 2. Peace is the ordinary status of man; war is an extraordinary indulgence of nature. 3. War is either defensive or offensive. 4. The cause of war ought to be clear. 5. A list of unjust causes for wars. 6. Craft may be used against an enemy. 7. What further is lawful against an enemy. 8. Within states individuals are deprived of the right of war. 9. War is either formal or less so. 880 10. A magistrate as such has no right to make war. 11. Whether he can make war on the presumed will of the supreme sovereign. 12. How far an injury done by a citizen furnishes a cause for war against¹ a state. 13. On the equity of reprisals. 14. On whose behalf a war may be justly waged. | <ol style="list-style-type: none"> 15. On the declaration of war. 16. Nations usually allow themselves great licence in war. 17. On licence over the person of an enemy. 18. Whether it is lawful to kill an enemy by hired assassins. 19. Sacred objects are not exempted from the licence of war. 20. How property may be acquired by war. 21. To whom the spoils of war belong. 22. How far incorporeal objects may be acquired by war. 23. Whether a loan may be acquired by war. 24. The ways by which sovereignty may be acquired over the conquered². 25. How the booty of war may be recovered. 26. How whole peoples may be taken back from an enemy. |
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SINCE individuals who live in natural liberty have no less power accorded them than states to defend themselves against an unjust threat of violence, and to have recourse to force in maintaining their rights, when they have been infringed upon or denied by others, I feel that it would be fitting to examine first, what the wars of individuals and states have in common, and secondly, what belongs in a special way to the latter by their nature, or by the customs of nations.

2. Now it is one of the first principles of natural law that no one unjustly do another hurt or damage, as well as that men should perform for each other the duties of humanity, and show especial zeal to fulfil the matters upon which they have entered into particular agreements. When men observe these duties in their relations one with another, it is called peace, which is a state most highly agreeable to human nature and fitted to preserve it, the creation and preservation of which constitutes one of the chief reasons for the law of nature being placed in the hearts of men. Add Polybius, Bk. XII, chap. xiv. Nay, peace is a state especially reserved to human nature as such, since it springs from a principle which belongs to man, as distinct from animals, while war arises from a principle common to them both. Of course,

¹ [For *contr* a read *contra*.—Tr.]

² [For *invictos* read *in victos*.—Tr.]

even animals depend upon a natural instinct to defend and preserve themselves by force, but man alone understands the genius of peace. For it is characteristic of him voluntarily to do something for another, and to refrain from injury, by reason of a certain obligation residing in one, and of a certain right residing in another person, all of which is unintelligible without the use of reason. Of course domestic animals perform services for their masters, but that is due to a fear of blows, or an expectation of food, and not to any obligation, which, indeed, is beyond their powers to comprehend. Animals also refrain from doing harm to men and to other animals, but that is due to weakness, or to the fact that they find in them nothing to whet their appetite. Finally, there are some that show affection for one another or render mutual assistance, but that does not mean that they understand that they are obligated to act in that way. This is illustrated by a passage in Quintilian, *Declamations*, ix [13]:

Nature first put a certain sociableness into our minds beyond other creatures, whereby we are taught to rejoice in one another's company, to gather a people, to build cities, and though she hath furnished our minds with several inclinations, yet she hath given us no affection better than kindness one to another. For what would be more happy than we men, if all of us were friends? For then wars, seditions, robberies, and other mischiefs that arise from ourselves, would not also come upon us on the score of fortune. But because God thinks it not fit to bestow so great a blessing on us, yet certainly at all times and amongst all nations, 'twas ever held one of the greatest and as it were most sacred offices, for men to agree together in honest principles, to observe truth and faithfulness, and return love for love. (W.*)

- 881 Despite all this war is lawful and sometimes even necessary for man, when another with evil intent threatens me with injury, or withholds what is my due. For under such circumstances my care for my own safety gives me the power to maintain and defend myself and mine by any means at my disposal, even to the injury of my assailant, or, as Ulysses says in *Dictys Cretensis*, Bk. II [xxi]: 'To extort by force a right which cannot be secured by friendly means.' Here belongs the statement of Maximus of Tyre, *Dissertations*, xiv [xxiv. II e]: 'Consequently¹ to the just war appears a necessity, to the unjust a voluntary act.' Add Boecler on Grotius, Bk. I, chap. iii, § 1. A further consideration lies in the fact that nature has not only instilled in the minds of men a bitter sense of injuries, so that they avoid in every way being harassed by the injuries of others, but has also given his body for its protection such agility and strength of hands that he may not be forced to bear them in patience. And yet nature permits war, on the condition that he who wages it shall have as his end the establishment of peace. Aristotle, *Nicomachean Ethics*, Bk. X, chap. vi [X. vii. 6]:

[. . .] The object of war is the enjoyment of peace. [. . .] Nobody desires war, or pre-

¹ [For *Unde* read *Unde*.—Tr.]

pires to go to war, for its own sake. A person would be regarded as absolutely bloodthirsty, if he were to make enemies of his friends for the mere sake of fighting and bloodshed. (W.)

Themistius, *Orations*, x [p. 131A]: 'The prize of war is peace. Moreover, men fight because they have to, not in order that they may spend their days in fighting, but that they may rest in safety.' Tacitus, *Histories*, Bk. IV [lxxvi]: 'No man was so addicted to arms as not to prefer the same reward for repose to incurring danger for it.' (O.) Therefore, you would never approve the character of those described in the lines of Silius Italicus, Bk. III [330-1]: 'They cannot endure life without war; because the only purpose for living lay in arms, and a peaceful existence stands condemned in their eyes.' Furthermore, although he who has injured me gives me by that act the fullest power to find recourse against him in war, yet I should consider how much good or evil such a course will probably contain for me, or for others who have not injured me. For I need not fly to arms to avenge such injuries as do not mean my utter ruin, if that will mean greater disadvantages than advantages to me and mine, or if others with whom I am still at peace will by reason of my war suffer great losses, which I should, by the law of humanity, have warded off from them by allowing such an injury as was done me to go unpunished. Therefore, if a man feels that the avenging of an injury done him will mean more evil than good, he acts in a just and praiseworthy manner in refusing to punish it by recourse to war.

3. The causes of just wars may be reduced to the following heads: To preserve and protect ourselves and our possessions against others who attempt to injure us, or take from us or destroy what we have; to assert our claim to whatever others may owe us by a perfect right, when they refuse to perform it for us of their own accord; and, finally, to obtain reparation for losses which we have suffered by injuries, and to extort from him who did the injury guarantees that he will not so offend in the future. As a result of these causes we have the division of just wars into offensive and defensive, of which we consider the latter to be those in which we defend and strive to retain what is ours, the former those by which we extort debts which are denied us, or undertake to recover what has been unjustly taken from us, and to seek guarantees for the future. Although sometimes the credit for defence stands with him who is the first to take up arms against another, if, for instance, a man has been troubled time and again with sudden border raids, the enemy always retiring on his approach, or if by a swift movement he overcomes an enemy who is already bent upon attacking him, but is still engaged in his preparations. See Justin, II. iii. 12.

4. But in general the causes of wars, and of offensive wars in particular, should be clear and leave no chance for doubt. For time and again doubts arise on this point, either from ignorance of fact, when it is not clearly established whether a thing was done or not, or what was

the purpose of the doing, or from an obscure comparison of strict right with the law of charity, or from an uncertain balancing of the advantages which are likely to follow upon the declaration or avoidance of war. Therefore, in the matter before us, neither should we rashly advance any vague claim, nor, on the other hand, fly at once to arms; but we should by all means try one of three courses in order to prevent the affair from breaking out into open war, to wit, either a conference between the parties concerned or their representatives; or an appeal to arbitrators; or, finally, the use of the lot. Valerius Flaccus [*Argonautica*], Bk. V [563 ff.]: 'Should we never have given ear to prayers or sought treaties with the king, but turned our every effort to blind battle? That is the life of Thracians.' See Grotius, Bk. II, chap. xxiii, §§ 7, 11. [Especially should such amicable settlements be sought by him who is the plaintiff, since there is some reason for the favour which regularly attends possession.]¹ But however clear be the cause of war, every wise man before rushing to arms should carefully weigh the observations of Grotius, Bk. II, chap. xxiv. No less should he bear in mind that it is great folly both in individuals and states to be unable to reach a settlement while their fortunes are still unscathed. 'But when they have used each other severely², they separate of their own accord without the need of any one's intervention.' (F.) Isocrates, *To Philip* [38].

5. The unjust causes for wars are reviewed by Grotius, Bk. II, chap. xxii, of which some have no grounds at all, while some have a slight foundation, though³ weak at the best. To the first belong avarice and the lust for⁴ superfluous possessions, ambition and a craving to lord it over others, and a burning desire to gather fame from the oppression of their fellows. Yet men usually go to much labour to conceal the first of these, because it betokens a sordid mind, although many a man puts forth the last as a proof of greatness, 'calling it praise fit for a king to battle for another's goods'.⁵ Yet all kings should take to themselves the words of Philiscus to Alexander: 'Be mindful of glory; yet be not a pestilence, nor some great disorder, but a bringer of peace and health.' [Aelian, *Varia Historia*, XIV. xi.] For although God often uses war to drain away, as it were, the dregs of mankind, as we find in Euripides, *Helena* [39-40], Jupiter saying that he raised up the Greeks and Phrygians against each other:

[. . .] To disburden so

Earth-mother of her straitened throngs of men; (W.)

still it is unlawful for princes to rush into⁶ war for that reason, when no other cause can be found. And yet the Hebrews held that they were

¹ [This sentence is added by Barbeyrac from the *De Officio Hominis et Civis*, 2, 16, 3, in order to round out the expression of a thought which Pufendorf himself, in his later work, recognized to have been incomplete.—Tr.]

² [For *sicet* read *licet*.—Tr.]

³ [Tacitus, *Annals*, XV. i, slightly modified.—Tr.]

⁴ [For *mali* read *mals*.—Tr.]

⁵ [For *habenâ* read *habendâ*.—Tr.]

⁶ [For *mare* read *ruere*.—Tr.]

permitted, in order to increase the majesty of their nation, to attack other peoples and reduce them and their property to subjection for no other reason than that their Sanhedrin had seen fit to declare a war. Selden, *De Jure Naturali et Gentium*, Bk. VI, chaps. iii and xii.

To the second class belongs fear of the strength and power of a neighbour, and 'when men deem that will is equal to power'. Lucan, Bk. III [101]. Yet fear alone does not suffice as a just cause for war, unless it is established with moral and evident certitude that there is an intent to injure us. For an uncertain suspicion of peril can, of course, persuade you to surround yourself in advance with defences, but it cannot give you a right to be the first to force the other by violence to give a real guarantee, as it is called, not to offend. Gellius, Bk. VIII, chap. iii [VI. iii. 31-2]:

For the fortune of gladiators prepared to engage, was of this kind, either to kill if they should conquer, or to die if they should yield. But the life of men is not circumscribed by such unjust or insuperable necessity, that you ought first to commit an injury, lest, by not doing so, you should endure it. (B.)

For so long as a man has not injured me, and is not caught in open preparation to do so (for sometimes an incompleated injury can be 883 avenged by a war no less than a completed one), it should be presumed that he will perform his duty in the future, especially when he confirms it by protestations and his pledged word. But it would be unjust to extort a real guarantee from such a one through force, since by such a procedure his² condition would be worse than ours, in that he is required to abide by our mere given word. But supposing there exists a just cause for war, in that case an unusual increase in a neighbour's power comes in for serious consideration in the debates upon war, since experience well shows that most³ men, as their strength increases, grow more eager to lord it over others. Add Cumberland, *De Legibus Naturae*, chap. ii, § 15, towards the end; Bacon, *Essays*, chap. xix. Seneca, *Oedipus* [542-3]:

There stands a mighty tree
And with its heavy shade it overwhelms
The lesser trees. (M.*)

Procopius, *Gothic War*, Bk. IV [xx]:

Men naturally are restive when there is any neighbouring power which has attained great size and is prepared to inflict injury. For the extremely powerful are never at a loss for excuses upon which to bring war against their neighbours, no matter how innocent these may be.

Herodes, *De Republica* [13]:

Neighbouring nations are not displeased when peoples near them are torn with internal

¹ [For *quotcunque* read *quodcunque*.—Tr.]

² [For *plurisquis* read *plurisque*.—Tr.]

³ [For *his* read *is*.—Tr.]

strife. Weaker ones see that thus they will not be subdued; those of equal strength think they will be the stronger; powerful ones hope that they will subdue them the more easily.

Polybius, Bk. I, chap. lxxxiii: 'It is never right [. . .] to help any one to build up so preponderating a power as to make resistance to it impossible, however just the cause.' (S.) Appian of Alexandria, *Bellum Lybicum* [xi]: 'Although he be a friend, not even he should become so powerful.' Yet it would be impudent to allot *utility* the same right over the property of others as necessity, as Thucydides, Bk. I [lxxvi], represents the Athenians maintaining: 'No one ever put justice before force and refrained from taking advantage, when opportunity offered, of securing something by main strength' (S.); especially since mankind would surely fare ill for the future, if it was introduced as a right, that I could take by force from another, against his will, whatever I think will be of use to me. For others will surely employ the same licence against me that I use against them.

On the other pretexts adduced by Grotius in the passage cited above, we must reach the same conclusion. Thus we cannot agree with Bacon of Verulam, *The Advancement of Learning*, p. 348, when he holds that sufficient cause for waging war upon the Americans¹ can be found in the fact that they can be held condemned by the very law of nature, because it is their custom to sacrifice men and eat human flesh. On this matter we should carefully consider whether a Christian prince can attack the Indians, as men condemned by nature, merely because they eat human flesh like any other food, or because they eat the flesh of men of their own religion, or because they eat that of strangers. And in connexion with their treatment of strangers we must again inquire, whether those foreigners come to their shores as enemies and robbers, or come as innocent guests, or driven by storms. For only in the last case does a right of war lie with those whose citizens are treated with such cruelty, not in the others.

6. There is also this one feature common to all wars, that, although their method and genius, as it were, is force and intimidation, one may still use craft or deceit against an enemy, provided that this does not entail perfidy and the violation of pacts and pledged faith. Agesilaus says in Plutarch, *Agesilaus* [*Laconian Apophthegms*, p. 209 B]: 'To break one's promise is indeed impious; but to outwit an enemy is not only just and glorious, but profitable and sweet.' (G.) And especially appropriate in this connexion is the saying of Cleandrides in Polyænus, 884 *Strategemata*, Bk. II, [x. 5]: 'When the lion's skin fails, one must put on also the fox's.' Silius Italicus, Bk. I [219]: 'He had no confidence² in the sword alone without guile.' Add Xenophon, *Training of Cyrus*, Bk. I [vi. 19]; Livy, Bk. XLII, chap. xlvii; Grotius, Bk. III, chap. i, § 9; and above Bk. IV, chap. i, §§ 12 and 19.

¹ [The American Indians.—Tr.]

² [For *Et metuens* read *Nec fidens*.—Tr.]

7. But if we are correctly to understand how far we may proceed with violence against an enemy and his possessions, we should observe that the licence to be used against an enemy is one thing, as it arises from a simple state of hostility, and another, as the mercifulness of natural law orders control and temperance in its indulgence. That is, since according to the law of nature there should be a mutual performance of the duties of peace, whoever takes the first step in violating them against me, has, so far as he is able, freed me from my performance of the duties of peace, and therefore, in confessing that he is my enemy, he allows me a licence to use force against him to any degree, or so far as I may think desirable. This is especially true because the end of war, whether offensive or defensive, could not be gained without this licence, if it were necessary to hold the use of force against an enemy within a certain limit, and never to proceed to extremities. For this reason even open wars partake somewhat of the nature of a contract like this: 'Try whatever you can, I will likewise use every means at my disposal.' And this holds good not merely if an enemy has undertaken to use every extremity against me, but also if he simply wishes to injure me within certain limits, for he has no greater right to do me a slight injury than a severe one. Therefore, not only may I use force against an enemy until I have warded off the peril with which he threatened me, or have received or extorted from him what he had unjustly robbed me of, or refused to furnish, but I can also proceed so far as to secure guarantees for the future. And if he allows that to be forced from him, he shows clearly enough that he still intends to injure me again in the future. Nor is it in fact always unjust to return a greater evil for a less, for the objection made by some that retribution should be rendered in proportion to the injury, is true only of civil tribunals, where punishments are meted out by superiors. But the evils inflicted by right of war have properly no relation to punishments, since they neither proceed from a superior as such, nor have as their direct object the reform of the guilty party or others, but the defence and assertion of my safety, my property, and my rights. To secure such ends it is permissible to use whatever means I think will best prevail against such a person, who, by the injury done me, has made it impossible for me to do him an injury, however I may treat him, until we have come to a new agreement to refrain from injuries for the future.

But now the law of humanity would not only have one consider how much an enemy can suffer without injury, but also what should be the deeds of a humane and, above all, a generous victor. Therefore, we should take care that, so far as it is possible, and as our defence and future security allow, we suit the evils inflicted upon an enemy to the process usually observed by a civil court in meting out justice in offences and other quarrels. This proportion and measure is treated in

detail by Grotius, Bk. III, chaps. xi-xvi, just as the understanding of the licence of war is greatly aided by the three rules laid down by the same author in Bk. III, chap. i, §§ 2-4. It often happens, as well, that the uncertainty of the outcome of a war leads us to temper its licence, for fear the examples we have set may by the hand of fortune be turned against us. See Diodorus Siculus, Bk. XIV, chap. xlvii. Vergil, *Aeneid*, Bk. X [533]: 'By the death of Pallas, Turnus had first removed all friendly intercourse of war.' (B.) Here belongs an incident found in Anton. Gratianus, *De Bello Cyprio*, Bk. V, to the effect that when Colonna gave orders for the Turks captured in the battle of Lepanto to be accorded generous treatment in Rome, he turned to Mohammed and said, 'Learn humanity of us, you who are regularly so harsh and cruel to Christian captives'. To which the infidel replied, 'You should forgive us, for it has never yet been our fortune to be captured and fall
885 into the hands of our enemies; in fact we Turks have only learned how to make captive, not how to be captives ourselves'.

What is permissible against such as only furnish an enemy with supplies, is also to be seen in Grotius, Bk. III, chap. i, § 5, and chap.¹ xvii.

8. Let us now consider the questions which concern in a peculiar way wars waged by states and their heads. Here we must observe, at the outset, that the right of war which accompanies a natural state is taken away from individuals in a commonwealth, and that therefore individuals can no longer revenge injuries done them with the means at their own disposal and at their own discretion, or extort with violence of their own doing anything owed them when it is denied, but on such matters they must have recourse to a magistrate, whose function it is to secure to injured persons reparation for damage and guarantees for the future, as well as to make it possible for every man to enjoy his own right. On this point bear *Digest*, L. xvii. 176; IV. ii. 11 at end, 12, 13; XLIII. xxiv. 7, § 3; *Code*, I. ix. 14. And although individuals in a state are sometimes permitted to defend themselves by their own strength, that cannot properly be called a right to make war. For that right is summed up in this: That a man can commence a war at his own judgement, continue it so long as he pleases, and conclude pacts with the enemy. But citizens are allowed to use violence in their own defence only in case of an unavoidable peril, and then not after it has been warded off, just as there is no necessity for individuals drawing up pacts for peace, when that is already secured well enough by the authority of the supreme sovereignty. Nay, even though a quarrel may have been settled between private citizens, that does not prevent a magistrate from having a free hand in settling the injury which gave rise to the altercation between the citizens.

¹ [For &c. read & c.—Tr.]

But it may sometimes happen that individuals receive back such a right of defence as is theirs in natural liberty; if, for instance, a man come to places which belong to no state but still continue in their primitive community. Yet we must observe, in such a case, whether a man is attacked there by a fellow citizen or by another; for if the former be the case, he can use force only in repelling the immediate peril, while he must leave the prosecution of the injury to their common master. Unless it should appear that his assailant is not going to return to his country, and has nothing at home with which he may render satisfaction for the injury. But if the attack be made by a subject of another country, a man is not forbidden, in case he has prevailed, from going to any extreme in his punishment. Yet he may also enter an action against him in his own country, and there demand satisfaction and punishment, also reserving to himself the intervention of his own state, which acquires a right, when justice is denied one of its citizens, of using violence to secure satisfaction for him. Therefore, if a man is attacked upon the open ocean he need not always call upon his own force any further than to repel the peril, since his assailant can be threatened¹ with an action in his own state, when he has returned to his own home. But if such citizens have paid no heed to the authority of the judge, or the latter patently refuses to see that justice is rendered, a man can conduct his defence as he sees fit, especially if he be outside the jurisdiction of a state. And yet if a judge pleads the condition of the commonwealth, and urges me to postpone the prosecution of my injuries, or to pardon the commonwealth for its remissness, it is the duty of a good citizen to acquiesce in his desire.

9. A common distinction is drawn between a war that is *formal* and one that is *less formal*. The former requires that it be conducted on each side by the authority of the supreme sovereignty of a state, and that proper notice be given of its opening, while the designation less formal is given to such a war as is not proclaimed, or which is waged against private citizens. Of these last two the former is more like a kind of incursion or freebooting expedition, while the latter accuses one of the parties of the crime of rebellion, or of such a mode of life as makes a man unworthy to be called a regular soldier. Again, under less formal wars may fall civil wars, when a state is so divided that one cannot tell 886 on which side the supreme sovereignty stands. And in this connexion we should observe, in the case of formal wars, that the peoples who wage them along with their commanders are usually called lawful enemies, as opposed to robbers and highwaymen. See *Digest*, L. xvi. 118; XLIX. xv. 19, § 2; XLIX. xv. 21, § 1; XLIX. xv. 24. Cicero, *Philippics*, IV [vi. 14]: 'He is an enemy who has also a republic, a

¹ [For *intentarari* read *intentari*.—Tr.]

senate-house, a treasury, harmonious and united citizens, with whom, if fortune so wills it, there might be peace and treaties on settled principles.' (Y.*)

Although a state should not be considered as no better than a band of robbers, merely because it has officially, in a way, been guilty of unjust practices, nor should a band of robbers receive the dignity of a state, even though they treat their members with some show of justice. Add Grotius, Bk. III, chap. iii, § 2.

10. At this point, by reason of what is said by Grotius, Bk. I, chap. iii, § 4, the question is raised, as to whether to a magistrate properly so called, as such, belongs the power to wage war. This must surely be denied. For since war is the most important of those matters whereby an entire state can be put in jeopardy, to give a magistrate as such the power to decide upon war of his own authority, is equivalent to granting him the supreme sovereignty. See *Digest*, XLVIII. iv. 3. Yet it is patent that when the supreme authority appoints a magistrate to administer certain details of the affairs of state, the power necessary for the fulfilment of that function is understood to be given him. Therefore, it is a principle of Roman law, that a mixed power belongs to every magistrate, as such, who has jurisdiction, and this mixed power is defined as that modestly to force refractory subjects to observe his jurisdiction, and to obey his decisions. But if a magistrate who exercises jurisdiction uses force upon a few recalcitrants, he must not be held to be waging war, since a coercive force over subjects is not a right of war. Furthermore, it appears that war is waged between equals, or those who claim to be such. Yet if the number of refractory persons be very large, or if the whole state be imperilled by their disturbances, and the ordinary officers are not sufficient to control them, a magistrate properly waits for directions from the supreme power, on how to deal with them. Therefore, Grotius, Bk. I, chap. iii, § 4, is wrong when he says:

And surely if the matter be viewed without reference to the laws of particular states, it would seem that every public official has the right to wage war for the protection of the people entrusted to his charge, and also in order to maintain his jurisdiction if assailed by force. (K.)

For the protection of the people is the proper province of the supreme sovereignty, while a magistrate whose province is the administration of justice, protects the people only to the extent that he defends the right of the weak against the more powerful, which end can be achieved without the right to wage war. We might mention, in passing, that although the slaughter by Moses of some thousands of men because of the worship of the golden calf, may more properly be called a punishment than a war, yet the slaying of the Benjamites, in *Judges* [xx], appears to be the latter rather than the former, although

the opposite position is taken by Erasmus of Rotterdam, *Letters*, Bk. VI, ep. xxix.

In this connexion it may not be¹ out of place to make some general remarks on the power of military magistrates or generals, who serve under orders of their superior. Now a general, when sent out with full authority to wage war, can attack the enemy as well as defend himself against him with every means which he thinks will serve such purposes, but just as he cannot commence a new war, so he cannot close the one already begun, except on the authority of his supreme sovereign. But when a general has received restricted instructions on the conduct of the war, they will set forth very clearly how much power is accorded him, although in all cases generals have the power, whether they have received unrestricted or restricted instructions, to defend themselves in any way they see fit from the attack of an enemy, when they can no longer escape it by an honourable withdrawal. Only under such circumstances can we allow what is said by Cicero, *Letters [to Friends]*, Bk. X, 887 ep. xvi: '[. . .] You ought not, in the midst of such sudden and pressing emergencies, think yourself bound to ask advice from the senate. Be your own senate and follow wherever the interest of the public service shall lead you.' (S.)

Now defence consists not alone in repelling or avoiding the attack of an enemy, but in countering it. And so, for example, although an admiral be commanded merely to stand on the defensive, he is not prevented thereby from firing upon the enemy's fleet and trying to destroy it, when he has been attacked, but is only forbidden to take the offensive when the other shows no signs of action. So if the commander of an army has received orders not to attack the enemy, he may still not only repel his attack, when his position is assaulted, but may even leave his trenches in counter attacks, and when he is attacked on the march, and cannot withdraw in safety and with honour, he will be within his rights in fighting a decisive action. Therefore, the governor of a province, or the commander of a city, especially if he have troops under him, can resist the attacks of an enemy without consulting the supreme sovereign, but he may not carry the war into foreign lands, unless that be expressly stated in his instructions. Some inferior commander who receives instructions to hold a city or a fort with his troops, should defend it with every means at his disposal, and until the destruction of his force, which would be of no service to his cause, can no longer be avoided. We can pass judgement from what has been said on the incident of Pinarius in Livy, Bk. XXIV, chap. xxxvii. The defence of the citadel of Enna had been entrusted to him, and its keys were not to be turned over to the citizens upon pain of death. Therefore, when he felt that his troops were threatened with destruction, unless

¹ [For *fureit* read *fuertit*.—Tr.]

he put down a rebellion arising in the city, he did not exceed the limits of his power in putting to death the guilty parties, save that he appears to have been too cruel after the peril was ended. Nor did Pinarius, as a matter of fact, stir up a new war, since the Roman state was already at war in Sicily with the Carthaginians and their allies, whom the people of Enna were planning to join. But it does not lie within the power of a general to decide whether to commence hostilities against a people which had lent aid to a former foe, especially after the war is over. On the case of Cn. Manlius who commenced hostilities against the Gallo-Graeci, see Livy, Bk. XXXVIII, chap. xlv ff.; Bk. XLI, chap. vii; Florus, Bk. II, chap. xi. If the governor of a province, especially one that is far removed from the capital of the state, has been granted the power of war and peace with his neighbours, whatever wars he undertakes will be considered formal ones, since he who has given a man authority to do something is regarded as the author of what he does. But if a governor has declared war on another without the authority of the supreme sovereign, it shall lie with the latter, whether or not he will approve the act of his subordinate. If he does so, the war will have to be regarded as a formal one, and that ratification throws back, as it were, an authority upon the war and makes the whole state responsible for it. But when the supreme sovereign disowns the deeds of his governor, the undertaking will be looked upon as no better than a freebooting expedition, and the whole state will not be implicated in the war, provided the governor is either surrendered to the injured state for justice, or else punished at home, and the damage done is, so far as possible, repaired. An illustration of this was the question put by the Roman mission, in Livy, Bk. XXI, chap. xviii, as to whether Hannibal was attacking Saguntum on his own authority or on that of the state; whereupon the Carthaginians quite properly replied that the first question to be decided was, whether the city of Saguntum could be attacked without contravening any treaty between themselves and the Romans, and that until this was decided there was no point in the Romans asking whether a citizen of their country had acted upon his own authority or that of the state. Add the arguments *pro* and *contra* over the seizure of the Cadmea by Phoebeidas, in Xenophon, *Greek History*, Bk. V.

11. A further question is, whether a governor who lacks a general or special authority, can rightfully commence a war against a foreigner, 888 on the presumed will of his supreme sovereign, or because he believes that his act is approved by him. This must be answered in the negative. Because it is not enough for him to consider what would be the decision of his sovereign, if consulted in this particular case, but he should consider rather what the same would want done without being consulted, when there was no hurry, or the matter is doubtful, if a

law had to be passed, or a general ruling made on all such cases. If that were so, the decision would certainly be that a minister should not undertake anything, without consulting his sovereign, which concerns the supreme power in the state, such as war, and especially an offensive one, which is the subject of our present inquiry, and regularly admits of delay. And so even should it turn out that a supreme sovereign agrees in feeling that a war may now be begun against a certain enemy, it cannot but displease him for a minister to exceed the limits of his position.

This is illustrated by the action of Cambyses¹ in putting to death his servants for sparing the life of Croesus, although he was glad enough that he had been spared. Herodotus, Bk. III [xxxvi]. Seneca, *On Anger*, Bk. III, chap. xvi, gives us another illustration in the case of C. Piso, propraetor of Sicily. Yet add Livy, Bk. XLIV, chap. x.

12. But just as those who live as individuals in natural liberty cannot be punished by war, except for injuries which they themselves have committed, so it is a point for further inquiry, as to how in states the guilt of an injury and the reason why war may be begun, passes from those who are immediately guilty, over to the entire state. Now it is clear that a community, whether civil or of any other kind, is not responsible for the actions of individual members, except by some culpable act of commission or omission on its own part, for no matter how much a state may threaten, there is always left to the will of citizens the natural liberty to do otherwise, so that in no way can a state stand good for the actions of its individual subjects. Add Grotius, Bk. II, chap. xxi, § 2, and the illustrations which he adduces from Livy, Bk. XXIX, chap. xvi; Bk. XXXV, chap. xxxi; Bk. XLV, chap. xxiii; Valerius Maximus, Bk. VI, chap. vi, §§ 3, 5. Now of those ways by which the heads of states become exposed to war because of injuries done by their citizens, two come in for special consideration, namely, sufferance and reception. As for sufferance it must be held that he who knows a wrong is being done, and is able and obligated to prevent it, when that does not involve the probable danger of a greater evil, is held to have been guilty himself of the wrong. That is, what is required is a union of knowledge of the fact and of power to prevent it, neither one of these alone being sufficient to implicate one on the crime of another. See *Digest*, XLVII. vi. 1, § 1. Now it is presumed that the heads of a state know what is openly and frequently done by their subjects, and the power to prevent is always presumed, unless its lack be clearly established. Here belongs a statement of Lycurgus, *Against Leocrates* [§ 146]: 'Crimes lie upon their authors so long as they have not yet been brought to trial. But so soon as they have been tried and had sentence passed upon them, they lie upon those who have not

¹ [Of course Cyrus is meant, as in the passage correctly cited above.—Tr.]

punished them in accordance with the laws.' Add Polybius, Bk. IV, chap. xxvii, at the beginning; Gratian, *Decretum*, I. lxxxvi. 1 and 3. As for the matter of reception, and how far a state may furnish cause for war against itself by receiving and defending those who have wronged others, all this is fully set forth by Grotius, Bk. II, chap. xxi, §§ 3-6.

13. Reprisals or violent executions upon the persons or property of citizens of another commonwealth which refuses to do justice, are adequately treated by Grotius, Bk. III, chap. ii. On the equity of reprisals I would only add this: That just as a result of the union into a civil body is that an injury done to one of its members by foreigners is regarded as affecting the entire state, so it does not appear unjust that individual subjects should be obligated to contribute to the debt of the
889 state, since, after all, what they contribute on that score has to be made up to them by their state. But if one or another citizen suffer some loss thereby, he should count it among those inconveniences which almost necessarily attend states, and which, in any event, are but a small part of those which they could have expected outside the shelter of a state.

14. It is everywhere recognized that men wage wars not merely on their own behalf but also frequently on behalf of others. For this to be lawful, there is required in him to whom aid is brought, a just cause for war, and on him who undertakes to bring it to another there should lie a special obligation, whereby he is bound to the principal belligerent, and which is of such a nature, that, in order to favour one man, I can treat another as though he were my enemy. For otherwise the remonstrances of Lucan, Bk. IV [707 ff.], will be in place: 'Who thinks of comparing the leaders, who of weighing the causes? The side he has taken to that does he wish well; just as in the shows of the fatal sand¹ no ancient grudge compels those brought forward to combat together, but they hate those pitted against them.' (R.)

Now among those whom we not only rightly can but should defend, are our subjects; and this not only because they are a part, as it were, of the government, but also because it was to enjoy such defence that free men of their own accord set up governments or submitted to them. Thus, according to Livy, Bk. VII, chap. xxxi, and Florus, Bk. I, chap. xvi, the Campanians, in submitting themselves and their belongings to the Romans, held that the latter were absolutely obligated to take up arms in their defence. Although it should be observed, in this particular case, that since the Campanians had maltreated the Samnites before that time in an unjust war, the Romans could not properly undertake their defence, even though they surrendered themselves, before they had restored the damage done and paid the costs of the war. Yet it is only proper for the heads of states to go to war for individual citizens, if it can be done without entailing a greater hardship upon all

¹ [Referring to the arena.—Tr.]

or a majority of the other citizens, since their duty is more concerned with the whole body of citizens than with a part, and the greater the part the more closely it approximates the whole. Add Grotius, Bk. II, chap. xxv.

The next persons after subjects for whom we are obligated to take up arms, are allies, who have made this an article of their treaty with us. But they yield under every circumstance to our subjects, provided aid cannot be furnished both of them at once, and no despite is done to the treaty, for no state is obligated to any one more than to its own citizens. Therefore, when a government promises aid to others, it is understood to do so on the condition that such aid can be given without impairing its obligation towards its own citizens. And so he is even¹ a fool who puts any trust in a treaty when its observance is of no importance to the other party. And just as no man should undertake unjust or rash wars, so no man is obligated to give aid to an ally who engages in such wars. And although this statement applies primarily to offensive wars, yet it applies in a way to defensive ones as well, for if any ally of mine sees that he is not the equal of an enemy, even with my aid, and yet persists in courting certain ruin when he could close with him on tolerable terms, it would be insane of me to join myself to his folly. And to this extent we must accept the statement of Grotius, *loc. cit.*, that 'we are not obligated to render aid if there is no hope for a successful outcome, since alliances are formed for good and not for evil', because there is no purpose of entering into an alliance if one is to suffer no peril or loss for one's ally.

After allies come friends, or such as we are joined to by reason of some kindness or favour. Although no certain and definite aid is promised these by an express treaty, yet the striking up of mutual friendship is understood to imply a promise that the safety of the one will be the other's care, so far as more binding obligations permit, and will in fact weigh more heavily with him than the ties of human brotherhood ordinarily demand. And this alone can be sufficient to 890 make a man undertake another's defence against the manifest injuries of his enemies, especially since it can very easily be our highest interest, and in fact redound to the general good of mankind, to prevent a man from injuring and insulting others with impunity. Solon replied, when asked to assure the existence² in the world of the fewest possible injuries: 'If those who were not wronged should feel as bad about it as those who were.' Diogenes Laertius, *Solon* [59]. A sentence of Quintilian, *Institutes of Oratory*, Bk. IV, chap. i [9], applies here: 'For there is a natural feeling in behalf of those oppressed.' (W.) Euripides, *Suppliants* [267-9]:

The beast finds refuge in the rock,
The slave at the Gods' altars; and a state
Storm-tossed must cower beneath another's lee. (W.)

¹ [For *et iam* read *etiam*.—Tr.]

² [For *extinuae* read *extinuae*.—Tr.]

Yet there ought to be some restraint in this, so that not every man, even though he live in natural liberty, should have the right to coerce and punish by war any person who has done any other person an injury, on the sole excuse that the public good demands that injuries to the innocent should not go unpunished, and that what concerns one should concern all. For since he who is attacked in this fashion is not deprived of his right to meet with equal violence the violence of him whom he himself has never injured, the result would be that for one war to distress and embroil mankind there would be two. Nay, for a person to thrust himself forward as a kind of arbitrator of human affairs, is opposed even to the equality granted by nature, not to mention the fact that such a thing could easily lead to great abuse, since there is scarcely a man living against whom this could not serve as an excuse for war. Therefore, an injury done another can only give us cause for war when the injured party calls upon us for aid, so that whatever we do in such a case is done not in our name but in that of the person wronged.

But can a man also take up arms to protect another's subjects, that is, from the injuries of their own sovereign? On this point one may consult the view of Grotius, Bk. II, chap. xxv, § 8. In our opinion the safest principle to go on is, that we cannot lawfully undertake the defence of another's subjects, for any other reason than they themselves can rightfully advance, for taking up arms to protect themselves against the barbarous savagery of their superiors.

15. On the declaration required for a formal war Grotius, Bk. III, chap. iii, can furnish all the necessary information.

16. Grotius, Bk. III, chaps. iv ff., has given a full account of how large numbers of nations have set no limit or measure on the licence against an enemy, allowed us, as we have already said, by the law of nature. But here it is to be observed that generals commonly prescribe laws to their soldiers as to how far they should proceed against an enemy, and punish when they transgress their orders. That is done not as if the soldiers in question were doing injury to an enemy, but because of the violation of the general's authority, and to preserve military discipline. Thus even when a man in a formal war has exceeded in his slaughter and rapine the limits set by natural law, he would not commonly be held a murderer or thief, or be punished, were he by chance brought before a third nation which was at peace. And this not only because it is not our concern what offences a man has committed elsewhere, but also because it appears that nations have a tacit agreement not to take upon themselves decisions growing out of the wars of others. For why should he who is not an ally of either party rashly assume another's quarrel? Why, scarcely even in a just war can it be known for certain what is a just way to defend oneself, to secure compensation for damage, or demand guarantees for the future! And so it is better to

leave such questions to the conscience of the belligerents, than to pass judgement on them to one's own peril; especially since the belligerents themselves have agreed by a tacit pact either to increase or temper the savagery of the war at their own pleasure.

17. How far in particular many peoples commonly extend the licence of war on the persons of enemies, is shown in detail¹ by Grotius, Bk. III, chap. iv. 891

18. A special question, in this connexion, is, whether you may kill an enemy with hired assassins. On this point Grotius, Bk. III, chap. iv, § 18, holds that a distinction should be drawn between those who violate an express or tacit article of faith, such as soldiers, citizens, vassals, refugees, and those who are not so bound, and that to secure assassins from the latter sort is forbidden by no law. Add Thomas More, *Utopia*, Bk. II. But to use those whose act involves them in perfidy, is regarded among the more civilized nations as disgraceful, although even God-fearing princes frequently offer rewards to any who will make away with rebels and the leaders of pirates or robbers, nor is such an act criticized, owing to the disrepute which gathers around such men.

Practically the same answer can be given to the general question as to whether it is lawful to use in war the help of any persons that can be secured. Here a distinction is commonly drawn between traitors to and deserters from their masters, who voluntarily offer their services, and those who are led by promises or rewards to break their faith. Grotius, Bk. III, chap. i, §§ 21-2, feels that the customs of nations legalize the use of the services of the former, but not of the latter. Yet compare Quintilian, *Declamations*, cclv. However, his distinction is not to be accepted without some question. For the two things which I have in mind when I seek to wean away the subjects of my enemy, namely, to strip him of his resources, and to inflict some loss upon him, are both entirely lawful for me, if my cause of war be considered just. Why, then, I may not attain that end by corrupting the minds of his citizens with hopes of reward, I cannot see. Especially since all men agree that I can drive the citizens of my enemy to surrender, and so to desert their master, by feigned terrors, and such a desertion is surely not entirely blameless, while military laws inflict capital punishment no less upon such as allow themselves to be imposed upon in this way, than upon those who break their oaths, and traitors, since ignorance and credulity are no less opposed to military service than is perfidy. Furthermore, force as a means of destroying an enemy has so lawful a standing that even fraud is not looked upon as illegal. And although those deserters cannot act as they do without involving themselves in sin, yet no guilt can come from that fact to the man who solicits them, for I am under no obligation to give up asserting my right in whatever way it

¹ [For *latet* read *late*.—Tr.]

can be done most conveniently, lest I give occasion of sin to those who have by their injury broken off all communication of right with me. And when I am permitted to kill a man with an iron lance, why may I not attack him as well with one of silver? Especially since it is still left to their judgement, no matter what approaches I make, whether they will treat me as an enemy, or deserve my gratitude by rendering some useful service. But the reason, why, in time of peace, I cannot, for example, make overtures to another man's slave to desert his master in a rascally fashion, and to come to me, is twofold: Because I have no power to interfere in his affairs and because I could have had no right to punish that servant, if he should not accept my offer and flee to me. But both of these rights obtain in the case before us, for as the dominion held by our enemy over his possessions is no concern of ours, to prevent our being allowed to take them from him, so also his right over his subjects is none of our business, because we are not obligated to make it our concern that it persist in him undisturbed. Therefore, the statement usually opposed to this position, namely, that a man cannot incite another to do something which involves him in sin, or, in other words, that a man sins when he is the occasion or cause of another man sinning, can apply, apparently, only among non-enemies. For in respect to me an enemy is in such a state that I need give no heed in pursuing my
892 right against him, as to whether or not it leads him to fall into sin. And so although our money or our promises may actually have led another to perfidy, yet that cannot, apparently, be laid to our account as our own sin, because for the present all interchange of right has been broken off between us by that hostile status, and he has, so far as he was able, given us an unlimited licence against himself. Furthermore, since, when considerations of war demand it, to kill an enemy is not unlawful, no more will it appear unlawful to give him reason for his falling into sin. For it is a distorted reason, which some advance, to the effect that enemies should keep faith, and that therefore the subjects of an enemy cannot be enticed to perfidy. Yet a man should take care that he does not set an example which may work to his own injury, while he who refrains from such conduct, when he might have profited by it, unquestionably deserves the praise accorded to unusual generosity. And truth lies with the following statement of Procopius, *Gothic War*, Bk. I [viii. 36]:

Though he who has found a traitor is pleased at the moment of victory by the service rendered, yet afterwards, moved by suspicion based upon the traitor's past, he hates and fears his benefactor, since he himself has in his own possession the evidences of the other's faithlessness. (D.)

Add Valerius Maximus, Bk. VI, chap. v, § 7.

19. What the licence of war allows regarding the possessions of an enemy, as well as whatever is called sacred, is set forth by Grotius, Bk. III, chap. v.

20. A man can acquire, in a just war, by the law of nature, and with a clear conscience, from the possession of enemies, whatever is owed him, or its equivalent, and such things as caused him to take up arms, because his enemies refused to pay them, including all expenses he was put to in vindicating the violation of his right, and whatever else he may have felt was necessary in order that he might secure guarantees from his enemy. Therefore, if a man was led to injure others by confidence in his wealth, it is lawful to take from him, when defeated, his superfluous possessions, so that he may be less over-bearing in the future. But by the customs of nations a man becomes owner in a formal war of such things as he took from the enemy, although they be beyond all bounds and reason, and far exceed the claim for which the war was begun. See Grotius, Bk. III, chap. vi, §§ 1 ff., where he also remarks that this is understood of movable as well as immovable spoils of war. But we should observe, in this connexion, that seizure in war acquires only a right which prevails against some third party, and that for the captor to acquire a dominion which will prevail also against him from whom the things were taken, the latter must have concluded peace with the other, and made a legal transfer. For without this a right to such things is understood to remain with the former owner, whenever he regains enough strength to recover them from his enemy.

21. The question is also raised, to whom the things acquired in a formal war belong; whether to the whole people, or to individuals among the people, or to those who were the first to acquire them. This, we feel, can be answered in a few words. Now it is certain that the right of war, under which is comprehended the right to arm citizens, and to lead them out into the field, as well as the right to levy upon them money, or whatever is needful for war, is vested in the supreme sovereignty. But since wars are undertaken either to assert the private debts of individuals, which an enemy wilfully refuses to pay, or for some reason which concerns the whole commonwealth, it is clearly to be seen, that in the first case, the prime point to be held in mind is that those, for whose sake the war is waged, should receive what is owed them. What is taken over and above such debts, and in wars undertaken for reasons of the state, whosoever it be that first acquires it, whether mercenaries, or citizen soldiery who serve under the orders of the state, and even without pay, belongs to the author of the war, which is the supreme sovereignty. Aelian, *Varia Historia*, Bk. VI, chap. vi: 'A Spartan soldier was not allowed so much as to strip an enemy of his spoils.' But since the burden of war lies heavy upon
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individual citizens, whether they are called upon for taxes, or for military service, it is both right and humane on the part of him in whom resides the supreme sovereignty, to make it possible for individual citizens to derive some profit from a war. Now this is possible

in several ways: If citizens who participate in a war may receive some salary from the public treasury (see Livy¹, Bk. IV, chap. lx; Bk. V, chap. iv); or if all share in the booty, or every soldier be allowed to keep what he has seized (thus we are told by Polybius, Bk. IV, chaps. xxvi, xxxvi, that when a Greek state declared war it 'gave public announcement of the booty', that is, a crier announced it to be the will of the state that every man could take booty); or if the booty is appropriated by the state treasury for future use, to be employed in decreasing the burdens and taxes of the citizens. But mercenary troops are owed nothing beyond their pay, unless it be the desire to use them generously, or to reward them for some distinguished service, or to incite them to great fortitude. Add Grotius, Bk. III, chap. vi, § 8, who goes into this question in great detail. But when he distinguishes between public and private acts of war, of which the latter are only undertaken upon occasion of a public war, it is to be observed that it is questionable whether everything that is taken in war by private acts and on the unbidden initiative of individuals, can belong to those who take it. For it is a part of the right of war to stipulate what persons can injure an enemy, and how far they may proceed. And so private individuals will not be permitted to make booty of an enemy's property, or take off any of his possessions, without permission from the supreme sovereignty, whose province it is also to decide how far private individuals should exercise that licence of plunder, and whether all the booty or only a part should be allowed to them. And so whatever belongs to private citizens in a war, depends entirely upon the indulgence of the supreme sovereignty, or, in other words, the state alone authorizes a man to be a soldier and allows him to commit the acts of offensive war. Therefore, in Cicero, *On Duties*, Bk. I, chap. xi, Cato 'declares that it is not lawful for a man who is not a soldier to fight with an enemy'. (E.) Add Ziegler on Grotius, Bk. III, chap. v, § 12.

22. On the acquisition in war of non-physical things, this special point should be noted, namely, that they can only be acquired along with the subject in which they inhere, whether that be persons or things. Now certain rights inhere in things, such as lands, rivers, ports, cities, territories, and even more to persons, in so far as they possess those things, there belong specific rights over other things or men. But the point of our inquiry in this connexion is, whether this right belongs to that thing by a personal or real pact, that is, whether he who was the first to connect that right with a thing, made a pact whereby that right would lie forever with the possessor of that thing, whoever he may be, and no matter how it may have come into his possession; or whether he wished that right to prevail only when special persons held the thing by a certain title. If a right is connected with some thing in

¹ [For *Linus* read *Livius*.—Tr.]

the latter manner, a man cannot exercise that right so soon as he has used some title to seize the thing, but inquiry must be made as to whether it accords with the first establishment of that right, that it should follow the title of seizure in war.

Now those rights which belong of their nature and directly to some person, concern either other persons or things. The rights which belong to one person over another person, since they are acquired only with the latter's consent (and this concerned only a certain person and not merely any one), may not be understood as acquired with a person, even though the one to whom they belonged may have fallen into the hands of enemies. Thus when a king has been captured by his foes, it is not supposed that his kingdom has also become theirs, nor does the capture of a husband or father give power immediately over the wife or children. But when a wife is captured along with her husband, the captor secures a right over the captive wife, not from that fact that he took her husband along with her, but solely because of her capture, nor is his right increased or decreased, in case he captured her husband at the same time or not. Nor does the victor secure any conjugal power over another's wife, but only such as is usually acquired over captives. 894 Compare Grotius, Bk. III, chap. vii, § 4.

With regard to rights over things we must make a distinction as to whether a man lives in a commonwealth, or outside one in a mere state of nature. In the latter case it is understood that he who has taken possession of a man's person has also taken all his possessions, or at least acquired¹ the power to take them as well, since there is no one who can rightfully forbid his seizing them. But it is the rule in states that a man's possessions do not perish with his person, but that his right to them passes to other persons of that state, or, in case there are none to receive them, to the public treasury. Therefore, if a citizen is captured by an enemy, whatever there be of his property that is not taken with him, is not secured by his captor, but passes to him whom the laws of the state would have named as his successor, had he died a natural death. But if an enemy has seized a captive's property along with his person, his claim of a prize in war is enough to assure him the dominion over the captured property, nor need he secure that dominion ultimately from the person of the former possessor whom he took with them. And so it is the same thing, so far as the right of the captor over the things captured is concerned, whether he seized their owner along with them or not.

23. These matters are illustrated by the question which was once argued in the Amphictyonic Council, as set forth by Quintilian, *Institutes of Oratory*, Bk. V, chap. x [III]: 'When Alexander had demolished Thebes, he found a document in which it was stated that

¹ [For *natus* read *nactus*.—*Tr.*]

the Thebans had lent the Thessalians a hundred talents. Of this document Alexander made a present to the Thessalians, as he had had their assistance in the siege. But subsequently, when the Thebans were re-established by Cassander, they demanded payment of the money from the Thessalians.' (W.) The reasons set forth by the Thebans can be seen in the same passage, to which the Thessalians could have replied as follows: I. What has been taken by just force cannot be reclaimed, and by the consent of nations force used in a formal war is counted just, so that after peace has been made there remains to the former owner no claim to things taken in such a war. II. The right of war enjoys a validity in such things as are later brought up for judgement, for surely if some controversy arises at the conclusion of a war over a thing which I have acquired during the course of it, all I need do is to claim that it was a prize of war. III. Whatever has been acquired in a just war is rightfully retained even in peace, especially after peace has been established by agreement, for all things on the restoration of which there was no express agreement in the articles of peace, are understood to remain in the hands of their possessor. IV. With a captured person can be acquired those rights which are properly and ultimately founded in things, provided, however, that the captive transfer them to me by his consent, which I have the power to secure by threat of some graver evil. Therefore, just as I can give another my power of action, with the result that a debtor is as much obligated to pay him as he was before to pay me, so, if a captive give his consent to transfer his action to me, his debtor thereupon owes me what he had owed my captive. And in this way Alexander could have taken to himself that credit, even had he left the state of Thebes standing, by forcing them to transfer their right to him. And as a matter of fact he is understood to have done so after he had become master of Thebes without the exception of any thing. On this basis he had the right to require that debt of the Thessalians, or else to make them a present of it; and he could, indeed, have brought direct pressure upon the Thebans to cancel the debt in behalf of the Thessalians. Therefore, when Alexander turned the papers of the debt over to the Thessalians, it was not his purpose that the Theban state, already destroyed by him, should never at any time be able to require the debt, but that he might give open evidence that he would never demand it of the Thessalians on the score of his mastery over Thebes. V. Their statement, that so long as any one of their citizens still lives, he is and is counted to be the creditor for the entire sum, and that he therefore has the same right as the state had to require what was owed it, is
895 false. For the individual citizens who survive the utter destruction of a state can on no count claim for themselves the right of the state, since they no longer constitute that state. Now it is patent that Alexander entirely destroyed the Theban state, so that those who survived that

catastrophe could by no interpretation be regarded as a people, while they who later built a city of Thebes were clearly a new people, who, even if the old Thebans had had any special rights left, could never have laid claim to them on that basis, save as they acquired them entirely anew. And this was certainly not done in the matter of the debt of the Thessalians. VI. The Thessalians did not in some informal way get possession of the papers but merely accepted them, when turned over by him who had acquired everything that could be called Theban, and showed that he wished to make his allies a present of their debt.

24. The way in which sovereignty is acquired over conquered peoples is set forth by Grotius, Bk. III, chap. viii.

25. We must now briefly consider how things seized in war may return to their former owners. On this matter we hold that it is highly agreeable to natural equity that prisoners of war, upon escaping in some way from the hands of their enemies, when not bound to them by their pledged word, and making their way back to their own people, not only recover their former position, but also all their property and rights. As to things, if during the course of the war they are taken back from the enemy either by ourselves, or our citizens or soldiers, it is just that they return to their former owners, and this is true not only of immovable but also of movable property, provided we can clearly identify it. For since it is the duty of a state to offer every possible defence to the property of its citizens, it will also be its function to see that they recover whatever they have lost. Nor does it make any difference if this has been taken back by soldiers, for they are but servants of a state, and whatever they acquire they acquire for the state and not for themselves. Since it would be unfair for the state to take to itself the property lost by its citizens, there is nothing left than for it to be restored to its former owners. See I *Samuel*, xxx. 22 ff. We read in Homer, *Iliad*, Bk. XI, that the spoil was divided among those from whom the enemy had formerly taken it. The rules of the Roman law, especially on the right of recovery (*postliminium*), are accurately set forth by Grotius, Bk. III, chap. ix.

26. If a whole people has either by its own strength, or with the aid of allies, shaken off a foreign yoke, it unquestionably recovers its ancient liberty and status, and if some part of its former possessions still remains in the power of its enemy, it keeps unimpaired its claim to the recovery of the same, so long as the war has not been peaceably concluded. But if a third nation in its own name take away in war a people already subject to its enemy, that people will only change masters and will not recover its liberty. The same principle must apply also to a part of any people. But if a part of a people is recovered by that nation from which it had for a time been separated, or by its allies, it will be joined again to the former body, and will resume its old place and rights

although there may possibly be an agreement with the allies whereby they are to keep whatever was formerly ours that they may take from the enemy. Thus we read in Justin, Bk. XXIX, chap. ii, that Demetrius preferred to yield his lost kingdom to Philip rather than to the Romans. But if a part of a people has on its own initiative ejected the enemy's garrisons, it will return to its former body and will not assume to establish a separate state, in case the old state has not renounced its right to that part.

ON PACTS RELATING TO WAR

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| <ol style="list-style-type: none"> 1. The division of pacts which presuppose war. 2. Whether pacts which are not concerned with ending a state of war, are valid. 3. The nature of a truce. 4. On its duration. 5. A truce does not concern the cause of war. 6. A declaration of war is not required at the termination of a truce. 7. A truce is concluded by an express pact. 8. On the beginning and end of truces. | <ol style="list-style-type: none"> 9. When a truce obligates subjects. 10. What is or is not allowed by a truce. 11. What is done with a man who is seized in the enemy's country, after the expiration of a truce, and forcibly retained. 12. The course to be followed in case a truce is broken. 13. On the right of safe conduct. 14. On the redemption of captives. 15. On pacts made by generals in time of war, 16. And those by private citizens. |
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WE must now inquire into public pacts which presuppose a state of war. Some of them end the state of war, while others leave it still going on, but mitigate it to some extent. Before we undertake to discuss the latter in detail, we shall have to inquire in general into the validity of the second kind.

2. Now Grotius, Bk. III, chap. xix, reaches the general conclusion that all pacts made with an enemy must be observed. This is, of course, true with regard to pacts which look toward peace, but as regards those which leave a state of war still continuing, and are not concerned with ending it, there may well be some question. For it is not an entirely valid argument to say that a man knows what is going on, and is capable of agreeing to it, and that therefore a second party can acquire a right from his promise, or may be the object of an obligation from him. For a state of war as such regards force as its peculiar method of agency, while the peculiar instrument of peace is faith. Therefore, it seems absurd to use faith when the matter at hand does not concern the restoration or preservation of peace, nay, when it would seem to heighten rather than diminish the state of war. Again, I ask of any person with whom I conclude a pact, that he show faith towards me. And yet it implies a confusion for me to demand that another keep faith with me, and at the same time avow that I intend to remain his enemy, that is, to remain a person who would injure him in every way possible. For a state of hostility of itself grants one the licence to do another injury without limit. Therefore, the promise that I will not exercise the licence of hostility against another seems opposed to actual conditions, so long as I proclaim that I will continue in a full state of war. And so what was said in another connexion [III. vi] will not be

able to apply here, namely, that those who conclude pacts with one another have by that act renounced the exceptions, which, being derived from the person of the one, can make the other fear that he will break his faith. For if they seriously renounce those exceptions, they thereupon cease to be enemies, while if they openly avow that their hostility still continues, this fact destroys all confidence in their words, and the more proper presumption must be, that they are but laying traps for one another and hoping to find a way for injury in lulling one another into false security. An illustration of this is the incident given by Procopius, *Gothic War*, Bk. IV [xxix], when the envoys of Narses sent to Totila asked him:

'What time will you set for battle?' the latter replied, 'We shall fight in eight days'.

897 On hearing this the messengers return to Narses and report the agreement. But he, suspecting Totila of guile, made preparations to battle on the next day, and he was not wrong in his expectation. For at daybreak the next morning Totila appeared in full force before any scout could bring word.

Nay, he who is misled by such a pact can secure no new right against his deceivers, since the state of war already existing with his enemy gives him the right to go to any extreme of violence. But if a man should say that a person ought to stand by agreements of this kind, lest his enemy should be greatly angered at being deceived, and should wreak all the more vengeance upon us, such a person acknowledges by his very statement that these agreements are to be measured by their utility. On this point bear the remarks of Ambrose, *On Duties*, Bk. I, chap. xxix:

If the day or the spot for a battle has been agreed upon with an enemy, it would be considered an act against justice to occupy the spot beforehand, or to anticipate the time. [. . .] For a deeper vengeance is taken on fiercer foes, and on those that are false as well as on those who have done greater wrongs. (R.*)

Yet we are not obligated to use every licence of war upon an enemy, and often it is deserving of praise to spare one upon whom the most extreme treatment could have been visited. But since war is allowable for this end, namely, that we may defend or assert our rights when that is impossible by peaceful methods, it should be agreed that the shortest way by which that end can be attained is the most agreeable to nature. And so when those pacts which only temper the use of force in war do but increase and nourish war, it is manifest that they are repugnant to nature. Compare Hobbes, *De Cive*, chap. iii, § 27.

However all this may be, the more advanced nations have nevertheless come to include among those customs which are intended to increase bravery in war, that of holding valid also those pacts which are not concerned with putting an end to a state of war, but only of seeing that it is waged with a certain moderation. To these belong a truce of a few days or hours, in order to bury the dead; a pact to grant passage through our guards; an agreement entirely to spare certain places, men,

or things; to forbear from fighting at a certain time; to avoid the use of certain weapons and missiles. Thus Ad. Olearius, *Itinerarium Persicum*, Bk. V, chap. xx, writes that the Turks and Persians agreed that their merchants could carry on their business in safety even in war time, and trade between both countries, since it was to the interest of both nations that their commerce be uninterrupted. In brief, since ambition and lust for wealth drove nearly all mankind into unnecessary wars, it seemed to be to the advantage of human interests to make a kind of business of war and to reduce it into the form of an art, on the ground that injuries to the innocent, at least, might be more tolerable, when war was not allowed to indulge in all the licence properly accorded to it. Another consideration is that a reputation for perfidy, or for tricking others by pacts, is usually harmful to persons engaged in fighting, and that men of judgement are deceived only once. Yet a cautious man would do well not to put too much trust in such pacts, or to grant an enemy an opportunity to do him hurt, because he lured himself into a false security. And so only necessity will lead us to make such agreements, except when we are in a position to retaliate upon our deceiver, or can in other ways look out for our own interests.

3. Among the pacts which do not put an end to a state of war, but only suspend its operation for a time, falls a truce, which is an agreement whereby the acts of war must for a time be stopped, although the war still continues. This definition is illustrated in Grotius, Bk. III, chap. xxi, § 1. Now truces can extend over several years, although it may be said in excuse of Varro and Paulus, who define them as being of short duration, that they had in mind only those truces which are generally concluded while both armies remain in the field, and so last regularly only for a few days, and not those which put a stop to all preparations for war and for a certain time are like complete peace, especially when they contain a special clause to the effect that negotiations leading to a complete settlement will be carried on in the meantime. And it should be noted, furthermore, that although truces of the latter kind regularly embrace all territories of both belligerents, it may be, and often is agreed, that they shall be observed only in certain places, while the war may continue in others; for instance, European nations with colonies in the East or West Indies may conclude a truce to be observed in Europe, and continue the war in the Indies. 898

4. In this connexion the question can be raised, as to whether, if peace be concluded for a definite period, such as for twenty or forty years, &c., it should be considered only a truce. It is our opinion that every peace is by its nature eternal, that is, whenever peace is concluded the parties make an agreement that they will never again take up arms over those disputes which gave rise to the war, but that they will now settle them once and for all, or refer them to arbitrators, or find

some other amicable solution. And so that eternal peace will never be regarded as broken, even though the same nations come to war later on for some new cause different from the former, for an eternal peace does not mean that one of the parties is obligated forever to swallow indignities offered by the other. Therefore, although the term 'peace' has been used, if a certain time has been set during which it is to continue, and¹ the dispute out of which the war arose has not been settled, it will be no more than a truce which requires for its duration the mutual exercise of the duties of peace. We are informed by Justin, Bk. III, chap. vii, that the Lacedaemonians concluded peace for a period of fifty years, but that when the war broke out again after six years, they complained of a breach of the 'truce'. On the other hand it seems absurd for one to make a truce for a hundred years, as Romulus did with the city of Veii (so Livy, Bk. I, chap. xv, although Dionysius of Halicarnassus, Bk. II [lv], calls it *σπονδαί*, that is, a treaty²), for there can scarcely be an injury which does not wear itself out, as it were, in so long a period, so that it is absurd to put off its prosecution for a century. For when we read further on in the same author,³ Bk. VII, chap. xx [8]: 'So peace was granted to the people of Caere, and it was resolved that a truce of a hundred years be made and recorded in a decree of the senate'⁴ (F.*), I should feel that this was done that the senate might not detract from its authority by forgiving in so easy a way a manifest injury. According to Sozomen, *Ecclesiastical History*, Bk. IX, chap. iv, Theodosius II made a truce with the Persians for a hundred years. Diodorus Siculus, Bk. XII, chap. lx, mentions a peace between the Ambraciots and the Acarnanians for a hundred years, and Ferdinand of Spain and Alphonso V of Portugal drew up a peace for one hundred and one years. Connestagio, *De Unione Lusitaniae*, Bk. I.

5. Now since a state of war continues during a truce, which would be impossible, were not the claim still standing, and the dispute not yet settled which gave rise to the war, it is clearly absurd to ask a man to make a truce with me, and yet renounce his claim against me. For if he does the latter, what further requirement is necessary for peace? Or why should I want to reserve to myself at the close of a certain time the licence for war, without the cause for renewing the war? See Baudius, *De Induciis Belli Belgici*, p. 128.

6. It is, furthermore, obvious from the nature of truces, that, if the war is to be renewed at their expiration, it need not be declared anew. Compare Grotius, Bk. III, chap. xxi, § 3. And yet in the case of longer truces, and when there has been complete demobilization,

¹ [For *ne* read *nec*.—Tr.]

² [Here Pufendorf renders the Greek *σπονδαί* by 'treaty' although its most common meaning by far is 'truce'.—Tr.]

³ [That is, Livy, not Dionysius.—Tr.]

⁴ [The latest text reads *aes*, 'on a tablet of bronze' (after Madvig), instead of *SC* (= *senatus consultum*).—Tr.]

the truces regularly carry, or at least should carry, a clause to the effect that, during this period, attempts will be made to settle the controversy; and although it is not required, it would at least be generous and honourable to inform our foe, some time beforehand, of our probable intention to renew the war, so that we may have the opportunity to show him that we find no pleasure in it, and that we are not the ones responsible for there being no complete peace.

7. We should also call attention to the fact that a truce, the observance of which carries with it an obligation, can be made only by an express pact or by acts so similar to those of friendship and peace, that they can be referred to no other cause; although negotiations for peace have of themselves not the force of a truce, unless there is an express statement to that end. Therefore, an enemy can in no wise justly conclude, from the fact that I have for a time ceased all hostile acts, that I have consented to a truce with him, nor can he accuse me of breaking any tacit faith, if, after such a lull in hostilities, whereby I led him into a feeling of security, I suddenly make an unexpected attack upon him. It is in this sense that we should explain the meaning of those writers who commonly designate a temporary cessation of hostilities without a pact, as a 'tacit truce'. See Justin, Bk. VI, chap. vii; Livy, Bk. II, chaps. xviii and lxiv; Bk. XXIII, chap. xlvi. The meaning of these passages is that for the period of which they speak the enemy remained inactive in good faith, exactly as if an agreement had been reached to that effect.

8. On the time limit usually put upon truces, one may consult Grotius, Bk. III, chap. xxi, § 4. But we cannot agree with his statement that the day from which a period of time is said to commence will not fall within that period, because the preposition 'from' has a disjunctive and not a conjunctive force. For surely its beginning is a part of a thing. Therefore, if it has been agreed that a truce will continue for ten days from the first of July, surely no one will understand this to mean anything other than that the first day of the month is also included in the truce. Nor does the word 'from' always have the force of dividing the word with which it goes from that which follows, but often of including the beginning in a thing. What is more common than the expressions 'from head to foot', 'from egg to apples' ?¹

9. Grotius, Bk. III, chap. xxi, § 5, also shows when a truce begins to obligate more particularly the subjects of both warring nations.

10. The things that are and are not permissible during a truce are enumerated by Grotius, Bk. III, chap. xxi, §§ 6 ff. Yet on this point we feel that every kind of a truce permits acts that are merely defensive, even though the truce may have been requested or obtained on other

¹ [That is, 'from beginning to end', i.e. of a Roman meal. The expression is from Horace, *Satires*, I. iii. 6 f.—7r.]

grounds. And so, for instance, it will not be unlawful during a truce that was only granted for the burial of the dead, for one to withdraw to a safer position, or to throw up earthworks; or for a besieged force to admit fresh troops and supplies, even if they have only bargained that they shall not be attacked. Nor are we convinced by the reason which Grotius gives in section 10, namely: 'Since such truces work to the advantage of one of the parties they should not work any hardship on the one who grants them.' For since a man is never accustomed by any pact to renounce his right of self-defence, he who has granted such a truce may throw the blame on his own easy ways and imprudence for his not taking sufficient care to see that his enemy might not be able to strengthen his position during the truce. See Xenophon, *Agésilas* [i. 10-11], and Cornelius Nepos, *Agésilas*, chap. ii, on the truce made by Tissaphernes with Agésilas, on which incident it is our opinion, that, if the former really conferred with his master, the king, as to whether he could on any basis settle upon some terms with the Lacedæmonians, he was not guilty of perjury for the mere reason that he prepared himself for any emergency. Add also Montaigne, *Essais*, Bk. I, chap. xvi.

11. The same writer, Bk. III, chap. xxi, § 9, points out that when a man is seized at the expiration of the truce on the enemy's soil, and detained by superior force, he can be held prisoner.

12. If a truce is broken by either party, the injured one can renew hostilities without any formal declaration, although, if he so chooses, he can also wait until the end of the truce. But if they had settled upon a punishment for such a breach it must be paid by him who was the first to commit it, and when the punishment is demanded and paid by the guilty party, the other has, of course, no right to resort to arms because of it, for the purpose of paying the fine is to prevent the deed from having any further effect. On the other hand, if the injured party
900 resumes the war, he is understood to have given up the idea of the punishment, although it is surely repugnant to the pact to give up the penalty and fly to arms. For it is not the rule in such agreements to have it optional with one of the parties, whether he will take the penalty or resume the war. See Grotius, Bk. III, chap. xxi, §§ 11-12.

13. On pacts which concern the grant of safe conduct, or, in other words, the guarantee of free passage through territory held by the enemy, and how they should be interpreted, we are fully informed by Grotius, Bk. III, chap. xxi, §§ 14 ff.

14. Pacts on the redemption of captives are greatly favoured by Christian nations, especially if one is held captive among infidel peoples, when even the sacred treasures of the church are rightfully used for his ransom. See *Code*, I. ii. 21; Gratian, *Decretum*, II. xii. 2. 13-15. Although the customs of the Romans, as set forth in Livy, Bk. XXII,

chaps. lix, lxi, and Horace, *Odes*, Bk. III, ode v, were entirely different. Silius Italicus, Bk. X [663 f.]: 'For a man with arms in his hands to have allowed himself to be captured was the worst possible crime.' We read in Eutropius, Bk. III [vi. 2], that when Hannibal offered the Romans the opportunity to ransom their captives, the senate replied to him that 'those who could be captured when they had arms in their hands were not necessary citizens.' It was also a law of Plato's, *Republic*, Bk. V [p. 468 A]; 'And may he who allows himself to be taken prisoner even be made a present of to his enemies? is he not their prey and may they not do as they like with him? Certainly.' (J.*) Quintilian, *Declamations*, cccxxxix:

In war the most fortunate thing is to win; the most valorous is to die for the cause, if victory be not vouchsafed. Even the third possibility is not¹ a disgrace, namely, to return at all events to one's country, and if victory be not vouchsafed, to escape. For it is possible to believe that the man who does this has saved himself for a second engagement, and has recovered the courage that had at one time given way before adversity. But the man who surrenders himself into slavery,² who throws away his weapons and puts out his hands to have the waiting chains fastened about them, what hope does he give us for the future? [. . .] What hope have we left in our soldiery, if they think there is nothing better than being captured?

What should be observed in such matters is set forth by Grotius, Bk. III, chap. xxi, §§ 23 ff. In connexion with section 28, we should like to add an incident given by Marinus Barletius, *De Vita Castriotae*, Bk. VII. When a certain infidel captive, who had been given to Musachius out of the booty, had agreed with him on a ransom of two hundred pieces of gold, he at once took them out of his pocket and counted them out to his captor, who refused to let him go, claiming that he had already acquired the money together with the person of the captive. But when the affair was referred to Castriota he decided in favour of the infidel.

15. On the pacts of generals, and what must be observed in connexion with them, we are informed by Grotius, Bk. III, chap. xxii. But we should note, in connexion with section 8, that generals can only agree to relatively short truces, and not to such as put a complete end to preparation for war, inasmuch as these last lie in the province of the supreme sovereigns.

16. Finally, the same author, Bk. III, chap. xxiii, sets forth how far private citizens can enter into agreements with enemies in time of war. To his observations may be added the custom followed, according to Buchanan, *History of Scotland*, Bk. IX, by the English and Scotch with regard to pacts of this kind:

If any person does not appear on the appointed day, this is his punishment: In their meetings which they regularly hold to recover their property, whoever has the complaint to make that he has been deceived carries about in the sight of all a representation of

¹ [A necessary emendation by Rohde.—Tr.]

² [For *inter virtutem* read *in servitutem*.—Tr.]

a hand or a glove upon a long spear. This they consider the greatest disgrace possible, so much so that those who have broken faith are loathed by their friends and relatives, while even a common person will not be seen in their company, or speaking with them, or receive them into his house.

Procopius, *Gothic War*, Bk. I [i], tells of an interesting pact between two soldiers, a Goth and a Roman, who had fallen into the same pit and agreed to help each other to safety; which agreement was later on endorsed by the Goths.

ON PACTS WHICH RESTORE PEACE

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| 1. Whether pacts of peace are weakened by the exception of fear.
2. Whether peace can be legally concluded with rebels.
3. How far upon concluding peace the possessions of private citizens can be left untouched. | 4. The time limit for the fulfilment of peace to be strictly observed.
5. The situation when peace is referred to the decision of battle.
6. A hostage for the person of his prince is no longer held when he succeeds the same.
7. On guarantors of peace. |
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PACTS by which wars are entirely ended are so fully treated by Grotius, Bk. III, chap. xx, that we may add scarcely anything save by way of a brief gleanings. The first question that comes up in connexion with them is, whether they can be made invalid by an exception of fear unjustly inspired. This is denied by Grotius, Bk. II, chap. xvii, § 20, and Bk. III, chap. xix, § 11, in the case of formal wars, on the ground that the opposite custom has become the law of nations, which holds that, if this were not the case, no end or limit could have been put to such wars, which are only too frequent, while the welfare of humanity demands that they be brought to a close. Yet what has been extorted by an unjust war cannot be kept with good conscience, and just as there is no question about restitution in such a case, so it does not appear clear that there is any law of nations which does not allow one to advance an exception of fear against an unjust victor. And even if such a law were to be found, it does not seem that to neglect it would mean any great loss for the peace of mankind. For, according to Grotius, the effect of formal war, whatever the nature of its justifying cause, is this: That external dominion, to use his phrase, is secured over the possessions of one's enemies. Therefore, if a man later wage a formal war on his former victor, even though he have had no justifying cause beyond the fear of which we are speaking, he will still, when fortune smiles upon him, not only get back what he lost in the unjust war, but also acquire all his enemy's property. It is, therefore, short-sighted indeed for a man who has taken something from another by the use of unjust force, to imagine that his holding is made more secure by some other means than force. No less foolish is the man who, after compelling another by unjust force to accept hard terms of peace, does not see that they are carried out at once, while he holds control over him, but depends only upon the agreement of the vanquished, and leaves him in a state where he has the power to pay back the evil which he suffered. See Guicciar-

dinus, *History*, Bk. XVI towards the end, and Bk. XVII towards the beginning.

Therefore, it seems more true to say that, if a man who has been the victim of an unjust war, undertakes to settle it in a peaceful manner, and deprecates the war, and is still forced to an unjust peace, no law prevents him from advancing the exception of fear to the carrying out of the terms of peace, or from seeking reparation for the injury when an opportunity later arises. So Polybius, Bk. III, chap. xxx, gives it as his opinion that the Carthaginians had just cause for their second war upon the Romans, by reason of the fact that while the life of their state was threatened by civil war, the Romans extorted from them Sardinia and a large sum of money: 'For as they had only yielded to the pressure of circumstances, so they seized a favourable turn¹ in those circumstances to revenge themselves on their injurers.' (S.) Yet our decision would have to be different, if the belligerents at the outset made an agreement to rest their case with the fortune of battle. And this is understood to be the case, when peaceful means are rejected, while the question at
902 issue is not yet clear, and both sides rush to arms, or when the revenge for their injuries and the securing of their claims,² which might have been attained by law or negotiation, are left to the decision of war. For in that case there is an open appeal³ to the arbitrament of Mars, and both sides enter the conflict with the thought: 'Either I will revenge my right or injury in war, or else I will lose still more.' When those who rush into a war in such fashion as this come out the worse for it, they can no more complain of the injury which they receive than can the man who is wounded in a duel of his own making. And so he who gets the worse in such a combat should take to himself the resignation of a character of Plautus, *Amphitruo*, Act I, sc. i [396]: 'Suit yourself, do what suits you, seeing your fists are too much for me.' (N.) Compare *Digest*, XLVII. x. 3, § 3, and IX. ii. 7, § 4.

2. Another question on which opinions differ is, whether peace and negotiations with rebellious citizens or their leaders should be kept. Grotius, Bk. III, chap. xix, §§ 6 ff., advances many reasons to show that they should. But it appears to us that the matter should be set forth more clearly like this. When a prince has by force overcome some rebellious subjects, he may decide of his own will what measures to take with them. But if the rebellion is composed by pacts, the very nature of such arrangements shows that the king is forgiving the rebels their crime, and so the pacts cannot be made void on the plea of treason on their part, while the rebels are understood to be joined anew by that agreement to the state, and to promise it obedience, presupposing, as

¹ [For *occasionem* read *occasione*.—Tr.]

² [For *injuriam, praetensionemque* read *injuriarum, praetensionumque*.—Tr.]

³ [For *summitur* read *sumitur*.—Tr.]

⁴ [For *b.* read *§*.—Tr.]

a sort of condition of their obedience, that the state will observe¹ the substance of the pact. And so especially in monarchies such a pact may have the force of an understanding, or fundamental law. But such as rebel with the purpose in mind of wringing from a prince what they want, may well note the statement of Gramondus, *Historiarum Galliae*, Bk. II, to the effect that 'Subjects have no other security than the loyalty which they owe their king'.

3. How far a state may leave untouched the property of private citizens in concluding peace may be comprehended from the nature of eminent domain, by the force of which the property of private citizens, no matter how it has been acquired, can be given over, when the state finds it imperative or to its great advantage to do so, it being understood, however, that the state is obligated to reimburse private individuals for it out of the public treasury, either at once, or as soon as it begins to be solvent. But the question whether a private citizen's property is to be taken from or left to him, in a monarchy concerns the king, and upon the demand of the king the whole body of citizens is required to make up to individuals whatever loss they have suffered on this score beyond their proper share. But foreigners to whom such property is handed over, need not inquire whether or not it was to the advantage of the state for them to receive that property, since the act of the king in so doing is sufficient to give them lawful dominion, both because of the presumption which attends² the acts of a king, and because there would be no foundation for negotiations with other nations, were it not always accepted that whatever the head of a state does is binding. Furthermore, the law of human society not only seems to advocate that property of this kind handed over to an enemy be made up to individuals by the rest of the citizens to the best of their ability, but also requires the same of losses which they have suffered at the hands of enemies, particularly if no special guilt attached to them for the outbreak of the war. See *Digest*, XVII. ii. 52, § 4, and XIV. ii. Although it is also clear enough that, in practically every case, such unfortunate citizens are merely told to look upon losses of this kind as an unavoidable calamity.

4. If a period is fixed within which the conditions of peace are expected to be fulfilled, it should be most strictly observed, so that by strict right no excuse is accepted for the least delay, unless one is restrained by a force beyond his control, or there be no suspicion of guile. The reason for this is that even a brief period of time can suffice to cause a great change in affairs. Therefore, if a person were allowed any delay in fulfilling the conditions of peace, it would be easy for him to find an occasion to withdraw from the terms of his agreement. A further consideration lies in the fact that a man cannot be safe in

¹ [For *praestant* read *praestandum*.—Tr.]

² [For *committatur* read *comitatur*.—Tr.]

demobilizing his army, the maintenance of which involves a great expense, before the terms of peace have been carried out.

903 5. Sometimes the terms of peace are left to the decision of some battle, to be fought out¹ between two champions, or four, or six, or more, or even between two entire armies. And here a difficult question arises, whether, namely, the fortune of the whole state may rightly be committed to the chance of such a battle. Of course it appears that this method spares men's blood, and crowds into the smallest possible compass the distresses of war, and yet it seems preferable, on the other hand, for a state even to undergo a bloody war rather than to lose at a single blow, by such a kind of duel, its liberty and safety, since it should be remembered that the fortunes of war can be overcome even after one or two disastrous battles. Yet if there is no hope of a successful outcome, although the entire power of the state take the field, such a single combat may be tried as the lesser of two evils, in case the enemy agree to it. So also when princes wage war, not for the rights of a state but over their private concerns, their states may readily allow them to fight it out among themselves in single combat. See an instance of this in Diodorus Siculus, Bk. IV, chap. lx. Dionysius of Halicarnassus, Bk. III [xii]:

He owned that when leaders of armies seek to establish their own power, it is both glorious and necessary for them to engage in single combat in order to acquire it; but when the cities themselves are contending for superiority, he thought it not only hazardous but even dishonourable for them to trust their fate to the decision of a single combat. (S.)

Although, as a matter of fact, even princes are not justified in settling a dispute, which is still undecided, in so violent a fashion. However, we should observe, in this connexion, that those who leave in this way the decision of a dispute to the outcome of a battle, can only gamble with some right which they themselves have, and cannot pass to another a right of which it is not in their power to dispose. Therefore, if a king undertakes to enter the lists over a kingdom which is not a part of his patrimony, nothing will come of his acts, unless he is supported by the consent of the people, and of those who by virtue of their birth have a right to the succession.

Now in formal battles of this kind a dispute often arises over the question who is to be regarded as the victor. And on this point we should recognize that such battles are regularly decisive, so that if two are engaged, he will be the victor who has either slain his opponent, or so weakened and wounded him that he acknowledges his defeat, as did Turnus in Vergil, *Aeneid*, Bk. XII [931 ff.], after he had received a severe wound. When several fight, that side will be victorious which has slain its opponents, or has thrown them into such disorder that they can offer no further resistance. But if the combat is between two entire

¹ [For *ineunde* read *ineundae*.—Tr.]

armies, to gather the spoils of the battle, to bury the slain, to rest upon the field of battle, and to return again to the conflict, do not of themselves give proof of the victory, since such acts are possible even when the battle has been fought to a draw. But when other factors are present, they are of considerable importance in showing that the enemy had fled. And certainly when a man has quit the field after a battle, there is a strong presumption that he has fled. When neither side¹ can advance sound proofs for victory, the case remains as it stood before the battle, and they will have to fall back upon a new battle or a new treaty. There is a famous example given by Plutarch, *Parallels* [p. 306 B], and Herodotus, Bk. I [lxxxii]:

There happened a dispute betwixt the Argives and Lacedaemonians about a claim to the possession of Thyreatis. The Amphictyons gave their opinion for a trial of it by battle, so many and so many of a side, and the possession to go to the victor. The Lacedaemonians made choice of Othryades for their captain, and the Argives of Thersander. The battle was fought, and the only two survivors that appeared were Agenor and Chromius, both Argives, who carried their city the news of the victory. In this interim, Othryades, who was not as yet quite dead, made a shift to raise himself by the help of broken lances, gathered the shields of the dead together, and erected a trophy with this inscription upon it in his own blood. 'To Jupiter the Guardian² of Trophies.' (G.)

For my part I should not hesitate to decide in favour of the people of Argos. Add Jan de Meurs, *Miscellanea Laconica*, Bk. IV, chap. xiv.

6. With regard to hostages that are given to ensure peace, we should observe, in addition to what is given by Grotius, Bk. III, chap. xx, §§ 52 ff., that in case the hostage should become the heir and successor of the person who gave him, he is no longer held upon the death of the prince, even though the treaty may not cease at his death. 904 For such a case is always understood to carry the tacit exception, that a man is no longer a hostage, if he takes the place of the principal debtor, although he must, of course, find another for his place, if that is demanded.

7. A further way in which to assure the security of a peace is when other parties, and especially such as have acted as mediators for the peace, pledge their faith that both sides will stand by their agreements. To such a guarantee there is joined an understanding about aiding the one who is attacked contrary to the agreements, against the author of the injury. Compare Diodorus Siculus, Bk. IV, chap. lv. But the guarantors will be obligated to give this aid only if the peace that has been broken is the one agreed upon, and not if a war arises over some new issue.

¹ [For *ne utram* read *neutrām*.—Tr.]

² [For *tutuori* read *tutori*.—Tr.]

CHAPTER IX

ON TREATIES

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| <ol style="list-style-type: none"> 1. The division of treaties. 2. Treaties whereby no obligation is contracted beyond that of natural law. 3. The nature and number of equal treaties. 4. On unequal treaties. 5. Which¹ of several confederated states should receive aid. 6. Some treaties are real, and others personal. 7. They are distinguished either by special signs, | <ol style="list-style-type: none"> 8. Or by general. 9. Whether treaties are concerned with deposed kings. 10. Whether allies made after the conclusion of a treaty are properly so called. 11. Treaties are not understood to be tacitly renewed. 12. What obligations lie upon those who have formulated treaties which have not been ratified. 13. Whether a promise is ratified by the silence of the supreme sovereign. |
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WE must now turn to the consideration of that species of public pacts which passes under the special name of treaty. Pliny, *Natural History*, Bk. VII, chap. lvi, states that they were first invented by Theseus, but his assertion can be allowed only in the sense that he was either the first to strike a treaty in Greece, or that he added to them certain rites and solemnities. We shall divide them by the simplest manner according to their subject-matter, whereby some of them only constitute what was already accepted by natural law, while others contain something over and above the duties of natural law, or at least settle and determine them when they seem indefinite.

2. To the first division belong those treaties which contain some agreement about mere humanity, as it is to be observed on one side or the other, or to prevent injuries to either party. See *Genesis*, xxii. 23. In the treaty entered into between the Lacedaemonians and the King of Persia we find, according to Thucydides, Bk. VIII [xviii], the following article:

All the territories and all the cities which are in possession of the King, or were in possession of his forefathers, shall be the King's. [...] Against these neither Lacedaemonians nor their allies shall make war, or do them any hurt, nor shall the Lacedaemonians or their allies exact tribute of them. (J.) The King shall have full jurisdiction over them.²

Now we might say that by this article the Lacedaemonians renounced all claims that they might in any way have advanced over Asia, for Asia belonged to the king despite the Lacedaemonian League, and it flows from the nature of dominion both that no man can attack any-

¹ [For *Viri* read *Utri*.—*Tr.*]

² [The last sentence seems not to be in Thucydides at all. The second is from a similar treaty, in chap. xxxvii.—*Tr.*]

thing which belongs to me, and that I have the final decision on whatever concerns that which is mine. One may compare also a treaty of peace between the Athenians and the Persians, as recorded in Diodorus Siculus, Bk. XII, chap. iv. Now such treaties were considered necessary, especially in the eyes of the ancients, between those who up to that time had had no dealings one with another. Indeed, most men had so completely forgotten¹ the principle of natural law, namely, that all men are related to each other by nature, and that it is wrong, therefore, for one to do violence to another except for some preceding offence, that it was generally believed the duties of humanity should be exercised only towards one's fellow citizens, and that foreigners were no better than enemies, whom we could injure whenever it appeared to be to our advantage. See Grotius, Bk. II, chap. xv, § 5.

But now between those who in their more advanced culture profess the observance of natural law, such treaties are no longer necessary², except as it is not unbecoming that, as between individuals, so between nations, some more extended proof of friendship may be given when they first come to have more intimate relations with one another. An illustration of this can be found in the words of Cicero, *Letters to Friends*, Bk. XIII, ep. x: 'Yet, after all, in forming new connexions the first approach is always of consequence, and by what kind of introduction the door of friendship, so to speak, is opened.' (S.) But in general civilized men should almost be ashamed to be a party to a pact the articles of which say no more than that they may not clearly and directly violate the law of nature, as if without such a pact a man would not be sufficiently mindful of his duty. Compare *Digest* II. xiv. 50. Indeed, treaties of that nature frequently pass under the name of friendship, although, as a matter of fact, the law of friendship, properly so called, requires more than does the common duty of humanity. For although the offices of friendship are not so definite as those which are owed by a pact, yet every one recognizes³ in general that the term friend implies that a man gladly shares what he has with his friend, looks out for his welfare, aids him with advice and counsel⁴, strives with all his might to ward off what threatens him with hurt—and all this with a greater⁵ affection than accompanies the services entailed by mere humanity. Grotius, in the passage just cited, also lists under this head treaties which provide for the interchange of the right of hospitality and of trade, in so far as they are owed by natural law. See above, Bk. III, chap. iii, §§ 9, 11.

But that those are not properly allies and confederates who have made an agreement to observe nothing further than the common duties

¹ [For *oblitteratum* read *oblitteratum*.—Tr.]

² [For *vir* read *novit*.—Tr.]

³ [For *intensione* read *intensiore*.—Tr.]

⁴ [For *necessaria* read *necessaria*.—Tr.]

⁵ [For *consolendo* read *consulendo*.—Tr.]

of humanity, is shown by Livy, Bk. XLI, chap. xxiv, where the Achaeans because of their dislike for king Perseus forbade the Macedonians to set foot upon their soil. For this reason Macedonia became a place of refuge for runaway slaves of the Achaeans, because the latter feared to enter that country to claim their own men. Out of a desire, therefore, to win them over, Perseus promised in writing that he would hand over to them their runaways, provided they rescinded the decree shutting Macedonians out of Achaea. When the matter was being discussed in the council of the Achaeans, Callicrates was unwilling to comply with the king's request, lest the Romans take offence at it, while Arco contended that they could meet the request of the king and still maintain their treaty with the Romans, giving as his reason: 'No one advises us to form a new alliance, or sign a new treaty [. . .] but merely that we may have the intercourse of affording and demanding justice, and that we may not by excluding his subjects from our territories, exclude ourselves from his dominion, and that our slaves may not have any refuge to fly to.' (M.) Nor, he added, was this opposed to their treaties with the Romans, since they contained no agreement that mentioned Perseus in particular.

3. Of treaties which add further duties to those which men owe each other by the law of nature, some are equal, and others unequal. The former are such as are carried out in the same manner by both parties, or, in other words, when not only are equal promises made by both parties, simply or in proportion to their strength, but they are also carried out in an equal manner, so that neither party is made worse than or subject to the other. We shall see, a little later, what is the
 906 character of unequal treaties. Isocrates, *Panegyric* [176]: 'Those are agreements', that is, equal treaties, 'which stand equally and fairly to both sides, but those are dictates', that is, unequal treaties, 'which (unjustly) put one side at a disadvantage.' (F.) But there is no reason for his addition of the word 'unjustly'. Both kinds are commonly entered into chiefly to form some union or society, the end of which is either commercial relations, or a united front in war, that is, the rendering of mutual aid in offensive or defensive war, or other matters. Equal treaties on commercial relations may take a number of forms: It may be agreed that the citizens of each of the two states on coming to the other's shores or harbours shall pay no duty, or never any more than the present rate, or not above a certain amount, or no more than the citizens of the state or other favoured nations pay, or the like. We have equal treaties relating to a united front in war, if an agreement runs that both parties shall furnish an equal number of troops, ships, or other munitions of war, and this either at any time when one or the other of the allies is invaded, or wishes to attack another, or only when either is attacked. Sometimes, also, aid is promised only for a special war, or

against certain specified enemies, or, it may be, against all except the allies of either of the parties. Finally, equal treaties are entered into on other matters, if it is agreed that one party shall not have any forts on the confines of the other, or shall not defend or harbour the other's subjects, but shall apprehend them and return them to the other, or that one shall not allow the other's enemy to march through his territory, and the like. Grotius, Bk. II, chap. xv, § 6.

4. After this description of equal treaties it is easy to understand the nature of unequal. Treaties are unequal when the things promised by the two parties are unequal, or when either party is made inferior to the other. Now unequal promises are made either by the superior or the inferior ally. The former is the case if the more powerful promises aid to the other without receiving the same in return, or if he promises more aid than the other, the aid being in that case not proportionate. The latter happens if the inferior ally is obligated to furnish more than he receives from the other.

Some of these treaties also imply some diminution of the supreme sovereignty. Of this kind was the treaty between the Romans and the Carthaginians at the end of the second Punic war, which forbade the latter to make war against the wishes of the Romans. You may also list here the case of greater Armenia, of which we are informed by Appian of Alexandria, *Preface* [ii], 'which is not subject to the Romans in¹ the way of tribute, and its people appoint their own kings.' (W.) Add also the pact regarding Sicily made by Peter with Theodatus², in Procopius, *Gothic War*, Bk. I [vi]. On the other hand, the supreme sovereignty is not diminished by such treaties as carry with them only some temporary burden, or one which may be performed at one and the same time, as when by the terms of peace one party is required to meet the bill for the pay of the other's soldiers, or to meet all the costs of the war, or to pay a certain sum of money as a fine; as he may also be compelled to dismantle his fortified cities and forts, to withdraw from certain places, or to hand over hostages, ships, or military equipment. Thus Pliny, *Natural History*, Bk. XXXIV, chap. xiv [139], writes: 'In the treaty which Porsena granted to the Roman people, after the expulsion of the kings, we find it expressly stipulated, that iron shall be only employed for the cultivation of the fields.' (B. & R.) Compare 1 *Samuel*, xiii. 19-20. And in this connexion the statement of Procopius, *Gothic War*, Bk. IV, should be mentioned, to the effect that, when, by the terms of the truce drawn up between Justinian and Chosroes, the former was to pay two thousand pounds of gold,

Isdiagunus, the Persian representative, demanded it in one payment. But Justinian wished to pay it at the rate of four hundred pounds a year, so that by using it like a kind of pledge he could keep Chosroes from a breach of the peace. Finally, however, the Romans

¹ [For *ἐν* read *ἐς*.—Tr.]

² [For *Theudato* read *Theodato*.—Tr.]

agreed to their demands and paid the entire amount in cash, for fear it would look as if they were paying annual tribute. So far do men habitually go in order to avoid what may sound base rather than what is actually so.

907 But the principal question in this connexion is, whether such unequal treaties as carry with them permanent and perpetual burdens, do always and of themselves impair the supreme sovereignty, or, in other words, whether an unequal ally is able to maintain his supreme sovereignty. Now perpetual burdens are such as these: When one of the parties is obligated to have the same friends as the other, but not *vice versa*; and when he may not build forts in certain places, or raise an army. We find an instance of this in the treaty of the Romans with the Latins, in Dionysius of Halicarnassus, Bk. VIII [chap. xv], whereby the latter were forbidden to levy armies on their own authority, have their own commanders for their contingents, or lead them forth on a campaign; the result of which was, that, since the decision regarding war and peace lay with the Romans alone, those under whose leadership everything was done reaped the glory and the fruits of the victories, although their allies shared in the toil. Other such burdens are when the number of one's ships is limited, when one may not found a city, may not sail in certain waters, or recruit troops in certain places, and other restrictions of a similar nature; and especially when one of the parties is required to show respect for the other's majesty, and so to recognize him as his superior in dignity, and to show him in all his actions a certain kind of respect. This last is set forth by Cicero, *For L. Cornelius Balbus*. Isocrates, *Panegyric* [101-5], writes that the relations of the Athenians with their allies were such that they kept in their own hands the supreme direction of the confederacy, while leaving them their liberty and setting up in them a democratic form of state. Grotius, Bk. I, chap. iii, § 21, gives a reply to this question, drawing from *Digest*, XLIX. xv. 7. But the difficulty arises from the words of the Jurisconsult which immediately follow that passage: 'But defendants from allied states we try in our own courts, and we punish them when found guilty.' For surely it shows subjection for our ally to have power to summon our citizens before his tribunal and to punish them. An example of this is that of Decius Magius, in Livy, Bk. XXIII, chaps. vii ff., and especially the account found in Pausanias, *Achaica* [VII. x. 9], to the effect that, when, at the suggestion of Callicrates, the Roman ambassador charged the leading men of the Achaeans with favouring the interests of Persius, one of their number, Xenon by name, confident of his innocence, said that he was not afraid to stand trial on that charge even before the Roman senate. This was adroitly interpreted by the ambassador as a voluntary appeal to Rome, and so Xenon and a number of others were sent there, although Polybius, *Selections on Embassies*, cv [XXXI. viii. 7], says of the men that had been summoned, that 'he did

not believe that¹ the Senate had the authority to decide the matter'. The easiest reply to the whole matter is that the words which precede are to be taken of the early period of the Roman state, when it was more careful in observing the articles of its treaties, and in treating those who had voluntarily entered an alliance with them differently from those who had been conquered in war. Thus Cicero, *On Duties*, Bk. II [viii], says that the early Romans made themselves responsible for their allies, but did not govern them; and Scipio boasts that the Roman state 'preferred² to bind foreign peoples to them by good-faith and social relations, rather than to hold them in grievous slavery'. And the words which follow must be taken of later years, when their respect for their old treaties began little by little to lessen, and their yoke rested upon conquered and allied peoples without any discrimination. See Livy, Bk. XLII, chap. i; Appian, *Civil Wars*, Bk. I [xcvi], in a passage where he observes that Sulla forced all the allies to contribute taxes, although down to his time they had enjoyed immunity. At the same time the state claimed the further right of taking all suits from their allied states to Rome, and trying the men there as though they were subject to the Romans. And it is perfectly clear from the letter of Proculus, that there once stood a great deal between the first and second statement.

Grotius, after having gone to great pains to enumerate the different kinds of such disputes as may arise between allies, ends by giving no solution to this difficulty. See also Antonius Matthæus, *De Criminibus*; II. i. 5 and 6, on *Digest*, XLVIII. But far-sighted men do well in 908 pointing out how frequently it happens that, if the superior in a treaty is far more powerful than the other, he gradually comes to exercise the sovereignty, properly so called, especially if the treaty is perpetual and carries the right to introduce garrisons into towns. See Bodin, *On the Republic*, Bk. V, chap. vi. Isocrates, *Archidamus* [51]: 'Those who wish to be free ought to avoid agreements in accordance with dictated conditions as akin to slavery.' (F.)

5. Grotius, Bk. II, chap. xv, § 13, takes up this further question: If several allies of the same nation go to war with each other, which of them should the nation aid, which is allied to both sides? See also Simler, *History of the Swiss Republic*, Bk. I, p. 119. Add on this point that there should be understood as underlying all treaties which a king enters into with foreigners on giving them aid, this exception: 'Provided considerations of his own kingdom can conveniently allow it,' which considerations outweigh all private relations and even those of blood and kinship. Add Gellius, Bk. II, chap. xxix. For since a king is bound to no one more closely than to his citizens, no promise of his to a foreigner can be valid if it is clearly to the disadvantage of the latter. In Guic-

¹ [For *V*. read *Vi*.—*Tr*.]

² [For *male* read *malle*.—*Tr*.]

ciardini, *History [of Italy]*, Bk. XVI, king Francis says that first place is taken by the oath sworn at Rheims, whereby the kings of France are forbidden ever to alienate any of the patrimony of their crown. This is the sense in which is to be taken the following statement of Bacon of Verulam, *The Wisdom of the Ancients*, chap. v: 'For princes there is but one true and fitting basis of faith, necessity—a great deity to the powerful,—danger to their position, and a share in profit.' Aristotle, *Nicomachean Ethics*, Bk. VIII, chap. v, long before put the case more simply: 'For confederacies between states seem to be based upon utility.' *Idem*, *Rhetoric*, Bk. III, chap. xiv [III. xvi. 9]: 'Men are unwilling to believe that a man does anything voluntarily except what is to his advantage.' Valerius Flaccus, Bk. IV [744]: 'They are faithful friends who have a common foe.' Isocrates, *To Philip* [45]: 'States regard neither enmity nor oaths nor anything else but what they suppose to be for their advantage.' (F.*) Thus Polybius, Bk. II, chap. xlvii, says of Aratus: '(<Since> he knew perfectly well that kings look on no man as a friend or foe from personal considerations, but ever measure friendships and enmities solely by the standard of expedience.' (S.) Andr. Maurocenus, *Historia Veneta*, Bk. I, speaks for the senate¹ of Venice when he says: 'We estimate friendships by the advantage and honour accruing therefrom to the state.' Yet we are told by Polybius, *Selections on Embassies*, xciii. 6 [XXX. v. 8], that the Rhodians made no treaty with the Romans for one hundred and forty years, although they sent them aid in many wars; and the reason for this, he adds, was: 'They wished that no ruler or prince should be entirely without hope of gaining their support or alliance; and they therefore did not choose to bind or hamper themselves beforehand with oaths and treaties; but, by remaining uncommitted, to be able to avail themselves of all advantages² as they arose.' (S.) Thomas More, *Utopia*, Bk. II, would have his Utopians strike no treaties, for a different reason. But whoever suffers a loss by reason of a treaty which becomes void when the other signer finds reasons for a change, can only blame himself that he did not inquire more fully into the affairs of his ally. See *Digest*, L. xvii. 19. Although it is the part of an honest ally, when his affairs will not allow him to remain longer in the alliance, to warn the other party so that he can thereupon consult his own advantage, for, as Euripides, *Iphigenia among the Taurians* [605-7], says:

Most base it is

That one should in misfortune whelm his friends,
Himself escaping. (W.)

Therefore, in treaties that concern joint action in war the greatest importance is accorded the article that no one may make a 'separate peace with a common enemy, or one that does not include his ally,

¹ [For *Statu* read *Senatu*.—Tr.]

² [For *pes* read *spes*.—Tr.]

Although equity demands that this article should have the restriction: Provided the other of the allies does not reject fair conditions of peace; 909: for in such a case the treaty appears to be violated, and the other ally is permitted in his own interests to take separate action. Yet this principle must be received with some caution, lest it be made the handle to evade the treaty, and one of the allies be set up as a judge over the other. See Ioh. Labardaeus, *Historiae de Rebus Gallicis*, Bk. V, p. 313, ed. Paris, 1671.

6. [Now of all treaties, equal as well as unequal, the most common are those which are concerned with furnishing aid in defensive or offensive war, or with regulating commercial relations. But the most binding species of treaties are produced by those which concern some perpetual union of several states.]²

There is an excellent division³ of treaties into real and personal, of which the latter are such as have been entered into with a king, entirely with relation to his person, and expire with him, while the former are such as are entered into not so much with relation to the king himself, or the heads of the state, as to the kingdom itself and the commonwealth, and persist when the heads of the state, with whom lay the administration of the commonwealth at the time when the treaty was made, have passed away. To which class any particular treaty belongs will be clear from what follows.

Now it is certain that all treaties made with any free people are by their nature real, and continue up to the time expressed in that treaty, even though the magistrates who were the instruments in drawing it up may be dead or out of office. And it is an easy inference from this that a treaty entered into by a free people will continue, even when the form of government has been changed from a democracy to a monarchy, and this because the people remains the same, even though the form of the commonwealth be changed, and because it is understood that a king, who has been called to his throne with the consent of a people, assumed together with the crown all the obligations which were contracted by that people in so far as it held in its hands the supreme sovereignty. A further consideration lies in the fact that, since treaties are entered into by those who enjoy the supreme sovereignty, which resides⁴ in the state as a common subject, both acts of the people by suffrage, and those later ones of a king who has been created by the will of the entire people, will be held to be those of supreme sovereignty. Yet we must except from this statement those treaties whose end is the preservation of a present status: If, for instance, two free peoples make a treaty to aid one another against such as would endeavour violently to change the government of the commonwealth. For the moment either

¹ [For '809' read '909'.—Tr.]

² [This paragraph was inserted here by Barbeyrac from the *De Officio Hominis et Civis*, 2, 17, 6, in order to fill out the sense of a passage left incomplete.—Tr.]

³ [For *distinction* read *distinctio*.—Tr.]

⁴ [For *eo* read *est*.—Tr.]

people has given its free consent to a change in the form of government, the treaty itself will be understood to cease, since there is no further ground for it.

Now although every treaty made with a free people is as a rule real, it is by no means true that every one made with a king is personal and perishes with him. For in many cases a person is inserted in a pact, not in order to make the pact personal, but in order to have a record of the agency by which the pact was made. *Digest*, II. xiv. 7, § 8. Yet since it is well known that some treaties are made by kings with the clear thought in mind that they shall cease with their authors, while others are made to continue during the reigns of their successors, there should be certain signs to show under which of these classes every treaty of a king should stand.

7. Grotius, Bk. II, chap. xvi, § 16, prefers to decide this question upon the definite wording of each treaty, rather than to make any general definition. Therefore, those will be real treaties which contain some express article to the effect that they are perpetual, or that they are made for the good of the kingdom, or that they are entered into with the king and his successors, or if a definite period is set for their duration. But other words also, and sometimes the very contents of the treaty, as well as its impelling cause, may lead to a fairly clear conjecture. Yet if the conjectures on both sides are equal, the result will be that favourable treaties will be considered real, the odious ones personal. Now treaties made for the sake of commercial relations are favourable, although treaties for war are by no means all of them odious, those connected with defensive wars having more than is favourable, while such as concern offensive wars lean toward what is odious.

910 8. But we can answer a little more definitely¹ the question how far a king is bound by the treaties of his predecessor in that office. For it is certain, in the first place, that the successor is obligated to maintain a peace which has been made by his predecessor; for a peace, provided its articles are faithfully carried out, fully does away with the preceding causes which gave rise to the war. In the next place, there is no doubt that a successor is obligated to keep those lawful agreements by which his predecessor conferred a right upon a third party. Again, it is certain that when the other ally performed his part of a treaty, and the king died before he could fulfil his own obligation, it must without fail be performed by his successor. For since that which the other performed on the understanding that its equivalent would be returned, has been to the profit of the commonwealth, or at least was done with that intention, it is surely obvious that, if its equivalent is not performed, the other retains a right to demand it back, on the ground that it was done, as it were, for a man who did not deserve it, and that the successor

¹ [For *distinctius* read *distinctius*.—Tr.]

is therefore bound to return what the other has performed, unless he prefers to pay its equivalent as expressed in the terms of the treaty.

In the last place, we must apparently come to the general position on those treaties of whose terms either nothing, or an equal amount, has been performed by both parties, that, if a prince has made a treaty as the head of his people, and with the purpose of securing their advantage, he is understood to have made a real treaty, which is binding also upon his successor. For such a treaty is binding also upon a whole people, whose next king, as its head, enjoys the same right, and is under the same burden or obligation as was their former ruler. But when a treaty directly concerned the interests of the king himself and his family, it is patent that, upon the death of the former, or the extinction of the latter, the treaty likewise expires. But it has become customary to renew treaties even though they be unquestionably real, upon the accession of a new king, at least in general terms, lest it might be possible, in view of the fact that the kingdom had as yet received no advantage from the treaty, for the other party to raise the exception that the treaty stood only upon the faith of its author, and does not devolve upon his successor. Especially since treaties are made to promote the advantage of the state, and since a king can have a different feeling from his predecessor on that point, and can also by his right as king take another way in order to secure it, and so pay no attention to a treaty which he feels is now of no use to his kingdom. Add Ioh. Labardaeus, *Historiae de Rebus Gallicis*, Bk. V, pp. 74-5, ed. Paris, 1671.

We should also observe, that, in case two nations have been related to one another by several old treaties, and undertake to renew them later as a whole, it is always understood that the last is renewed, since the later always annul the earlier. See Polybius, *Selections on Embassies*, XLI. iv. Yet no excuse can in any way be found for the culpable negligence both of the Achaean ambassadors, and of the body which dispatched them, who, upon deciding to renew their treaty with Ptolemy of Egypt, did not even know what treaties there were between the king and the Achaeans, or which of them they wanted to renew.

9. The question is also raised in this connexion, whether, when a king with whom a treaty has been made has been expelled by his own subjects, the other party to it is obligated to furnish him the aid which he promised him when he was on his throne. Grotius, Bk. II, chap. xvi, § 17, answers this in the affirmative, on the ground that such a king, who has suffered an injury by being expelled, still retains a right to the kingdom, even though he has lost possession of it. But in our opinion it appears certain that, if the treaty was expressly conceived for the defence of the person of the king and of his line, he should¹ be furnished aid with which to recover his kingdom. But when a treaty is drawn up

¹ [For *debenat* read *debeant*.—Tr.]

for the advantage of a kingdom, it is strongly to be questioned whether a banished king can demand aid on the strength of that treaty. For the presumption is that aid is promised only against foreign foes, and a case
 911 like this was never thought of. Although surely such a treaty does not appear to prevent us from coming to the aid of a lawful sovereign in driving out a usurper; just as when we have a treaty with a free people, which some usurper within its borders is trying to enslave, we can rightfully give them aid to overthrow him before he has become a legitimate prince. For the qualities in treaties, as, for instance, if the words of a treaty should run, that it is entered ¹ into with a 'king and his successors', signify a right, in the strict sense of the term, and not a mere usurpation, or, in other words, they apply to princes who have acquired a kingdom by just title, and not such as base their power upon unjust force.

10. There remains still the well-known question, whether, when a treaty provides that the allies of each party shall be safe from attack by the other, the term 'allies' is to be applied only to those who were such when the treaty was drawn up, or also to the later allies of either party. The arguments brought forward on this question between the Romans and the Carthaginians at the opening of the second Punic war, may be seen in Polybius, Bk. III [xxvii], and Livy, Bk. XXI, chap. xix. It is the decision of Grotius, Bk. II, chap. xvi, § 13, that the Carthaginians were able to wage war on the men of Saguntum, who had afterwards become allies of the Romans, without any breach of the treaty, and that the Romans were likewise able to undertake their defence, since it is possible, without offence to a treaty, for one of two allies to attack a nation, and the other to send it aid. In fact, it often happens that treaties have express articles on such a situation; see the treaty struck by the Carthaginians and the Romans at the time of the war with Tarentum. Polybius, Bk. III, chap. xxv. Although it is but a step from such an arrangement to an open rupture of treaties, since blows are equally grievous whether given in another's name or in one's own, and especially when the seat of war is transferred to the territory of the assisting ally. See Justin, Bk. III, chap. vii.

11. It is also to be observed that treaties with a time limit are by no means understood to be tacitly renewed at its expiration, not only because no man is presumed to take upon himself a new burden without consideration, but also because, if such were the case, there could be no definite understanding on the duration of such a burden. Whatever is done, therefore, after the expiration of a treaty will necessarily be held as proof of goodwill rather than as signs that the treaty is being renewed. For simple friendship, of course, continues after a treaty has run its course. Moreover, it is part of the common nature of pacts, that,

¹ [For *initium* read *initum*.—Tr.]

in case one party has not observed the treaty, the other also may break it. Yet it is possible for allies to agree, that, even though one article of a treaty may not be fulfilled, the rest will still be faithfully observed, although this must be understood in such a way that the second party is not obligated to perform his side of the article neglected by the other, and that no positive harm be done him because of such omission.

12. We must now consider engagements, or those public pacts which are made by a minister of the supreme power, upon matters which are its concern but on which he has not received explicit directions. On this point there arises that extremely difficult question touching the obligation which lies upon promisors to those with whom they have agreed, in case the promise was made simply, without the condition being added that it should be ratified by the supreme power, and then that power refuses to ratify it. This point, we read, was heatedly discussed in connexion with the engagement made by the Romans at the Caudine Pass. Livy, Bk. IX, chap. viii ff. And, of course, if we wish to decide the matter by strict law, the Roman Senate and People had but to hand over those who had made the agreement, and were not bound to ratify it or to go back and put their army in the position in which it previously was. See Grotius, Bk. II, chap. xv, § 16; Valerius Maximus, Bk. IV, chap. viii, § 1; Juan Mariana, *History of Spain*, Bk. XXI, chap. xii. And yet, if we would weigh the affair by equity and honest dealing, our conclusion would certainly be that the Roman people was under an obligation to ratify that engagement, even though it was made without its approval. Of course, the consuls had no authority, without a special commission to that effect, to decide the issue of the whole war, and to conclude peace and a treaty with the enemy. And yet, since they had good reason for presuming that the state would give its consent, and since so many thousands of citizens, the flower of the state, in fact, could be saved in no other way, and since the enemy had already performed what was practically equivalent to peace and a treaty, it would surely have been but fair for the people to ratify conditions which contained nothing hard or unjust. See Guicciardini, *History [of Italy]*, Bk. XII, pp. 542 and 344, where he describes the agreement between La Trimoville and the Swiss, at Dijon; and Temple, *Observations upon the Government of the United Provinces*, p. 153, where he writes that, in the year 1668, within five days he concluded three agreements with the States General, without consulting the provinces, because, in observing the regular procedure, they would have been bothered¹ by all the artifices which others could muster, although these agreements were absolutely necessary for the state. And he adds that they were risking their lives in case the provinces did not ratify what they did, since the agreements otherwise exceeded their

¹ [For *distrubandi* read *disturbandi*.—Tr.]

authority. But, in the case before us, the Roman people could have stubbornly held the ground that they could not be obligated by their magistrates against their will, in case the Samnites had made any intolerable demands. What stung that proud people was the fact that their army was sent under the yoke, a very foolish thing for the Samnite general to do, since that insult would not weaken it, and was certain greatly to arouse the anger of a fierce people. To be sure, the army deserved that disgrace for venturing so rashly into an unknown region, without sending out scouts ahead of them, although it was better for them to suffer it than to allow the Roman state to lose so much of its strength. One may consider the arguments in Livy, Bk. IX, chap. iv, advanced by Lentulus in favour of ratifying the agreement. Nay, a state often ratifies the promises and acts of its generals out of regard for the high authority reposed in them, and to prevent them from transferring their allegiance to others. And so we read in Tacitus, *Annals*, Bk. XII [xviii]: 'Mithridates deliberated on whose mercy he should throw himself [. . .] since none of the Romans on the spot were in sufficient authority to have their promises respected.' (R.) But in this case that proud people refused to consider that they were not always privileged to avoid experiencing for once themselves, what they had often done to others. On the other hand the Samnites acted nobly in not receiving from the Romans the men who had made the agreement. But it was certainly a ridiculous and silly act on the part of Postumius, when the Roman leaders were delivered over, to strike with his knee as hard as he could the leg of A. Cornelius, the fetial, and to cry out, for all to hear, that he was a Samnite citizen, that he had violated the law of nations in striking the fetial who was an ambassador, and that therefore the Romans could wage war with a better right. Nor should we pass over the judgement of Livy himself upon the whole affair: After the Romans had been delivered¹, he says, and rejected, they departed to the Roman camp, 'after having discharged their personal obligations', and then he adds hesitatingly, 'and perhaps those of the state as well'.

13. The final question as to whether, if the supreme power has known of the engagement made by its minister, and has maintained silence about the matter, it may therefore be assumed to approve the engagement, is answered by Grotius, Bk. II, chap. xvi, § 17.

* [For *dediri* read *dediti*.—Tr.]

CHAPTER X

ON THE MISCELLANEOUS PACTS OF KINGS

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| <ol style="list-style-type: none">1. The outline of the chapter.2. How far a king may entirely resume his former rights in dealing with a foreigner,3. And how far in dealing with his own citizens.4. How far the contracts of kings are above the civil laws. | <ol style="list-style-type: none">5. A king cannot put aside a valid oath of his own making.6. How far a citizen has a right of action against a king because of a contract.7. Contracts with citizens are subject to the principle of eminent domain.8. How far the contracts of kings obligate their successors.9. Whether the donations of kings are subject to recall. |
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IT remains for us to consider the questions which usually arise in connexion with the miscellaneous pacts of kings, which questions can be grouped under three heads: First, whether there resides in the person of a king some special power over his own pacts; second, what privileges he enjoys with regard to obligations made with his subjects; third, on what basis he may obligate his successors.

2. With regard to the first head, the question is this: Since a king can restore his subjects to their former estate when they have been injured in contracts, or can release them for just reasons from a vow, can he do the same thing for himself, when by craft or force he has either entered some losing contract because of the inexperience of youth, or has in some other way been seriously outdone in a contract, or has got his affairs involved by a rash oath? Here we should observe, that, if the question is taken in its blunt form, and as the words actually stand, it implies a contradiction. For 'to restore to former estate', and 'to release from an oath', are such acts as not only have to do with another, but also proceed from one who enjoys some superior power over the other who is to be restored or released. Therefore, the question should more properly be put thus: If a king has been injured either in the drawing up of a contract, or is prejudiced in its fulfilment, can he by his own authority declare that, because of its inherent flaw, he is no longer held by that obligation? On this matter we must bear in mind that, just as those who live in natural liberty, subject to no other man, are the arbiters of their own affairs, so if they are unjustly injured by another in a pact, they can of themselves require that what they have done be restored to them, or that the other party make up his share; provided the hurt and injury be entirely clear, for when there is some question, it would be better to leave the matter to the decision of arbitrators. Therefore, since a king enjoys natural liberty, if he has discovered any fault in a pact of his making, he can of his own authority

serve notice upon the other party that he refuses to be obligated by reason of that fault; nor does he have to secure of the other a release from a thing which, of its own nature, is incapable of producing an obligation or right. In Gramondus, *Historiarum Galliae*, Bk. II, Louis XIII says that 'there lies a just appeal from a king in bonds to a king in liberty'. But because it may happen that a man who is led by his own wickedness to break his oath, may advance some defect in the pact to cover his own perfidy, states do well in establishing what acts are by their own right to be held invalid and null, and what must be examined and decided by a judge.

3. But if a king is concerned with his own subjects, it would then be my opinion that a decision should be reached upon distinct cases. Now a prince's minority is held to continue so long as the administration of the kingdom is in the hands of his guardians, and during that period he can himself conclude nothing with foreigners. But if he enters into a contract with one of his own subjects, and later finds out that he has been injured in it, there appears no reason why he should¹ not himself also enjoy the same advantage of the laws as he allows others, since otherwise he would be worse off than a private citizen. Furthermore, because of his tender age it cannot be presumed that he was able to renounce the exception belonging to his minority. Now a prince cannot, on the plea of his minority, withdraw from pacts lawfully concluded with foreigners by his guardians, because, if that were allowable, no man would be assured of any agreement with a prince who
914 was still a minor. Yet guardians shall give an account of their administration. But no exception of fear or injury, or even of craft, prevails against agreements or capitulations which a people makes with limited monarchs in granting them the throne.² For if those stipulations seemed too harsh, there was no one to force him to take the kingdom; nor is it presumed that any people would be so thoughtless as to want to bind its king by such laws as would cripple the government or prevent it from acting.

In this connexion we may throw out the query, whether David could have taken back the oath whereby he promised not to punish Shimei, who had upbraided him when fleeing from his throne. This we must deny. For the king did not swear under duress, or because of fear, or in haste, but after careful consideration, in order that the people which had joined in the rebellion might, upon witnessing such clemency, renew their loyalty to him with greater confidence. And as a matter of fact the guarantee of impunity was not of itself unlawful, and the king was able to overlook the offence of Shimei without doing injury to any one else, since it was committed against his own person. But some have raised the question; whether he did right in moving

¹ [For *dedit* read *debeat*.—Tr.]

² [For *regis* read *regni*.—Tr.]

Solomon, in his last injunctions to him, to take cognizance of the crime. And yet in our opinion David did nothing in this contrary to his oath; for he did not command his son to punish Shimei for his offence, but only advised him to keep his eye upon the man as dangerous and the enemy of his family, so that he might not raise a revolt, and that he might not so easily be granted a pardon if he were again guilty of such a deed. Therefore, Solomon required him to live in Jerusalem under his surveillance, and not to pass beyond the brook Kidron, that he might not again see the place where he so foully reviled David, and felicitate himself on the fact that he had gone unpunished. But divine providence ruled that he should break such easy terms, to which he himself had agreed, so that there might be just reason to turn so worthless a man over to condign punishment.

4. It should be noted, in the next place, that although, when kings exercise some acts with their citizens, not as kings, but as any private man, they are presumed to keep before their eyes the positive laws of the state, which govern the validity of such acts; they are, nevertheless, by virtue of the fact that they are superior to the civil laws, under no necessity of observing the letter of those laws, even in their private acts. Therefore, if they knowingly and willingly enter a contract which would otherwise be invalid in the eyes of the civil laws, they are held to have exempted that contract from the force of civil laws, whatever it may be, and not to have declared it invalid because of the laws, since otherwise nothing could come of their acts. On the action of Philip II of Spain, who, about the close of the last century, undertook on the basis of some laws to rid himself of his debts, see Grotius, *Historia Belgica*, Bk. V. Yet I should feel perfectly free to admit that, if a king notices afterwards, what he did not see at first, namely, that he was badly cheated in a contract, he may himself rescind that contract, or at least have it corrected. Add Grotius, Bk. II, chap. xiv, § 2.

5. It is patent, however, that a king can never take back an oath of his that has been validly sworn, and contains no scruple or flaw, on the mere plea that he is also allowed to relieve his subjects of their oaths. For the oaths from which he releases his subjects were made in the first place upon the condition: 'Provided our superior gives his consent.' And all would agree that no obligation could be contracted if every man could reserve to himself the right not to perform it, if he so chose. Add Grotius, Bk. II, chap. xiv, § 3.

6. Now although promises and pacts are as binding upon the conscience of a king as upon that of any private citizen, there is, nevertheless, this difference between the obligation of a king and that of subjects, namely, that it is no trouble for the former to exact what is owed him from a subject, when he demurs, while a citizen, so long as he

remains such, has no means within his power to recover his due from a king against his will. Although no king in his senses will refuse to pay his honest obligation, if he considers that his security and honour rest upon his standing by his agreements¹, and that it is unworthy of him who is given his position in order to mete out justice, deliberately to trample it under foot. Yet if kings, despite this prerogative, by a contract with their subjects allow them to institute action against their prince in his own court, such an action is based not so much on civil law as upon natural² equity, as though they could not but be willing to pay their debt when once their obligation had been defined. And so the end sought in such an action is not that the king be required to pay his debt, but that the subject show clear proof that the prince had obligated himself to pay it. And in a process of this kind there is every reason to observe the rule laid down by Sisimethra in Heliodorus, *Ethiopica*, Bk. X [10]: 'Justice has no respect for high station; but there is one who is king in every decision³ and that is he who surpasses the rest in the reasonableness of his arguments.'

7. It may also happen that a subject is deprived of a right which he has secured through a contract, either by way of punishment or by the force of eminent domain, provided, of course, that, in the latter case, the commonwealth actually has need of it, and is under obligation to make restitution. So also a ruler may for cause defer payment of his obligations, when the great necessity of the commonwealth demands the temporary use of funds which should otherwise go to a private citizen.

From these principles it is clear what decision should be reached upon the subject of the general cancellation of debts, which Solon called a *σεισάχθεια* [shaking-off of burdens]. See Plutarch, *Solon* [xv and xvi]; Cicero, *On Duties*, Bk. II, near end [xxiv].

8. Furthermore, if we are to know whether and how far a king may transmit to his successor an obligation by a private contract, we must first inquire whether a king holds his kingdom as part of his patrimony, or only enjoys the possession of it by a right, as it were, of usufruct⁴. Now he that succeeds a king who holds his kingdom in the first-named manner, succeeds to all his possessions, and he must be supposed in the very same manner to succeed to the debts and obligation which did not terminate finally in his person. But with regard to the debts of kings who hold their kingdom in the second manner, it is the opinion of Grotius, Bk. II, chap. xiv, § 11, that their successors are not obligated to pay them *ἀμέσως* [directly], and this for the reason that they are taking another's place. For such kings do not receive their right to a kingdom from the one who has just died, but from the people. Yet

¹ [For *pactorum* read *pactorum*.—Tr.]

³ [For *iudicio* read *iudicio*.—Tr.]

² [For *naturali* read *naturali*.—Tr.]

⁴ [For *usu fructuario* read *usufructuario*.—Tr.]

even such successors are obligated for the debt of their predecessors ἐμπέτως [indirectly] and through the medium of the state, and this not personally, but as they are the heads of states which are ultimately affected by any debt made by a king as their head. For that power belongs to kings to obligate the state itself by debts, is obvious from the fact that many times the necessities of a state could not be met except upon the basis that debts are contracted in this way. And since a king is empowered to administer and preserve a state, there will also lie at his disposal all the means without which that end cannot be attained. Yet that power to obligate a state is not unrestricted, but extends only so far as the king may have some good reason for contracting the debt. For, on the other hand, a king should not be so straitened that he can turn over to the state no other debts but what have actually served to its advantage (although local officials may well be limited to this; see *Digest*, XII. i. 27), but it may be enough if he had a good reason for his policy, although chance may have robbed him of his expectation. See *Code*, II. iv. 12. Therefore, the contracts of kings, if not manifestly absurd or unjust, will obligate a state, and even in case of doubt the presumption is in favour of the king. And so their successors as well will be obligated, since they are the heads of the state. Nay, even a 916 people will be obligated, if it deposes a king and sets up its own state, for whatever a free people has contracted would obligate both the people and whomever it may later set up, even with the fullest authority. And it is better to settle that question upon this basis, than by drawing a distinction between slight and great injuries. For in the administration of civil business it is much more fair to regard the good reason than the outcome of the undertaking, since an unforeseen situation commonly brings to naught even the best laid plans.

9. What has been said of the contracts of kings should also be applied to their donations, namely, that they cannot be recalled by successors, no matter if they had a good reason. See Suetonius, *Titus*, chap. viii; Pliny, *Letters*, Bk. X, ep. lxvi; Gratian, *Decretum*, II. xxv. i. 15. On the other hand, Galba attempted to take back the largesses made by Nero, leaving every recipient but a tenth part of what he had received. Suetonius, *Galba*, chap. xv; Tacitus, *Histories*, Bk. I [xx]. The latter author (*Histories*, Bk. III [iii]) holds up to scorn the donations of Vitellius, who was ruining the state, 'because to give or to accept them would have involved the destruction of the commonwealth'. Thus the senate made those states tributary again which had purchased their immunity of Sulla, although the action was censured by Cicero, *On Duties*, Bk. III [xxii]. And surely it seems that the money should have been returned to them, if it had been used for the state. Thus, as we are informed by Zonaras, in writing of Basilius of Macedon, since Michael, the predecessor of Basilius of Macedon, had squandered all the

money of the state, the latter issued a decree that whoever had received money for no good reason should return the sum, or at least one-half of it. Add Jerónimo Osorio, *De Rebus Gestis Emanuelis*, Bk. I, where he tells of the donations made by King John when he was about to die.

But the purpose for which such donations were made must always be kept in mind. If a king made a gift from his own property, it will be impossible to recall it. And if it was made out of the income of property, the administration of which was entrusted to him, we should observe in every case whether it was made with reason and in measure. For as no one would deny that rewards can be given from the treasury for past or present merits, according as the resources of the commonwealth warrant, so if huge sums of money are poured out upon idle and useless men, and the treasury is exhausted to satisfy their ambition, it would, in my opinion, be fair enough to make good the loss from him who was the cause for the state being bankrupt. Add Boecler on Grotius, Bk. I, p. 107; Grotius, Bk. II, chap. xiv, § 12. It was a very wise policy of Ferdinand of Aragon, as described by Laurentius Valla, *De Rebus Gestis [Ferdinandi Aragoniae]*, Bk. III: 'He was careful to hold on to the royal patrimony, and used to say that those who alienated it made enemies for themselves rather than friends, since they transformed their subjects into petty kings who were always concerned and suspicious lest their rights and licence be impaired.' The same principles will be applied to privileges and immunities; namely, that it be considered whether they have both reason and measure, and whether they can be consistent with the welfare of the state, for there can be no doubt that the last consideration should outweigh the hasty indulgence of a king. Indeed, all such privileges are to be strictly interpreted, in so far as they begin to lie heavy upon the rest of the citizens. Compare *Digest*, XLIII. viii. 1, §§ 10, 16; Demosthenes, *Against Leptines* [xcviii]. Appian of Alexandria, *The Wars in Spain* [xliv], in recounting how the Romans demanded of the Celtiberians tribute and military service, and the latter countered with a claim for the privileges granted them by the Romans themselves, adds: 'And on these terms the matter was settled. But whenever the Senate grants such privileges it always adds the following exception: "This arrangement will stand so long as it is agreeable to the Senate and the Roman¹ people."' In Guicciardini, *Histories*, Bk. VII, Louis of France, after subduing the rebellion of the Genoese, annulled his old conventions with that state, and then granted them again as privileges and not as pacts; 'So that he might always have the power to take them
917 away again.' But I am inclined to feel that this did not apply to all their privileges, but only² to such as they held by the force of a voluntary grant.

¹ [For *Romano* read *Romano*.—Tr.]

² [For *uisi* read *nisi*.—Tr.]

CHAPTER XI

THE WAYS IN WHICH A MAN MAY CEASE TO BE A SUBJECT

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| <ol style="list-style-type: none">1. A man ceases¹ to be a subject when his king dies without a successor.2. So also if he emigrates from a country.3. What should be observed in emigration.4. Whether whole bodies may emigrate.5. Whether it is lawful to pose as a deserter². | <ol style="list-style-type: none">6. Whether a state may banish a citizen at its pleasure.7. On exile.8. Citizenship is lost upon seizure by an enemy.9. Whether a citizen, when surrendered to the enemy but not received by him, remains a subject. |
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AMONG the ways in which a man ceases to be a subject some include also that where a king dies without any heir or successor, or has given up his kingdom as derelict, for in such cases, they would say, every man returns to his state of natural liberty. But since it is obvious that what happens here is only that the kingdom is not entirely abolished, but only lapses into a kind of interregnum, it follows, of course, that the obligation formerly existing on the part of citizens to their king who is no more, passes away, but that they remain still united to each other by the original pact which gave rise to the state.

2. The most common way is for a man of his own accord, with the permission of his state, to pass to another with the intention of establishing there the seat of his fortunes. The extent to which such a voluntary removal is allowed citizens is gathered from the ways in which a man is received into a state. For some men pass under the jurisdiction of a state upon being conquered in a just war, or when forced to it by extreme necessity, the amount of liberty allowed them being a matter to be discovered from the laws of the state. But in case a free man who either was never before subject to any one's sovereignty, such as the original heads of families, or has passed out from under that to which he was formerly subject, joins some state of his own accord, it will likewise have to be decided by the laws of that state how much liberty to leave it is allowed him. For there are states which a citizen may not leave without their express consent, while with others permission is granted in conjunction with a certain burden, for instance, by paying a specified sum of money, or by yielding to the state a portion of one's property. Ovid, *Metamorphoses*, Bk. XV [28-9], writes of the Argives: 'His country's laws forbade his departure. The punishment of death was appointed to the man who should desire to change his fatherland.' (M.) But when there are no laws on this matter, what a citizen may do must be gathered from the custom or nature of civil subjection, and every

¹ [For *desinitis* read *desinit*.—Tr.]

² [For *tansfugam* read *transfugam*.—Tr.]

citizen is understood to have licence to do what custom allows. If this affords no clear information, and neither party has mentioned the matter in the pact of subjection, the better course is to take for granted that every free man reserved to himself the privilege of migrating at his pleasure, and¹ so prefers, like Socrates, to be a 'citizen of the world', rather than to settle upon a fixed abode. Valerius Flaccus, Bk. VII [227 ff.]:

Hold that to all living creatures belongs this common world and common gods. Therefore, call wheresoe'er the day begins and dies, your fatherland. It cannot be these lands, born under the curse of gods, can hold us for ever beneath this constant cold.² To me, as well as you it is allowed to leave the uncouth Colchians.

For when a man joins a state, he does by no means renounce the supervision of his own actions and property, but his purpose is to secure himself some excellent protection. But since it often happens that the way in which the administration is conducted is of little value to some one man's private interests, or that they can be looked after better somewhere else, and since it cannot be expected that a commonwealth should be altered to suit the pleasure of one or two men, the next best thing is to allow them to look to their interests by going to
918 another state. Cicero, *Tusculan Disputations*, Bk. V [xxxvii]: 'Demaratus, the father of our king Tarquin³, not being able to bear the tyrant Cypselus, fled from Corinth to Tarquinii, and settled there. [. . .] Was it, then, an unwise act of him to prefer the liberty of banishment to slavery at home?' (Y.) Add Diodorus Siculus, Bk. I, chap. lxxvii. In the case of others their state does not offer them a field for the exercise of their endowments, to whom may be applied the line of Statius, *Silvae*, Bk. I [i. 101]: 'Ere now have I seen boughs upon stranger stock ingrafted overtop their parent tree.' (S.) Others experience the scriptural saying: 'No prophet is accepted in his own country' [*John*, iv. 44], because the eyes of the slothful fill with envy when⁴ they perceive those, whom they once looked upon as their equals or inferiors, raised by their virtue above themselves. Or the reason may be that given by Lacydes in Diogenes Laertius, Bk. IV [60], that 'images should be viewed from afar', since 'proximity diminishes reputation'. To undertake to deny such men the freedom to migrate to another country, would be the same as to command free men never to dare to rise above the level of their parents. Indeed, the states themselves may even find an advantage in this liberty of movement, from gathering to themselves the outstanding men of other lands. Cicero, *For Balbus* [xi]:

According to our laws no one can change his city against his will, nor can he be prevented from changing it, if he pleases, provided only that he be adopted by that state of which

¹ [For *ut quis* read *utque*.—Tr.]

² [The reading of this line is very far removed in form from that in modern versions, but not in sense.—Tr.]

³ [For *Torquinii* read *Tarquinii*.—Tr.]

⁴ [For *eam* read *cum*.—Tr.]

he wishes to become a citizen. (And further on): For, in the recollection of earlier times, many Roman citizens of their own free will, not having been condemned by any process of law, nor having been in danger, have left our state and joined themselves as citizens to other states. [xii] For there is a path from all cities to our city, and [. . .] the road to all other cities is open to our citizens. (And this right he praises in the warmest terms [xiii]): Oh how admirable are our laws, and with what god-like wisdom were they established by our ancestors from the very first beginning of the Roman name! [. . .] that no one can be compelled against his will to change his city, nor against his will to remain a citizen of any city. For these are the firmest foundation of our liberty, that every individual should have it in his power to retain or abandon his privileges. (Y.)

Add *Digest*, XLIX. xv. 12, § 9; Grotius, Bk. II, chap. v, § 24. Nor does it constitute an objection that the heads of families, who first undertook to establish a state, are understood to have bound each and every man by a pact to be willing to join his strength to the united strength of all. For a member can withdraw from other such unions, or organizations, provided he do so without evil intent, nor abruptly and to the hurt of the other members; and especially can he do so if the organization were not formed to run for any fixed period. Although, as a matter of fact, many states show little concern whether their citizens emigrate or not, for the reason that they are already overcrowded, and are more concerned with decreasing their population.

3. Yet since it is usually of some value to a state to know the number of its citizens, every one¹ who is going to leave a state should feel it obligatory, or at least honourable, to give notice of his departure, unless, perhaps, he has good reason to think that the state is not concerned whether or not it know when a citizen leaves its territory. But the express consent of the state will have to be secured by such as have assumed a special office, especially if it be for a stipulated term, as in the case of such as are on a commission or an expedition, or engaged in any other task which they undertook by a special agreement.

A man's departure should also be timely, and when it is not to the special interest of the state that it should not take place. To illustrate this point Grotius, Bk. II, chap. v, § 24, advances the following instances:

If a heavy debt has been contracted, unless the national is prepared to pay his share at once; likewise if war has been undertaken because of confidence in numbers (or in the bravery of certain citizens), and especially if a siege threatens, unless the national is prepared to furnish an equally capable substitute to defend the state. (K.)

See Lycurgus, *Against Leocrates*. Nor would you call them good citizens who, as Horace, *Odes*, Bk. I, ode xxxv [26-8], says of his friends, 'scatter so soon as they have drained our wine-jars to the dregs, too treacherous to help us bear the yoke of trouble'. (B.) But we should carefully note that the word 'emigrate' is taken as applying to one who actually passes out of the confines and territory of a state², and not of one who would deny that a state has any sovereignty over him, and yet

¹ [For *Ista* read *Isti*.—Tr.]

² [For *civitatsi* read *civitatibus*.—Tr.]

919 would continue to reside within its borders. For in the act of delimiting the bounds of its jurisdiction, a state is understood also to forbid any man who refuses to recognize its sovereignty, to make his home there against his will. And in this connexion we should observe that the former practice of the Spanish nobility of renouncing the laws of their country and moving to other places, was an ineffectual and improper way to free themselves from any obligation to their state, which act they believed made it lawful for them to take up arms against their king and country, and impossible for them to be accused of treason. See Mariana, *History of Spain*, Bk. XIII, chap. xi.

We can infer, from that which has been said so far, what is the power of avocatory mandates, whereby a state undertakes to recall its subjects from the service of foreigners. For instance, if a man who is under no special tie or obligation transfers the seat of his fortunes from a state, which has always granted such a right to all its citizens, to another, the country of his former allegiance has no further right over him, and therefore avails nothing in threatening him with a loss of his reputation and rights. But a state still retains a right over a citizen who broke its laws in leaving it, or was bound to it by a special obligation, or still has possessions, and especially immovable goods, within its borders, or, finally, is away merely for travel while retaining his right of citizenship. In which connexion we should mention in passing a law of Solon's, whereby:

He permitted only those to be made citizens who were permanently exiled from their own country, or who removed to Athens with their entire families to ply a trade. This he did, as we are told, not so much to drive away¹ other foreigners, as to invite² these particular ones to Athens with the fullest assurance of becoming³ citizens; he also thought that reliance⁴ could be placed both on those who had been forced to abandon their own country, and on those who had left it with a fixed purpose. (P.) Plutarch, *Solon* [xxiv].

Now since a state retains no power over a man who has once been freed from all civil obligation, it is patent that if he be sent by the new state to which he has moved as an ambassador to his former state, he enjoys all the privileges accorded ambassadors, of which the foremost is that he be exempt from the jurisdiction of the prince to whom he is sent. For if any prince does not choose to accord a former citizen such an honour, he can refuse to accept him. And this principle can apparently be extended so far, that, if a citizen with the knowledge of his state transfer his allegiance to another, in order to conduct its business there in the capacity of its public ambassador and minister, the former state is understood to have released him from his civil obligation, since two obligations of the same nature cannot inhere in the same subject. And so such a man will from that moment enjoy in his native state, which

¹ [For *summo vendorum* read *summovendorum*.—Tr.]

² [For *in vitandorum* read *invitandorum*.—Tr.]

³ [For *venturas* read *venturos*.—Tr.]

⁴ [For *simulfidos* read *simul fidos*.—Tr.]

he is held by a kind of fiction to have exchanged for another, the rights and privileges falling to ambassadors.

4. But it is the opinion of Grotius, *loc. cit.*, that great numbers of a people may not leave a state, because, if that right were granted, civil society could not exist, that in moral matters that thing is regarded as necessary which is required to obtain some end, and that cannot be done which prevents or destroys this end. Add Livy, Bk. XLI, chaps. viii, ix. Yet his statement is open to some question. For if individuals may leave a country at their pleasure, why may not more do so when it is to their advantage to change the seat of their fortunes at the same time? provided none of the objections we have already set forth interferes with that privilege. Nor does it make any difference if the state is weakened thereby, for if a man has no right to restrain me against my will, no injury is done him if he loses by my departure some future advantage which was not owed him at the time of my departure. Nor is it any more necessary for that state to have so many myriads of citizens, or always to be an object of dread to its neighbours, than for this or that citizen to count his fortune as so many thousands, although, of course, none of them should by illegal means lose what he has. Therefore¹, there seems to be little force in the argument of Grotius. For even if this or that state may be seriously weakened, or even 920 entirely drained of its population by the emigration of its citizens in large numbers, that does not mean the entire destruction of civil society among men. The destruction of one is the creation of another, and the decrease of one works to the increase of another. After mankind had multiplied nature desired that it be gathered into civil societies, but she never commanded that this or that state endure and flourish forever. Thus Babylon was drained of its population by Seleucia, and she in turn by Ctesiphon. Pliny, *Natural History*, Bk. VI, chap. xxvi. Yet if citizens wish to emigrate in large groups, they must leave the territory of the state just as individuals must. For all governments would be thrown into confusion, if entire cities or districts could withdraw at their will from their allegiance, and either put themselves under another authority, or set up an independent state.

5. In this connexion we should consider the question, whether we should approve the conduct of those who pose as deserters in order that they may thereby work some serious damage to the benefit of their own state on those to whom they make their way. Of course, those who are hasty in placing faith in such men cannot escape censure for their lack of foresight (see 1 *Samuel*, xxix. 4), nor can one greatly blame those who have meted out just punishment to traitors after their work has been accomplished. See Vopiscus, *Aurelian*, chap. xxiii. And yet I cannot with decency deceive a person, merely because he falls an easy prey to

¹ [For *Ude* read *Unde*.—Tr.]

my machinations, nor, as has been shown above, is a man obligated to commit a felony in order to be of service to a state. Nay, it is without doubt a criminal act for you to pledge your faith, in order that, in the breaking of it, you may find an opportunity to do all the greater harm; and good men should in every age condemn the remark variously attributed to Lysander and Philip, that 'children are to be tricked with toys and men with an oath'. See Aelian, *Varia Historia*, Bk. VII, chap. xvii. Therefore, if a deserter of the kind we are describing, had expressly pledged his word and then violated it in order that he might actually perform or only appear to perform some service for those whom he deserted, he will not be able to do so without involving himself in a villainy. Now some one may reply, that, since he to whom a deserter comes, already knew that such a man could not perform any service for him without committing a villainy, a man could not validly obligate himself to commit a villainy and that therefore the faith he gave was void; accordingly, no injury is done to such a person, if he is deceived while building his trust upon so slender a foundation. But there is no reason for our raising the question here as to whether or not it be a sin to use the services of deserters. For it does not follow that if I sin in using another man's services, he therefore has a right to do me an injury, just as it also does not follow, that, because he who hires an assassin to commit murder is as guilty as the assassin, the latter can therefore turn his dagger against the man who hired him. It is a general principle of the Roman law (*Digest*, XLI. i. 51), as explained by Cujas, *Observations*, Bk. IV, chap. ix, and Grotius, Bk. III, chap. i, § 22, that 'we may receive a deserter by the right of war', that is, that it is not contrary to the law of war to receive one who has deserted the enemy's side and chosen ours. But whether this must be understood to apply to the external law of war, as Grotius calls it, or the internal, which agrees exactly with the law of nature, is a matter one may well question. Yet it would be my opinion, that, if a man would undertake to defend the unrestricted licence to make use of the services of deserters, he should rest his case not so much on the fact that even God turns to His purposes the accomplished deeds of the Devil and of wicked men, as on the favour granted a just war, waged to ward off another's threatened injuries, or to gain our own right. This favour makes it unnecessary for the man who wages a just war to inquire too carefully into whether those who have put off their hostile attitude toward him were actuated by honest or dishonest motives, and therefore, since it is allowable for him to assume that they left their former comrades for just reasons, he will contract no guilt because he sets the stamp of his approval upon an unjust desertion.

921 But however all this may be, it is clear enough that it is unlawful to make faith an instrument for deception. And it is also patent

that the faith of such a deserter, who acknowledges that he deserted without just cause, is valueless, since it tends to give rise to new crimes¹, or to continue the old, and that therefore it is highly imprudent of a man to put any confidence in it. Therefore, deserters who wish to make an impression upon those to whom they go over, or who are seeking by their feigned flight an opportunity to do some mischief, usually claim that they were forced by injuries beyond their endurance to take this way of saving their lives. Who needs to be told how Zopyrus gained the confidence of the Babylonians, and Sextus Tarquinius that of the men of Gabii? Thus the man who lured M. Crassus into the open plains, called Mezeras, a Syrian, by Florus, Abarus, an Arab, by Appian, and Ariamnes by Plutarch, got the confidence of the general by recounting the goodwill and kindnesses which had been shown him by Pompey for his zeal in the Roman cause, and that these had cost him heavily. With what realism does Vergil, *Aeneid* [II. 57 ff.], describe the cleverness of Sinon, so as to clear the Trojans of any censure of imprudence! The man pretends that he was the object of Ulysses' hatred, in whose case any fraud could be conceived as possible, and whose hatred passed among the Trojans for a recommendation. The reason for the hatred he ascribes to the death of Palamedes, who was killed 'because he opposed the war'. He says that he was set apart for sacrifice, not by the command of the gods—for he would not appear to have refused to serve as a victim for the safety of his fellow citizens—but because of the false accusations of Calchas, who had been suborned by Ulysses and given easy credence by the rest of the Greeks. So deep is the injury, in fact, that he can say with all justice, 'I am not even bound to my fatherland by any of her laws'. And yet the old rascal first calls upon the gods and all things holy to witness that he 'has a right to hate men' who were now so unjustly angered at him, although they had once been citizens of the same country. But despite all this, he did not entirely persuade them until a miracle appeared to confirm his words. It is with justice also that Livy, Bk. XXII, chap. xxii, says: 'A deserter going over to enemies without the betraying of something valuable, is looked upon only as a stigmatized and worthless individual [. . .]' (S.) Add the speech of Indibilis in the same author (Bk. XXVII, chap. xvii); and that of Cn. Marcius to the Volscians in Dionysius of Halicarnassus², Bk. VIII. Thus in Tacitus, *Annals*, Bk. I [lviii], Segestes says: 'I have chosen my friends and enemies'³ [. . .] not from hatred of my own country—for traitors are abhorred even by those whose cause they espouse—but because I held that the interests of Roman and German were one, and was for peace rather than war.' (R.) See Ammianus Marcellinus, Bk. XVIII, chap. xi, at the end.

¹ [For *seculus* read *seclus*.—Tr.]

² [For *Harlincarn.* read *Halicarn.*—Tr.]

³ [Not in Pufendorf, but necessary for the meaning.—Tr.]

Among deserters are not to be included such persons as slip secretly within the enemy's lines to do him some unexpected damage, and do not promise him that they will join his forces. Nor should it be thought, that, because they are within the lines of the enemy, they must have given him a tacit promise not to commit any hostile act against him. For such a tacit promise of faith is presumed only of him who goes over to another in time of peace, not in time of war.

6. The further question is raised, as to whether, on the other hand, a state can not at its pleasure eject a citizen against his will, when he has not committed any offence. Cicero, indeed, in the passage quoted above laid it down as a fundamental principle of liberty that 'a man need not change his country against his will'. Now the statement of Cicero does not make the condition of the state inferior to that of its individual citizens; because the latter can leave it at their pleasure, while the former may not banish them. For when a man takes up his residence in a state, he entrusts to it, for the present at least, all that he has, which would necessarily be insecure or lost, if he might at any moment suffer banishment. And since that fate is regarded as the greatest possible indignity, it is therefore understood, that a citizen makes, as it were, an agreement with a state, that he cannot be ejected against his will, unless he deserves it. But a state, on the other hand, has not built its fortune and security on one or another common citizen, and therefore it is little or not at all concerned whether he make up his mind to emigrate; for when a state has reposed great confidence in some outstanding citizen, it usually binds him to itself with special agreements that keep him from being able to leave it whenever the idea seizes him. Nor should there be dissatisfaction that this understanding allows the citizen a little more than it does the state. For in case the former does not conduct himself as the state would have him, it can easily bring him to time, while if he cannot endure the way in which the state is being conducted, he has no other recourse than to bear it in silence or quit its soil.

Nevertheless, states usually have recourse to a less odious means of getting rid of suspicious or useless citizens, and of reducing their numbers so as to leave more room for the rest: That is, by removing them into colonies. Although the colonists are usually glad enough to go, since such as were struggling with poverty in their native land hope for better fortune in the colonies, while others are happy to get away from the surveillance of a state which looked upon them as undesirables. Thus Isocrates, *To Philip*, [120], urges the king to found cities in Asia and people them with those 'who are now wanderers from want of their daily bread, and who harass all whom they meet' (F.)—literally, the 'off-scourings of cities'. And in his *Panathenaic Oration* [166] he commends the Athenians for having done this very thing. Add Bacon, *Essays*,

chap. xxxiii. An excellent account is given in Dionysius of Halicarnassus, Bk. I, of the practice of many barbarian peoples and of the Greeks in sending forth their youth, under the protection of some tutelary deity, to find new homes; and the same writer, in Book II, says that the Aborigines were such a band of youths, consecrated in the traditional manner to the gods and sent out by their parents to find whatever homes fortune might have to offer. Pliny, Bk. III, chap. xiii, writes that the Picentes were an off-shoot of the Sabines 'Upon the vowing of a Sacred Spring'¹ (*Ver Sacrum*), while Strabo, Bk. V [iv. 12, p. 250], says that the Samnites descended from the Sabines in the same way. Add Justin, Bk. XXIV, chap. iv, Festus, *s.v.* *Ver Sacrum*, and *Mamertini*; Livy, Bk. XXXIV, chap. xlv. How Lydus and Tyrrhenus were forced by famine to cast lots so as to decide which of them would take a part of the people and leave their native land, may be seen in Velleius Paterculus, Bk. I, chap. i, Dionysius of Halicarnassus, Bk. I, and Strabo, Bk. V. Paul Warnefrid, *History of the Lombards*, Bk. I, chap. ii, writes that the same custom obtained among the peoples of Scandinavia.

But colonies may be and usually are planted in different ways. For they either remain a part of the state from which they are sent forth, or they are obligated to show respect to the mother state and to uphold its majesty, and are therefore joined to it by a kind of unequal treaty, or, finally, they treat with it on equal terms and right. Add Garcilaso de la Vega, *Comentarios Reales*, Bk. VII, chap. i.

7. Men cease against their will to be citizens, when they are deported from the state for some crime truly or falsely laid to their charge. For in refusing any longer to recognize a man as a member of its body, and in driving him from its territory, a state remits to him the obligation which formerly lay upon him as a citizen, and by the same act he is given the power to found for himself a new home wherever he can, while there remains to the state no jurisdiction over such exiles. Therefore, in Euripides, *Children of Hercules*, line 185, Iolaus maintains that the Argives have no right to take the Heraclidae from Athens, since the latter had already been banished by them. Now to be exiled upon a false charge is a grave injury (although a brave man does not lack some kinds of solace with which to face it; see Stobaeus, *Anthology*, xxxviii); and if it be on a true charge, it is a severe punishment, so much so that Philo Judaeus, *On Abraham* [xiv], regards it as even worse than death. For even though a man may be left his property, it is a nuisance to transfer it to another country; it is no less a trial to be torn from one's family and friends, while it is surely a deep disgrace for a man to have been held no longer worthy of the position which a state had once accorded him. Add Oppian, *On Fishing*, Bk. I, lines 274 ff. For he must needs be a man without a sense of shame, to whom could

¹ [For *vere* read *vere*.—Tr.]

be applied the lines of Juvenal, *Satires*, Bk. I [47-50]: 'This man has been condemned by a futile verdict—for what matters infamy if the cash be kept? The exiled Marius carouses from the eighth hour of the day and revels in the wrath of Heaven.' (R.) Nor are the following words of Cicero, *For Caecina* [xxxiv], such as may move a man:

923 Banishment is not a punishment, but is a refuge and harbour of safety from punishment. For those who are desirous to avoid some punishment or some calamity turn to banishment alone—that is to say, they change their residence and their situation, and, therefore, there will not be found in any law of ours, as there is in the laws of other states, any mention of any crime being punished with banishment. But as men wished to avoid imprisonment, execution, or infamy, which are penalties appointed by the laws, they flee to banishment, as to an altar, though, if they chose to remain in the city and to submit to the rigour of the law, they would not lose their rights of citizenship sooner than they lost their lives; but because they do not so choose, their rights of citizenship are not taken from them, but are abandoned and laid aside by them. (Y.)

Add also Polybius, Bk. VI, chap. xii. The Roman law, indeed, was different from all others in that a man could not be deprived of his citizenship against his will. Cicero, *For His House* [xxix]: 'Has not this principle been handed down to us from our ancestors, that no Roman citizen can be deprived [...] of his status as a citizen, unless he consents to such a thing [...]?' (Y.) And the Porcian and Sempronian laws forbade any magistrates clothed with civil authority to inflict the death penalty upon a citizen without the consent of the people. But in order that offences might not go unpunished, and yet that no citizen should seem to be banished against his will, they wanted it believed that citizens voluntarily chose exile in order to avoid punishment. Exactly the opposite institution is mentioned by Diodorus Siculus, Bk. III, chap. v, as prevailing among the Ethiopians, while Sallust, *Catiline* [li. 22], represents Caesar as saying: 'Other laws [...] provide that Roman citizens, even when found guilty, shall not lose their lives, but shall be permitted to go into exile.' (R.) And again [li. 40]: 'The condemned were allowed the alternative of exile.' (R.) But that those men who were under sentence of capital punishment were obligated to leave the country, was clearly enough shown by their being forbidden the use of fire and water, that is, the use of them within the jurisdiction of the Roman people.

Although care should be taken in passing sentence of exile, that no hurt redound to the state by making it possible for the person banished to go over to the enemy. For this reason some peoples never punish with exile, such as the Turks and the Muscovites, and the same was true of the early Jews, although perhaps another reason may have moved them, namely, that the exile might not change his religion. A milder punishment is relegation, whereby a man does not lose the right of citizenship, but is only required to make his home in a certain place, or not to set foot in a specified part of the state. Those upon

whom this last restriction was placed were given by the Romans the special designation of 'persons interdicted' (*interdicti*). See Brisson, *Selectae Antiquitates*, Bk. III, chap. v; Anton. Matthaeus, *De Criminibus*, XVIII. i. 6 and 10, on *Digest* XLVIII. But to some cases of exile one may well apply the saying of Diogenes [the Cynic, in Diogenes Laertius, VI. 49]. When he was told, 'The people of Sinope have condemned you to exile', he replied, 'And I have condemned them to remain where they are'.

8. Another way in which a man changes states against his will is when he has been conquered by an enemy and passes under another's sovereignty as citizen and subject, no matter whether or not he change his residence at the same time. And every one would concede that this may be done not only by individual citizens, or such of them at least as are bound by no other tie than that common to all citizens, but also by whole cities and provinces, where they see no other way of achieving security. See Grotius, Bk. II, chap. vi, § 5.

9. It is also a matter of common occurrence for a state to surrender one of its citizens to another state because of some injury done it, in order that the latter may not find in the deed a cause for war. See Herodotus, Bk. IX [lxxxvii-lxxxviii], where he tells the story of Timagenides and Attaginus, who were responsible for the Thebans casting in their lot with the Persians. In such a case the question arises: Does or does not a man who is surrendered by his state, and is not received by the other, remain a citizen of the former? This question is raised also in *Digest*, L. vii. 17. P. Mutius [Mucius] ruled that he did not, because, when a people has commanded that a man be surrendered, it appears to have banished him no less than if it had forbidden him the use of water and fire. The same question also was hotly contested in the case of Mancinus, who was surrendered to the people of Numantia, but not received by them. Later on, when he started to enter the senate chamber, the tribune Rutilius forbade him, on the ground that when the Pater Patratus¹ surrendered him to enemies of the Roman people, in order to clear the state of the sacred obligation of the treaty which he had signed, he had ceased to be a Roman citizen. But the majority favoured a more lenient decision, advancing in particular the argument that his surrender signified nothing, since he had not been accepted by the party to whom he had been surrendered. 924

Now our feeling on the matter before us is this: The injured state had a right over the other country's citizen, to use him as an enemy, but he becomes by his surrender a subject of the other state, so that he can be punished by it as one of its own citizens. After he was once accepted, the first state lost all rights over him, because it was of its own volition that he passed under the sovereignty of another state. Yet

¹ [The fetial priest who ratified treaties with religious rites.—Tr.]

when he is not accepted, the state which surrendered him will have the choice either of banishing him entirely, or of punishing him in proportion to his crime. And if neither of these punishments is meted out to him, he will not be held to have lost his right of citizenship, since the surrender of a citizen by one state to another state, is in itself only an offer of that right held by the state over its citizen, and not a full abdication and renunciation of it. Therefore, surrender does not in itself deprive any man of the right of citizenship, unless there be an express law to the effect that, in such a case as this, a man should be held to have lost his citizenship. Cicero, *For Caecina* [xxxiv], clears up the case before us: 'If a citizen has been surrendered by the Pater Patratus but has not been received by the enemy, he then retains his original rights of citizenship unimpaired.'¹ It may also be gathered from the foregoing that, if a surrender is accepted, and the person concerned happens to return to his former home, it will require some new grant for him to be a citizen. See *Digest*, XLIX. xv. 4. For the right of postliminium belongs only to those who have passed into the power of others without the consent of their state, and not to those whom the state of its own accord has delivered into the power of others.

¹ [This thought is in Cicero at this point, but not in these words.—Tr.]

CHAPTER XII

ON CHANGES WITHIN STATES AND THE DISSOLUTION OF STATES

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| 1. Although the form of a commonwealth changes the people remain the same. | 5. What results from one state being broken up into several? |
| 2. A state's debts are not cancelled by change. | 6. And what if several unite into one? |
| 3. How far the acts of a usurper are valid after his expulsion. | 7. The extent to which peoples are eternal. |
| 4. What place may a state claim after a change? | 8. How may the body (<i>materiale</i>) of a people perish? |
| | 9. How may its form (<i>formale</i>)? |

CHANGES in a state take place in three ways. A state may change while remaining the same, or it may still continue without remaining the same, or it may change so as to be entirely destroyed. The first kind of change takes place when the form of the state is changed; if, for instance, a monarchy turns into an aristocracy, or if a monarchy is formed out of a democracy or aristocracy. For in such cases the essential form of a state remains, while all that is modified is that form which results from a change in the proper subject of the supreme sovereignty. And so the people remains the same, whether the government is in the hands of a king, of nobles, or of the people. Nay, although it may happen that a free people as a result of conquest come so completely under the jurisdiction of some king that it is henceforth included in his patrimony, it does not for that reason cease to be a people, provided the conquering ruler undertakes for the future to rule the subject people as a distinct kingdom, and not to join it as a province to another people. For since by definition that which contains supreme sovereignty within its confines is a 'people', it makes no difference, so far as concerns the nature of a people, whether a king rules over them with full or limited right, for in either case he is the head of one and the same body.

2. From what has been said we can answer the question proposed 925 by Aristotle, *Politics*, Bk. III, chaps. i and ii, whether, if a state changes from a tyranny or oligarchy to a free and popular form of government, that free state should honour the *συμβόλαια* [agreements], pacts and conventions, as also other acts of a tyrant and a body of oligarchs. Those who deny this have advanced the following reasons: What was done by the tyrant or the nobles was not done by the state, which is obligated only by its own acts. And that it is a commonwealth only when everything is ordered for the common benefit, and when this is not done, the rights and name of a commonwealth are not observed, but we have only a display of bare force and power. But such considera-

tions are of no weight. For without setting forth at this time our former remarks upon a tyrant, a head, even though ailing, is a head, and whatever is done by a head, even though deranged, is held to have been done by the state. And who would undertake to deny the existence of a state when it is labouring under some disease? The same question was once discussed in Athens under the following circumstances. The well-known Thirty Tyrants, who then controlled the Athenian state, had negotiated a loan from the Lacedaemonians in the name of the state. After they had been expelled the latter required it of the Athenians, who had in the meantime set up a democracy. The decision prevailed of those who held that it was just and conducive to peace to pay the debt from the state treasury. The judgement of Demosthenes, *Against Leptines* [xii], on the matter was this: 'The people, they say, determined themselves to contribute and share in the expense, to avoid breaking any article of their convention.' (K.) And later he said to the Athenians: 'You chose to contribute money for the benefit of persons who had injured you rather than break¹ your word.' (K.) The same case is touched upon by Isocrates in his *Areopagiticus* [68]. Nay, not even when a state has been reduced to a province, and ceases to be a state, does it no longer owe any loan which it has contracted, since such a debt, being based, strictly speaking, not on the state as such, but on the state as possessing certain property, passes at once to whoever holds² that property.

3. But although the matter appears to be perfectly clear regarding borrowed money which has been spent upon the state and is presumed to attach itself, as it were, to the entire body of the state, it is not so plain whether the same answer should be made with regard to all the acts of a usurper, once he has been expelled. Assuredly, if the usurper of a state has made a treaty with another state about securing from it aid against a common foe, and has given it a part of the spoil, or sold it, both the treaty, the gift, and the sale will remain valid after the usurper has been expelled. For the other state surely has acquired a valid right by such acts, since it made these arrangements with the usurper as the head of the state, and as though for its advantage; moreover, it treated as a matter of no concern by what title he attained the sovereignty; and the act is vitiated in no other way.

But what if the usurper has oppressed the citizens, and wrongfully taken from them property which he has sold to a foreign state? Will they be able to demand their property after they have expelled him? Boecler, *Dissertatio de eo, quod egit Civitas*, feels that if, in such a case, the purchasers took these things with knowledge of the facts, they are obligated to recognize their guilt, and to be willing to part with things which cannot be sold or bought without injury, and that they ought to

¹ [For *deperiret* read *deperiret*.—Tr.]

² [For *possessore* read *possessorem*.—Tr.]

do so, even when they made the purchase in ignorance of the facts. All of which sounds plausible enough before the tribunal of the conscience. But if we turn to the general custom of peoples,¹ there appears no ground on which those who have been thus despoiled² can claim of a third state what they have lost. For so long as a usurper employs only open violence, he is considered as an enemy of the state, and when the spoils which he has wrung from these citizens have been transferred to a foreign state, they will be held by the same right as other movable goods taken in any war. And in case the sovereignty of that usurper has been confirmed by the consent of the citizens, foreigners can hold such stolen property as though it had been lawfully confiscated. For as neutral nations, which have no concern in a dispute, may and regularly do take no sides with the belligerents, and only await the outcome, so it does not belong to foreigners to pass judgement on the question how another state may settle the point of sovereignty within its own borders. But such acts of unjust usurpers as concern domestic matters can, after their expulsion, by all means be rescinded by the lawful authority, in so far as it may be to the advantage of the commonwealth. And this holds true not only of the laws they pass, but also of all donations and alienations of property which could not be made over to others without prejudice to the commonwealth and its laws.

4. Another question commonly raised in this connexion is, what rank or position should be assigned to a king who has acquired the sovereignty over a people formerly free, or to a free people after it has done away with a monarchy. To this Grotius, Bk. II, chap. ix, § 8, replies that a state after such a change deserves the same rank as it or its head enjoyed beforehand in assemblies. But it is our feeling that a distinction should be drawn between the case where³ a king, for instance, who has acquired sovereignty over a free people, remains in the established assembly or league, and that in which he thereupon withdraws from it and sets up a separate administration of his affairs. For in the former case he will unquestionably be able to claim no other rank than that formerly held by the free people, despite the pomp or majesty attending the person of a king. And, on the other hand, a free people, upon doing away with a monarchy, will be able to claim in a common assembly the same rank which its kings once held. But if either a free people, or a king, has completely withdrawn from some established assembly or league, the former rank of that state will carry no prejudice which would compel them necessarily to take a lower place, and to yield to those who once held a rank above them in a common assembly, since the holders of supreme sovereignty are by nature equal.

5. Changes which result in a state no longer appearing the same

¹ [For *populorum* read *populorum*.—Tr.]

² [For *spoliati* read *spoliati*.—Tr.]

³ [For *utrum* read *utrum*.—Tr.]

take place chiefly in these two ways: Either two or more states are formed out of one, or several states unite to form a single one. The first is the result either of mutual consent or of military pressure. Several states are formed out of one by mutual consent, when colonies are sent forth in the manner practised of old by the Greeks. For the custom followed by the Romans, and imitated by most of the present-day nations of Europe, was to found colonies that were to remain as a part of the mother state, or of a greater fatherland. But the colonies planted in the first manner constituted separate states, although in such a way that they were obligated to accord the greater fatherland due honour and a certain filial affection. See Thucydides, Bk. I; Henricus Valesius on *Excerpta Peiresciana*, pp. 6-7; Hobbes¹, *De Cive*, chap. ix, § 8. But a colony planted in this fashion will not be obligated to pay debts contracted by the mother state, unless there was that special agreement at the time of its founding, since they concern in the last resort the mother state's resources, with which the colony, as is presupposed, has nothing to do. And although the colonists may have received certain benefits from those obligations, while they were still residents of the mother state, the latter, by sending them forth free, openly declares that she will exact nothing of them on that score. And yet, if we consider the case in all strictness, a state is not changed in planting a colony, nor does it cease to be the same as before, but the result is the same as in natural generation: In the place of one state we have two. But if some kingdom should be divided by common consent into two or more distinct states, it would be but fair for the public property, as well as the debts of the entire kingdom, to be divided equally among them. Although when a division of this sort is voluntarily instituted by the parties concerned, it is scarcely conceivable that there should not be express provisions made in such cases.

- 27 6. Under a change of this kind, whereby a state is no longer what it once was, is classed the case where two peoples are united, not by a kind of treaty or articles of confederation, or under a common ruler, but so as actually to form one state out of two. It is the opinion of Grotius, Bk. II, chap. ix, § 8, that in such a case the rights held by each of the states thus uniting are not lost, but are made common to both, as is also true of their burdens and debts, in case they had reached no agreement to the contrary. See Livy, Bk. I, chap. lii, at the beginning. But we should carefully observe, whether two or more peoples so unite as that the entire body so formed enjoys henceforth equal rights and undertakes to establish some new state, instances being when two democracies do away with their former governments and unite to form one people and kingdom, or when two monarchies cast off their fundamental laws, depose their old ruling lines, and establish a new monarchy. It is clear that

¹ [For *Hobb.* read *Hobb.—Tr.*]

by such unions the old states are destroyed and a new one founded. But when one state is joined to another in such a way that the one keeps its government and home, while the citizens of the other leave their home and are received into the rights and home of the other state, it is perfectly clear that the one state is entirely destroyed, while the other, which remains, does not cease to be what it was before, even though it be greatly enlarged by such an accession. But there is no way whereby different states¹ can be so united that each shall remain what it was, save by way of a close treaty, which is better adapted to give rise to a system than to a state in the strict sense of the term.

7. The final change whereby a state entirely passes out of existence is when the people itself has been either dissolved or destroyed. It is, indeed, a common saying: 'Kings are mortal and states eternal.' But the expression is used not because peoples as well as kings may not be destroyed or scattered by some catastrophe, but because they do not, like mankind, come to a natural end after a definite span of years, since in the change of individuals one succeeds another in an unbroken line, and this either by receiving foreigners in the place of those who pass on, or by the bringing of children into the world. By virtue of this continuation of succession a people always appears to be the same, and enjoys the same rights, however often its citizens may have changed. Lucian, *Amores* [xix]:

(Nature), well knowing that we are all made of perishable material and that fate had fixed such a short period for each man's life, provided that the death of one man should be the birth of another. She offset against the number of the dying that of those who were entering upon life, so that we might live for ever in a series of constantly succeeding generations.

Vergil, *Georgics*, Bk. IV [206 ff.], writes of bees: 'Well, then, though the term of a short life awaits individual bees themselves—for not more than the seventh summer is passed by them—yet the race remains imperishable, and the fortune of the house abides unshaken, and grandsires of grandsires are reckoned.' (B.)

In order to understand this the better, we may well note what the ancient philosophers wrote on the subject of difference of bodies, as we find it, for instance, in Plutarch, *Conjugal Precepts* [xxxiv]:

Philosophers assert that, of bodies which consist of several parts, some are composed of parts distinct and separate, as a navy or army royal; others of contiguous parts, as a house or ship; and others of parts united at the first conception, equally partaking of life and motion and growing together as are the bodies of all living creatures. (G.)

Add *Digest*, XLI. iii. 30; VI. i. 23, § 5; Cujas, *Observations*, Bk. XV, chap. xxxiii, and Bk. XXVI, last chapter; Seneca, *Letters*, cii. That can be expressed also in this way: A body in general is that which is so held together by its *εἶς* [the nature of its being], coherence, or a

¹ [For *diversas* read *diversae*.—Tr.]

binding principle, that it is a single thing. Now that bond whereby the parts of a body are combined into a unity is threefold: natural, artificial, and moral. The natural bond is that whereby natural bodies are held together; the artificial, that whereby things which are naturally distinct are by human ingenuity and labour framed into a single solid thing; and the moral, that whereby different individuals are gathered together by human institution so that they are looked upon as a unit. Although such bodies may also be made up of beasts, as a herd, yet what we are especially interested in at this time is a union of many men. And as a result of these modes of union we have three kinds of bodies, natural, artificial, and moral, all of which have the characteristic that they appear to remain the same so long as that binding principle, through which their parts were at the outset knitted together, continues unbroken and undisturbed. The result of this is that a man does not cease to appear the same, even though the minute components of his body may change in various degrees, and are constantly replaced from the food which he eats. (Thomas Browne, *Religio Medici*, § 36 [37]: 'All this mass of flesh which we behold came in at our mouths; this frame we look upon hath been upon our trenchers; in brief, we have devoured ourselves.') Here belongs a passage in Seneca, *Letters*, lviii, and another in Plutarch, *De E apud Delphos*, p. 392 A B ed. Xylander [xvii]. Add Lucretius, Bk. III, ll. 860 ff., a passage, however, which must be accepted with some reservation, lest it be extended to the Article of Faith on the resurrection of the body. To the general topic of artificial bodies belongs also the question which was animatedly discussed among the ancients about the ship of Theseus; for this had been repaired so often in the course of the years, that not a single one of the planks of the original vessel remained. See Plutarch, *Theseus*, p. 10 [xxiii]; *Digest*, V. i. 76; VII. iv. 10, although this law is apparently opposed by *Digest*, XLVI. iii. 98, § 8; XLV. i. 83, § 5; Dionysius of Halicarnassus, Bk. I [i], on the hut of Romulus. Add Alexander ab Alexandro¹, Bk. III, chap. i; Michael Piccart, *Commentary on the Political Works of Aristotle*, Bk. III, chap. iii. Moral bodies are discussed in *Digest*, V. i. 76.

There is also an excellent passage in Plutarch, *De Sera Numinis Vindicta* [xv]:

For a state is a kind of entire thing and continued body, a certain sort of creature, never subject to the changes and alterations of age, nor varying through process of time
 928 from one thing to another, but always sympathizing and in unity with itself, and receiving punishment or reward of whatever it does or has ever acted in common, so long as the community, which makes it a body and binds it together with the mutual bands of human benefit, preserves its unity. (G.)

He goes on to say that men in the course of time experience more

¹ [For *Alex. o Alexandro* read *Alex. ab Alexandro*. The reference is to the *Genialium Dierum Libri Sex*, first published in Rome, 1522, as verified in the edition of Paris, 1539.—Tr.]

change than states, for if you happen not to have seen one of your friends for a few years, you will find such a change in his bearing and appearance, nay, frequently in his manners as well, that you will scarcely recognize him. On the other hand, if you return to a state even after an absence of thirty years, not only will you find the same buildings, but also the same institutions and customs of the people. Add Grotius¹, *loc. cit.* Although it is entirely possible in the course of time for a people not to be regarded as the same in all points. See above, Bk. VIII, chap. iii, § 29. Hobbes, *Philosophia Prima*, chap. xi, § 7, has chosen to set forth this view as follows: 'If a thing is named from such a form as is the principle of its motion, so long as that principle abides, the individual thing will be the same.'

8. However all this may be, it is still possible for a people entirely to perish, and this if either the substance (*materiale*) of the people, that is, the whole number of the citizens, passes away, or the moral tie which binds it together is broken. The *materiale* or body of a people perishes when either all the parts together are destroyed, without which the body cannot exist, or there is no further reason for its existence. Examples of peoples who have once and for all passed away are given by Grotius, Bk. II, chap. lx, § 4. Add *Digest*, VII. iv. 21. In this connexion the question arises, whether those who are left in such small numbers after such a catastrophe that they can no longer be called a people, may still retain the rights of the former people (see *Digest*, VII. iv. 31). It is the opinion of Grotius, in the passage just cited, that the dominion which the people had as affecting the individual may still reside in those few, but not such as belonged to the people as such; that is, that they can lay claim to the possessions and property of the slain citizens, but cannot assert their right to the supreme sovereignty, and to whatever depends upon it. And yet, if that handful, which has been so reduced by some other cause than war, is able to maintain itself against the attacks of foreigners until it has built up its numbers again into a real² people by taking in others, I see no reason why it cannot lay claim to the rights of the former people. See Justin, Bk. V, chap. vi, n. 5. This appears especially reasonable, in view of the fact that there is nowhere any stipulation as to how many fathers of families are required in order to form a people, and that when, in the beginning, mankind first broke up to form peoples, a very small number was sufficient for that end. Justin, Bk. X [i. 6], speaks of the fifty sons of Artaxerxes as 'so great a people', while in Ovid, *Metamorphoses*, Bk. VI [197], Niobe calls her fourteen children a 'people'. Apuleius, *Apologia* [47]: 'Fifteen free men constitute a people.' Add *Digest*, III. iv. 7, § 2, where it is stated that one man may bear the title of the whole (college, not people), but that he must promptly make plans to secure colleagues.

¹ [For *Grotius* read *Grotius*.—Tr.]

² [For *injusti* read *in justis*.—Tr.]

The multitude of men who together form a people perishes also not only when the citizens die individually, but as well when they separate of their own accord because of pestilence or discord, or are so torn apart by violence that they cannot come together again. Therefore, there was more flattery than truth in the boast of the people of Ilium, that they were the ancestors of the Romans. Justin, Bk. XXVIII, chap. i; Bk. XXXI, chap. viii. The manner in which the Scots were scattered by Maximus may be seen in Buchanan, *History of Scotland*, Bk. IV, towards the end.

9. The *formale* or species of a people perishes when either the entire or the established (*perfecta*) community of right is destroyed. The whole community of right and sovereignty is destroyed if the individual citizens, scattered this way and that, attach themselves to different states, either retaining their personal liberty, or being reduced to the state of slaves. See the example of Capua, in Livy, Bk. XXVI, chap. xvi. The established community of right between members of the same people is destroyed if the individual citizens retain their personal liberty and are left in their towns and farms, but must be subject to the sovereignty of another state. Such peoples are said to be reduced to the form of provinces. But the mere change of country and of towns, or the dismantling of defences, is not sufficient to make a people lose its identity.

The End
Glory to God Alone

LIST OF CLASSICAL AUTHORS AND TRANSLATIONS¹

<i>Author.</i>	<i>Title of Work.</i>	<i>Translator.</i>
Aeschines		Adams
Aeschylus		Plumptre, or Smyth
Ambrose		Romestin
Ammianus Marcellinus		Yonge
Appian		White
Aurelius Antoninus, Marcus		Haines
Apollonius Rhodius		Seaton
Apuleius		Anon. in Bohn's Library
Aristophanes		Rogers
Aristotle	<i>Magna Moralia</i>	Stock
	<i>The Nicomachean Ethics</i>	Welldon, or Rackham
	<i>Politics</i>	Jowett
	<i>Rhetoric</i>	Jebb, or Roberts
Arnobius		Bryce and Campbell
Arrian		Chinnock
Athenaeus		Yonge
Bion		Edmonds
Boethius		Stewart and Rand
Caesar	<i>The Civil War</i>	Peskett
	<i>The Gallic War</i>	Edwards
Callimachus		Mair
Cato		Harrison
Catullus		Cornish
Cicero	<i>Academic Questions</i>	Yonge
	<i>Cato Major</i>	Edmonds
	<i>On Duties</i>	Edmonds
	<i>De Finibus</i>	Yonge
	<i>De Inventione</i>	Yonge
	<i>Laelius</i>	Edmonds
	<i>De Legibus</i>	Yonge
	<i>Letters</i>	Shuckburgh
	<i>On the Nature of the Gods</i>	Yonge
	<i>Orations</i>	Yonge
	<i>On Oratory and On Orators</i>	Watson
	<i>Paradoxes</i>	Edmonds
	<i>De Republica</i>	Yonge
	<i>Tusculan Disputations</i>	Yonge
Claudian		Platnauer
Curtius Rufus		Anon. [London, 1809]
Demosthenes		Kennedy
<i>The Digest of Justinian</i>		Monro

¹ [Pufendorf's *De jure naturae et gentium* abounds in references to classical authors. Rather than to duplicate the work of translations already made it has been decided to use where possible some standard translation. The following standard translations have been employed, and they are designated in each instance in the text by the initial letter of the translator's name in parentheses following the quotation. An asterisk after the initial letter indicates that there have been some slight modifications made from the original form of the version.—Tr.]

Dio Cassius		Cary, or Foster
Diogenes Laertius		Yonge
Dio Chrysostom		Moss [not yet published]
Diodorus		Booth
Dionysius of Halicarnassus		Spilman
Epictetus		Matheson
Euripides		Way
Florus		Watson
Gellius		Beloe
Grotius		Kelsey
Herodotus		Rawlinson, or Macaulay
Hesiod		Evelyn-White
Homer	<i>Iliad</i>	Lang, Leaf, and Myers
	<i>Odyssey</i>	Butcher and Lang
Horace	<i>Odes and Epodes</i>	Bennett
	<i>Satires, Epistles, Art of Poetry</i>	Wickham
<i>The Institutes of Justinian</i>		Moyle
Isocrates		Freese, or Norlin
Julian		Wright
Justin		Watson
Juvenal		Evans, or Ramsay
Lactantius		Coxe
Lampridius		Magie
Livy		Edmonds, Foster, Mc- Devitte, or Spillan
Lucan		Riley
Lucian		Fowler, Harmon, or Paton (<i>Anthology</i>)
Lucretius		Bailey, or Rouse
Manilius		Creech, or Garrod
Martial		Anon. in Bohn's Library, or Kerr
Moschus		Edmonds
Nepos		Watson
Ovid	<i>Art of Love</i>	Riley
	<i>Heroides and Amores</i>	Showerman
	<i>Metamorphoses</i>	Miller
	<i>Ex Ponto and Tristia</i>	Wheeler
Persius		Ramsay, or Evans
Petronius		Heseltine
Philo Judaeus		Yonge
Philostratus	<i>Life of Apollonius of Tyana</i>	Conybeare
Pindar		Sandys
Plato	<i>Dialogues</i>	Jowett, or Davis
	<i>Letters</i>	Post
Plautus		Nixon, or Riley
Pliny Major		Bostock and Riley
Pliny Minor		Bosanquet, or Melmoth
Plutarch	<i>Lives</i>	Perrin
	<i>Morals</i>	'Translated . . . by several hands, corrected and revised by . . . Goodwin'
	<i>Roman Questions</i>	Rose

Polybius		Paton, or Shuckburgh
Procopius		Dewing
Propertius		Butler
Quintilian	<i>Declamations</i>	Warr
	<i>Institutes of Oratory</i>	Butler, or Watson
Quintus Smyrnaeus		Way
Sallust		Rolfe
Seneca	<i>De Beneficiis, &c.</i>	Stewart
	<i>Epistles</i>	Gummere
	<i>Tragedies</i>	Miller
Sophocles		Storr, or Plumptre
Statius	<i>Silvae</i>	Slater
	<i>Thebaid</i>	Lewis
Strabo		Jones
Suetonius		Rolfe
Tacitus	<i>Agricola</i>	Hutton
	<i>Annals</i>	Ramsay, or Oxford tr.
	<i>Dialogus</i>	Peterson
	<i>Germania</i>	Hutton, or Oxford tr.
	<i>Histories</i>	Oxford tr.
Terence		Sargeant
Theocritus		Edmonds, or Way
Thucydides		Smith, or Jowett
Velleius Paterculus		Watson
Vergil		Bryce, or Fairclough
Xenophon	<i>Anabasis</i>	Dakyns
	<i>The Cavalry Commander</i>	Marchant
	<i>Cyropaedia</i>	Watson, or Miller
	<i>Hellenica</i>	Dakyns, or Brownson
	<i>On Horsemanship</i>	Marchant
	<i>Memorabilia</i>	Dakyns, or Marchant
	<i>Oeconomicus</i>	Marchant
	<i>State of the Lacedaemonians</i>	Marchant

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Achilles Tatius (Greek novelist; 3rd or 4th century Christian Era).

The Romance of Leucippe and Clitophon, 904 (Bk. I).

Ad Herennium, see *Rhetorica ad Herennium*.

Aelian (Greek essayist; 2nd and 3rd centuries Christian Era).

Varia Historia, 10 (V. xvi), 67 and 82 (III. x), 90 (II. xxxvii), 251 (VII. xv), 263 (III. xxxvii; IV. i), 320 (III. xlii), 348 (IV. i), 363 (IV. i), 387 (IV. i), 482 (VIII. v), 498 (XII. ix), 510 (XII. viii), 528 (V. xiv), 582 (III. xlv; IV. i), 707 (XIV. xlii), 848 (VI. vi), 861 (IV. i; XII. xxxviii), 878 (XII. xlvii), 890 (VI. iv), 909 (X. xviii), 921 (II. vii), 924 (I. xxxiv bis), 1004 (II. i), 1206 (IV. vii), 1207 (XIV. xxvii), 1227 (V. xviii), 1273 (XIV. i), 1278 (III. xxxiv), 1295 (XIV. xi), 1310 (VI. vi), 1353 (VII. xvii).

Aeneas Tacticus (the earliest of the Greek tacticians; 4th century B.C.).

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Aeschines (Athenian orator; 389–314 B.C.).

Against Ctesiphon, 182 (general reference), 263 (244), 1036 (6);

Against Timarchus, 842 (general reference);

On the Embassy, 261 (181).

Aeschylus (Athenian tragic poet; 525–456 B.C.).

Agamemnon, 459 (1061);

Choëphorae, 469 (582);

Prometheus Bound, 1107 (324–6).

Aesop (Greek fabulist; if historical at all, in the 6th century B.C.; collection completed before the 11th century Christian Era).

Fables, 304 (401), 350 (228), 391 (175), 472 (353).

Africanus, Julius (Roman encyclopedist; 2nd and 3rd centuries Christian Era).

Keotol, 459 (II. xxxvii).

Agatharchides (Greek explorer; 2nd century B.C.).

De Mari Rubro, 683 (49), 865 (30), 1071 (50).

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Aggenius Urbicus, see Pseudo-Aggenius Urbicus.

Albericus or Albricus (Italian monk; 11th century Christian Era).

De Deorum Imaginibus (Rome 1517), 218 (22).

Alcinous (Greek philosopher, probably identical with Albinus; 2nd century Christian Era, certainly before Hippolytus, of the 2nd and 3rd centuries Christian Era).

De Doctrina Platonis, 1176 (32).

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Alvarez, Francisco (Portuguese missionary and explorer; ca. 1465–1541?).

Verdadera Informaçam das Terras do Presto Joam (Lisbon, 1540) (= *De-*

- Alvarez Francisco (*cont.*).
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- Ambrose, Saint (Latin Father of the Church; *ca.* 340-97).
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- Ammianus Marcellinus (Roman historian; 4th century Christian Era).
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- Andocides (Athenian orator; born *ca.* 440 B.C.).
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- Anonymous.
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Cardinalismus, 1254 (I. iii, pp. 375 ff.).
Nepotismus (sine loco 1692), 510 (Pt. I, Bk. III).
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- Aristotle (Greek philosopher; 384–322 B.C.).
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 Arnisaesus, Henningus (German physician; 1580–1636).
De Republica; seu Reflectiones Politicæ Libri Duo (Frankfurt, 1615), reprinted as *Relectiones Politicæ* in 1636, 1019 (II. vi. 1, § 56), 1021 (I. vi, § 1; § 57), 1053 (II. vii, § 2), 1102 (II. ii, §§ 10 *ff.*).
 Arnobius (Latin Father of the Church; 2nd and 3rd centuries Christian Era).
Against the Heathen, 45 (II. iv), 464 (I. lix), 1176 (I. xxxvii), 1190 (VII. viii), 1253 (II. lxxi).
 Arrian, Flavius (Greek historian; 2nd century Christian Era).
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 Asconius Pedianus, *see* Pseudo-Asconius.
 Athenaeus (Greek antiquary; 3rd century Christian Era).
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 Augustine, Saint (Latin Father of the Church; 354–430).
On Christian Doctrine, 461 (II. xxiv);
On the City of God, 279 (I. xviii), 631 (III. xxi), 892 (XV. xvi).
 Aurelius Antoninus, Marcus (Roman Emperor; 121–180).
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- VIII, § 14; XI, § 18), 80 (VIII, § 56), 100 (VI, § 44), 127 (IX, § 5), 170 (IX, § 9), 195 (VII, § 74), 205 (XI, § 8), 207 (II, § 1), 209 (IV, § 4; V, § 16; V, § 29; VII, § 55), 215 (VI, § 44), 218 (IX, § 1), 222 (IX, § 4), 234 (II, § 11), 236 (VI, § 30), 238 (X, § 6), 256 (XII, § 36), 294 (I, § 7; XI, § 8), 347 (III, § 4; IV, § 3; § 4), 377 (IX, § 42 *bis*), 970 (VI, § 54), 1196 (II, § 10), 1202 (II, § 19), 1242 (III, § 4).
- Aurelius Victor, Sextus (Roman historian; *praef. urbi*, 389 A.D.).
- De Origine Gentis Romanae*, 321 (vi).
- Ausonius, Decimus Magnus (Latin poet; † ca. 395 A.D.).
- Eidyll*, 1060 (xv. 37 f.);
- Ludus Septem Sapientum*, 1255 (78–80);
- Panegyricus ad Gratianum*, 1257 (xxiv), 1258 (xxv).
- Bachov von Echt, Reinhard (German jurist; 1575–?).
- In Institutionum Juris Divi Justiniani Libros Quatuor Commentarii Theorici [sic] et Practici* (Frankfurt, 1628), 774 (II. xxiii; III. ii).
- Bacon, Francis (English philosopher; 1561–1626).
- Cogitata et Visa* (? see note), vi (pp. 581–2);
- Essays* (London, 1613), 59 (xxxvii), 212 (xxiii), 236 (xviii), 238 (xxvi), 246 (xxviii, xxxiv), 247 (x), 250 (xlviii), 254 (xxx), 256 (ii), 347 (xiii), 383 (xvi), 482 (vi), 632 (vii), 760 (xxxix), 851 (viii), 1117 (xix), 1126 (xv, xxxv, xlix), 1127 (xxix), 1174 (iv), 1243 (xlii), 1244 (xl), 1259 (liii), 1272 (xiv), 1296 (xix), 1355 (xxxiii);
- History of Henry VII* (London, 1622), 643 (p. 127), 1114 (p. 242);
- Novum Organum* (London, 1620), vi (I. lxxxix);
- The Advancement of Learning (De Dignitate et Augmentis Scientiarum)*, London, 1613, 58 (IV. i), 210 (VII. i), 337 (VII. ii), 383 (III. ii), 468 (III. iv), 840 (VII. ii), 956 (VII. ii), 1272 (VIII. iii, n. 3), 1297 (p. 348);
- Wisdom of the Ancients (De Sapientia Veterum)*, London, 1609, 1335 (v).
- Balbus, Caspar (Gasparo Balbi, Venetian traveller; 16th century).
- Viaggi dell' Indie Orientali* (Venice, 1590), 780 (general reference), 1060 (general reference).
- Baldaeus or Balde, Philipp (Dutch traveller and writer; second half of 17th century).
- De Idololatria Indorum* (presumably part of the same work), 493 (last chapter), 847 (II. iii), 1262 (II. xvi);
- Description of the Island of Ceylon, Malabar and Coromandel (Naauwkeurige Beschryvinge van Malabar en Choramandel, &c., Amsterdam, 1672)*, 529 (xlvii), 565 (x, xxii), 1100 (xvii, p. 102), 1262 (xxvi).
- Balsamon, Theodore (Greek canonist; fl. 1193 A.D.).
- Commentaria in Canones Sanctorum Apostolorum, Conciliorum, et in Epistolas Canonicas, Ad Epistulam Basilii*, 278 (i. 43).
- Barbosa, Agostinho (Portuguese canonist; 1590–1649).
- In Codicem Justiniani* (Leyden, 1633), 508 (II. xxvii. 1).
- Barclay, John (Scottish satirist; 1582–1621).
- Argenis* (Paris, 1621), 458 (I).
- Barletius, Martin (Albanian historian; last half of the 16th century).
- De Vita Castriotae* (Strassburg, 1537), 1322 (VII).
- Baronius (Italian ecclesiastical historian; 1538–1607).
- Annales Ecclesiastici a Christo Nato ad Annum 1198* (Rome, 1588–93), 869 (IV, § 125).
- Barthema, Louis di (Italian traveller; 1480–?).
- Itinerario nello Egypto, nella Suria, &c.* (Rome, 1510), 856 (II. xi).
- Bate, George (English physician; 1608–69).
- Elenchus Motuum Nuperorum in Anglia, &c.* (Paris, 1649), 85 (I), 1254 (II, pp. 246 ff.).
- Baudius, Dominicus (Belgian poet; 1561–1613).
- De Induciis Belli Belgici* (Leyden, 1613), 1088 (III, p. 178), 1319 (p. 128).
- Beccadelli of Palermo, Antonio, *see* Panormita.

Becmann, Johann Christoph (German historian; 1641-1717).

Meditationes Politicæ, &c. (Frankfurt, 1679), 1286 (XXI, § 8).

[Bellaza, 1118, note 2 (*Atene et Roma*, XXII (1919), pp. 152-5).]

Benzoni, Geronimo (Italian traveller; 1519?-86).

History of the New World (La Historia del Mondo Nuovo, Venice, 1565), 237 (II. xiii), 871 (I. xxxvii).

Bernier, François (French traveller and physician; ?-1688).

De Nuperis Motibus in Imperio Magni Mogolis (Histoire de la dernière Révolution des États du Grand Mogol, Paris, 1670), 1095 (general reference); 1126 (general reference), 1275 (general reference);

De Rebus in Regno Mogolis Gestis (presumably the same work), 746 (p. 57), 900 (general reference).

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2 *Samuel*, 25 (x. 12), 72 (xxiv. 13, 17), 206 (xviii. 33), 280 (x. 4 ff.), 480 (xiv. 4 ff.), 498 (xiv. 19), 513 (xix. 23), 859 (xx. 3), 868 (xii. 8), 903 (xiii. 13), 1062 (xxiv), 1115 (xv. 25-6), 1145 (xi. 14-16; xii. 9), 1153 (xi. 15; xii. 9), 1199 (xvi. 11).

1 *Kings*, 71 (xviii. 1), 399 (xx. 3 ff.), 482 (iii. 25), 498 (ii. 23), 503 (xx. 4), 513 (ii. 8), 514 (ii. 20), 617 (i. 35), 779 (xx. 39), 888 (i), 1075 (xii. 7-8), 1101 (i. 5 ff.), 1115 (iii. 26), 1117 (iii. 9), 1144 (xxi), 1224 (xx. 39 ff.), 1242 (iii. 28).

2 *Kings*, 298 (vi. 28-9), 498 (v. 4, 6), 722 (xviii. 14; xix. 6), 922 (iv. 1), 1116 (xi. 2), 1203 (i. 52; ii. 23).

1 *Chronicles*, 287 (xxix. 3).

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History of Susanna, 834 (line 51).

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1 *Maccabees*, 288 (i. 32 ff.).

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- 1 *Timothy*, 196 (iv. 8), 823 (v. 8), 1001 (ii. 2), 1002 (vi. 1);
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- Bion (Greek bucolic writer; 2nd century B.C.).
- Idyl*, 245 (iii. 7).
- Boccalini, Trajano (Italian satirist; 1556-1613).
- Ragguagli di Parnaso* (Venice, 1612-13), 869 (II. lxviii).
- Bodin, Jean (French political writer; 1530-96).
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- Cumberland, Richard (Bishop of Peterborough; 1632-1718).
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- Curopolatas, Georgius Codinus (Byzantine historian; †1434).
- De Officialibus Palatii Constantinopolitani*, 664 (v. p. 61c).
- Curtius Rufus, Quintus (Roman historian; 1st century Christian Era).
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Davila, Enrico Caterino (Italian historian; 1576-1631).

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Delrio, Martin (Spanish scholar; 1551-1608).

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Didymus (Greek grammarian; born 63 B.C.).

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Digby, Sir Kenelm (English author and diplomat; 1603-65).

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Digest, see *Corpus Iuris Civilis*.

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Dio Cassius Cocceianus (Greek historian; born 155 A.D.).

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- Ennius, Quintus (Roman poet; 239-169 B.C.).
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 Faur, Pierre du (French classical scholar; 1530-1615).
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 Froissart, Jean (French chronicler; 1337-1410).
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 Gaius (Roman jurist; fl. 138-161 A.D.).
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 Gassendi, Pierre (French philosopher; 1592-1655).
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 Germanicus, Claudius Caesar (Roman statesman; 14 B.C. to 19 A.D.).
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Graziani, Antonio Maria (Italian historian; 1537-1611).

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Grégoire, Pierre (French jurist; 1540-1616?).

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Gregoras Nicephorus (Byzantine historian; ca. 1295-ca. 1360).

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Groenewegen van der Made, Simon von (Dutch jurist; 1613-52).

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- Historica Belgica* (Amsterdam, 1657), 573 (V), 1344 (V);
- On Campanella's Politica* (in *Quaedam Hactenus Inedita*, Amsterdam, 1652), 817 (general reference);
- On the Bible* (Paris, 1641-4), *Genesis*, 498 (xxiv. 2), 526 (ix. 3), 527 (xvi. 34), 843 (xx. 9), 898 (xix. 31), 903 (xx. 12), 1213 (ix. 6), 1275 (xvii. 26); *Exodus*, 320 (xxi. 28 ff., 33 ff.), 726 (xxii. 12), 918 (xxi-xxii), 942 (xxi. 4), 1179 (xxi. 12); *Leviticus*, 491 (v. 4), 735 (xxv. 29), 1174 (xix. 18); *Numbers*, 643 (xxvii. 8 ff.); *Deuteronomy*, 487 (xiii. 8), 630 (xxi. 17), 834 (xix. 16), 849 (xvi. 18), 888 (xxiii. 2), 890 (xxiv. 4), 925 (xxi. 18 ff.); *Joshua*, 1226 (i. 18); *Judges*, 262 (xvi. 30), 1067 (i. 1); *1 Kings*, 359 (x. 29), 399 (xx. 3 ff.), 888 (ii. 17), 1210 (ii. 6), 1277 (xvi. 24); *2 Kings*, 1069 (xi. 17); *Esther*, 818 (iv. 16), 1182 (ix. 10); *Proverbs*, 84 (xxix. 24); *Wisdom*, 232 (xii. 1); *Jonah*, 259 (i. 12); *1 Macabees*, 288 (ii. 37); *Matthew*, 60 (v. 22), 89 (general reference), 494 (v. 34), 500 (v. 33), 507 (xv. 6), 523 (v. 37), 819 (xii. 3), 844 (v. 27), 864 (i. 18), 883 (v. 31-2), 892 (i. 16), 1138 (v. 27), 1184 (v. 28), 1213 (v. 40); *Luke*, 755 (vi. 35), 757 (vi. 35), 1124 (iii. 13); *Hebrews*, 480 (xi. 31);
- On the Truth of the Christian Religion* (Paris, 1627), 180 (§ 7), 224 (I, §§ 19-22; II, § 9), 235 (IV, § 11), 875 (II, n. 13);
- Opuscula de Dogmatis Republicae Noxii* (in *Quaedam Hactenus Inedita*, Amsterdam, 1652), 55 (general reference).
- Gudelinus, Petrus (Dutch jurist; 1550-1619).
- De Iure Novissimo* (Antwerp, 1620), 576 (II. ii).
- Guicciardini, Francesco (Italian historian; 1482-1540).

- History of Italy* (*La Historia di Italia*, Florence, 1561), 802 (V, pp. 134, 146), 808 (XV, p. 433 b), 828 (XI; XII, p. 345), 830 (IV), 855 (VI, p. 178), 1093 (V), 1099 (XII, p. 367), 1115 (I), 1324 (XVI), 1325 (XVII), 1334 (XVI), 1340 (pp. 542 and 344), 1347 (VII).
- Gunther (French Cistercian monk; fl. 1205).
- Ligurinus* (*Sine loco* 1507), 57 (III. 289 ff.), 450 (VI. 656 ff.), 494 (III. 511 ff.), 506 (VIII. 793 ff.), 1147 (VII), 1157 (X), 1181 (I. 527 ff.), 1190 (I. 478 ff.), 1277 (III. 480 ff.).
- Haythonus (Hetoum, Hethoum, or Haiton; Armenian historian; 13th and 14th centuries).
- History of the Tartars* (Haguenau, 1529), 487 (xlviii), 906 (xlviii), 1135 (xlviii).
- Hebrews*, see *Bible*.
- Heliodorus (Bishop of Tricca; 4th century Christian Era).
- Ethiopia*, 347 (II. 31), 419 (I. 29), 421 (V. 26), 480 (I. 26), 849 (VIII. 17; IX. 25), 993 (I), 1232 (V. 20; V. 31), 1345 (X. 10).
- Helmold (German historian; †1183).
- Chronica Slavorum* (Frankfurt, 1581), 363 (I. lxxxii).
- Heraclides (Greek philosopher; 4th century B.C.).
- De Politiis*, 83 (Aristotle, *Fragments*, DCXI. xx), 263 (*ibid.* xxix), 268 (*ibid.* xviii), 735 (*ibid.* xii), 861 (*ibid.* lviii), 1278 (*ibid.* xx).
- Herbert, Sir Thomas (English traveller and author; 1606-82).
- Travels* (London, 1634), 895 (pp. 21, 240).
- Herodes Atticus, Tiberius Claudius (Athenian rhetorician; 101-177 A.D.).
- De Republica*, 1296 (13).
- Herodian (Greek historian; 3rd century Christian Era).
- Histories*, 265 (IV. v), 659 (VI. ii, iv), 1033 (I. vi), 1043 (IV. i), 1066 (I. iv. 6), 1220 (III. vi), 1271 (V. i), 1287 (II. iv).
- Herodotus (Greek historian; born 484 B.C.).
- History*, 58 (IX. cxxii), 73 (VIII. iii), 193 (II. cxxviii), 263 (I. ccxvi), 305 (VIII. cxi), 405 (I. cxxxi), 422 (III. cxxix), 483 (I. clxxxvii), 497 (IV), 510 (IV.

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- Hesiod (Greek poet; fl. ca. 800 B.C.).
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- Hippodamus (Greek architect; 5th century B.C.).
De Felicitate, 245 (fragment 1 ed. Mul-lach).
- Hobbes, Thomas (English philosopher; 1588-1679).
De Cive (Paris, 1642), 87 (xiv, § 1), 88 (xiv, § 2), 89 (iii), 95 (xv, § 5), 97 (viii, § 2), 104 (xiv, §§ 11-13), 117 (iii, § 5), 120 (iii, § 6), 121 (iii, § 6), 124 (iii, § 6), 125 (i, § 7), 126 (i, § 7), 130 (iii, § 7), 157 (x, § 1), 158 (i, § 7), 165 (ix, § 3; xiii, § 7), 166 (i), 168 (viii, § 1; xiii, § 7), 175 (v, § 2), 177 (xiii, §§ 7-8), 189 (ii, § 1), 204 (iii, § 26), 210 (i, § 2), 219 (iii; xv, § 3), 226 (xiv, §§ 4-5), 330 (i, § 3), 338 (iii, §§ 15-18), 375 (iii, § 8), 382, note 1 (xiv, § 19), 382 (xiv, § 19; xv, § 2; § 5; § 19), 390 (ii, §§ 3 ff.), 395 (ii, §§ 6 ff.), 412 (ii, § 11), 422 (ii, § 16), 431 (ii, § 14), 432 (ii, § 18), 493 (ii, § 23), 539 (i, § 6; § 11), 585 (ix, § 4), 699 (ii, § 9), 826 (i, § 9), 828 (iii, § 14), 871 (vi, § 16; xiv, § 9), 910 (ix), 927 (ix, § 8), 937 (viii), 944 (ix, § 9), 949 (i), 952 (i), 960 (i, § 2), 962 (v, § 1), 964 (ii, § 11), 968 (vi), 979 (v, § 8), 980 (vi, § 13), 981 (ii, §§ 8-9; vii, §§ 7 ff.), 982 (vii, § 9), 983 (xiii, § 3), 986 (xii, § 8), 995 (v, § 11), 998 (xiii, §§ 12-13), 1006 (ii, § 4), 1012 (vi, § 6; § 8), 1015 (preface; vi), 1018 (vi), 1029 (vii, § 5), 1031 (vii, §§ 8, 9), 1035 (vii, § 2), 1053 (x), 1057 (vi, § 14), 1059 (x, § 8), 1077 (v, § 6 bis; § 9; vi, § 13; § 17), 1078 (vii, § 16; ix, § 11), 1082 (vii, § 16), 1090 (vii, § 5), 1091 (vii, §§ 15-16), 1094 (ix, § 15), 1096 (ix, § 19), 1103 (viii, § 7), 1104 (xii, § 9), 1117 (x, § 10), 1121 (xiii, § 15), 1124 (xxiii, § 10), 1126 (xiii, §§ 12-13), 1127 (xiii, §§ 7-8), 1133 (xiv, § 10; § 14), 1134 (vi, § 16; xiv, §§ 9-10), 1137 (xiv, § 9), 1138 (iii, § 23; xii, § 1), 1140 (xii, § 2), 1159 (ii, § 18), 1164 (xiv, § 7), 1165 (ii, § 19), 1174 (iii, § 11), 1210 (iii, § 11; xiii, § 16), 1230 (i), 1241 (i, § 2), 1246 (xv, § 9), 1247 (xv, § 9), 1274 (vi, § 15; xii, § 7), 1276 (xii, § 7), 1276, note 7 (vi, § 15, note 1), 1280 (xii, § 9), 1282 (xiii, § 10), 1317 (iii, § 27), 1363 (ix, § 8);
- De Corpore Politico* (London, 1650), 413 (I. ii. 10);
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- Leviathan* (London, 1651), 12 (xvi), 60 (vi), 85 (xxv), 104 (xxvi), 124 (xv), 125 (xv), 138 (x), 165 (xiii, § 7), 166 (xiii), 168 (xiii), 204 (xv), 250 (iv), 251 (xlvii), 331 (xiii), 376 (xi), 423 (xiv), 461 (iv), 498 (xiv), 922 (xx), 955 (xi), 966 (xxx), 977 (general reference), 983 (conclusion), 984 (introduction), 997 (xxx), 998 (xxx), 999 (xxx), 1015 (xii, xxix, xlvi, xlvii), 1018 (xxix), 1034 (xxix), 1035 (ii, § 19), 1041 (xxix), 1043 (xxii), 1044 (xix; xxii; xxvi), 1053 (xix), 1075 (xxx), 1077 (xxix), 1083 (xix), 1092 (xxi), 1116 (xlv), 1120 (xlv), 1121 (xxx ter), 1123 (xxv, xxx), 1124 (xi), 1125 (xxx), 1160 (xxviii), 1172 (xxviii), 1175 (xxviii), 1197 (xxvii), 1210 (xxvii), 1226 (xxviii), 1238 (xxvii), 1239 (x; xxx), 1241 (x), 1245 (x), 1268 (x);
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Homer (Greek epic poet; 9th (?) century B.C.).

Iliad, 234 (XIX. 86-7), 254 (XVIII. 104), 258 (IX), 414 (III. 105-6), 472 (IX. 312-13), 514 (X. 307 ff.), 728 (VII. 472 ff.), 729 (VI. 236; IX. 122), 730 (VI), 767 (VII. 171), 803 (III-IV; IV. 13), 804 (III. 281), 879 (IX. 341 f.), 1146 (XII. 243), 1177 (XI. 793), 1180 (IX. 702 ff.), 1258 (I. 277 ff.), 1259 (I. 280-1), 1281 (I. 125-6), 1314 (XI);

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Horatius Flaccus, Quintus (Latin poet; 65-8 B.C.).

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Horn, Johann Friedrich (German jurist; born 1633).

De Civitate (Utrecht, 1664), 840 (I. i, § 2), 861 (I. i), 935 (I. iii, § 5), 956 (I. iv, § 6), 960 (I. iv, § 6), 1003 (II. i), 1018 (III. i, § 3), 1026 (III. i), 1085 (II. ix, § 2), 1087 (II. ix, § 4).

Hotman, François (French jurist; 1524-90).

Franco-Gallia (Geneva, 1573), 1071 (xii);

Observations (Basel, 1560-75), 761 (II. i);

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Huarte y Navarro, Juan (Spanish physician; ca. 1530-92).

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Hyginus (Roman antiquary; age uncertain, probably before the 5th century Christian Era).

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Iamblichus (Greek philosopher; † ca. 330 A.D.).

Protrepticon, 151 (xx, p. 123A), 208 (xx, p. 123A), 216 (xiii, p. 76A), 221 (xiii, p. 83A), 1178 (ii, p. 4A).

Isaeus (Athenian orator; fl. 385 B.C.).

Orations, 407 (ix), 627 (iii. 42; iii. 68; vi. 28), 636 (viii. 32), 640 (vii. 30), 832 (iii; viii, 6), 949 (iii. 66), 1280 (vi).

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Isocrates (Athenian orator; 436-338 B.C.).

Aegineticus, 642 (general reference), 907 (8);

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- Archidamus*, 44 (37), 659 (26), 1244 (4), 1334 (51);
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 Ives or Yves de Paris (French scholar; 1593-1678).
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 Jornandes (Gothic historian; 6th century Christian Era).
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 Juvenal, Decimus Junius (Latin satirist; ca. 40-ca. 125).
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La Barde, Jean de (German philosopher; 1600-92).

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Le Grand, Antoine (Dutch philosopher; 17th century).

Institutio Philosophiae secundum Principia R. Descartes (London, 1672), 54 (VII. v), 55 (VIII. xvii, xviii), 60 (VII. xix), 242 (VIII. x. 420), 248 (VIII. xii), 527 (VI. iii).

Leibnitz, Gottfried Wilhelm (German philosopher; 1646-1716).

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L'Empereur, Constantin (Dutch orientalist; 1570-1648).

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Leo I, Flavius (Emperor of Constantinople; † 474 A.D.).

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Leo Mutinensis, or Leo of Modena (Jewish scholar; 1571-1654?).

De Ritibus Hebraicis (*Historia degli Rite Hebraici*, Paris, 1637), 522 (II. iv, § 4), 753 (II. v), 822 (V. v, § 1), 846 (IV. ii), 868 (IV. ii).

- Leo of Africa (Joannes Leo Africanus; Moorish geographer; fl. 1526).
- Description of Africa* (Antwerp, 1556), 684 (III), 692 (VII), 897 (I), 1245 (I).
- Léry, Jean de (French traveller; 1534-1611). *Itinerary (Histoire d'un Voyage . . . en la Terre du Brésil, Geneva, 1578)*, 894 (viii).
- Lesbonax (Greek rhetorician; 2nd century Christian Era).
- Oratio Hortatoria*, 1264 (II. 12, 13).
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- Libanius (Greek rhetorician; 314-ca. 390 A.D.).
- Chirae*, 9 (i. 6), 317 (ii. 13), 889 (i. 10); *Declamations*, 51 (xxxv, p. 780 B,C,D, ed. Morellius), 113 (xxiii. 20), 150 (ix. 345-6), 209 (xiii. 30), 215 (v, p. 79), 240 (xxi, p. 535c), 266 (xxiii. 8, 10), 267 (iii. 24), 279 (ii. 193, p. 223b), 347 (xiii. 26), 481 (xxix, p. 664d), 521 (iii, p. 249A), 648 (iii. 16), 684 (xlviii. 29), 746 (xxix. 1, 143), 812 (xxxix. 36; xl. 75), 921 (ix. 43), 924 (xxxix. 36; xl. 75), 993 (xxx), 1154 (I. xxvii. 42), 1177 (xx), 1196 (viii. 22), 1198 (xxix. 1, 111), 1201 (x. 16, 17);
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- Lindenberg, Friedrich (German jurist; 1573-1648).
- Codex Legum Antiquarum* (Frankfurt, 1613), 768 (glossary).
- Lipsius, Justus (Belgian scholar; 1547-1606).
- On Tacitus, Annals* (ed. Antwerp, 1581), 848 (III).
- Politica* (Antwerp, 1589), 485 (IV. xiv, n. 32);
- Livy (Titus Livius; Latin historian; 59 B.C.-17 A.D.).
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Loccenius, Joannes (German historian;
1597-1677).
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Londorp or Lundorp, Michael (German
historian; first half of the 17th century).
Continuatio Sleidani (Frankfurt, 1615-
19), 710 (general reference).
Lopez, Eduardo (Spanish traveller; 2nd
half of the 16th century).
De Regno Congo (*Relazione del Reame di
Congo*, Rome, 1591), 854 (II. ix).
Lucanus, Marcus Annaeus (Latin epic
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Lucian (Greek writer of dialogues; born
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Lucretius Carus, Titus (Latin poet and
philosopher; *ca.* 96-55 B.C.).
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Lycurgus (Athenian orator; †323 B.C.).
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Maccabees, see *Bible*.

Machiavelli, Niccolò (Italian historian; 1469-1527).

Discorsi sopra la Primadeca di Tito Livio (Rome, 1531), 1139 (I. ii);

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Macrobius, Ambrosius Theodosius (Latin grammarian; 4th century Christian Era).

Saturnalia, 543 (I. viii), 1278 (III).

Maestert, Jacob (Dutch jurist; 1610-58).

De Justitia Romanarum Legum (Leyden, 1634), 924 (xxvii).

Maiores, see Maria de Conti, Marcus Antonio.

Mamertinus, the elder, Claudius (Latin panegyrist; 3rd century Christian Era).

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Mandelslo, Johann Albrecht von (German traveller; 1616-64).

Itinerarium (Morgenländische Reise. Beschreibungen, Schlesswig, 1650), 1249 (II), 1262 (II. x).

Manilius, Marcus (Latin astronomer; 1st century Christian Era).

Astronomica, 4 (III. 39 ff.), 62 (V. 226), 149 (II. 105-8), 150 (IV. 4 ff.), 151 (II. 592 ff.), 155 (I. 68), 166 (V. 495 ff.), 167 (V. 120 f.), 234 (IV. 79 ff.), 334 (III. 525 ff.), 348 (IV. 537 ff.), 778 (II. 586-8).

Manutius, Paulus (Paolo Manuzio; Italian printer and critic; 1512-74).

De Legibus Romanis (Paris, 1557), 631 (general reference), 1278 (general reference *bis*).

Maria de Conti, Marcus Antonio (Italian humanist; 1514-55).

Orations (Venice, 1582), 465 (general reference).

Mariana, Juan (Spanish historian; 1536-1624).

History of Spain (Historiae de Rebus Hispaniae, Toledo, 1592), 694 (XV. ix), 855 (XXIV. v), 1102 (XX. ii, iii), 1340 (XXI. xii), 1351 (XIII. xi).

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Marselaer, Frederic de (Belgian jurist; 1584-1670).

Legatus (Antwerp, 1618), 228 (II. xiii), 426 (I. xxx), 798 (II. xxxix), 802 (I. xxxviii), 1127 (II. xi), 1155 (I. xxxiii), 1240 (I. xxxiii).

Martial (Marcus Valerius Martialis; Latin writer of epigrams; *†*ca. 103 A.D.).

De Spectaculis, 241 (XXXI. i);

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Martini, Martin (Jesuit missionary; 1614-61).

Historia Sinica (Munich, 1658), 204 (IV. xxv), 255 (I. xxxiv), 531 (V), 546 (V. xxiv), 582 (IV. xxi), 584 (V), 778 (IV. xi), 857 (III. xxviii), 901 (I), 909 (VI. i), 927 (I), 930 (IV. ii; VI. i), 1062 (III. i), 1075 (V. xxxvii; VI. i), 1097 (VI. i), 1270 (preface), 1287 (IV. xxiv).

Matthaeus, Antoine (Dutch jurist; 1635-1710).

De Criminibus (first edition at Ticino before 1685), 77 (V. v. 6 on *Digest* XLVIII), 83 (V. iii. 16 on *Digest* XLVIII; X. i. 1-2 on *Digest* XLVII), 141 (XIX. i on *Digest* XLVIII), 262 (V. i. 9 on *Digest* XLVIII), 286 (III. iii, 13 ff. on *Digest* XLVIII), 306 (XLVII. i. 7), 504 (XVI. v on *Digest* XLVII), 518 (XVI. v on *Digest* XLVII), 648 (XIX. iv and XX. iv. 14 on *Digest* XLVIII), 664 (I. iv. 4 on *Digest* XLVII), 779 (XIV. ii. 13 ff. on *Digest* XLVIII), 871 (III. i. 13 on *Digest* XLVII), 918 (V. i. 5 on *Digest* XLVII), 1183 (V. ii on *Digest* XLVIII), 1193 (XIX. v on *Digest* XLVIII), 1202 (I. i. 9 on *Digest* XLVII; XVIII. iv. 28 on *Digest* XLVIII), 1206 (V. iii. 10 and XVIII. iv on *Digest* XLVIII), 1208 (I. iii. 2, 3 on *Digest* XLVII; VIII. i, ii on *Digest* XLVII), 1214 (I. ii on *Digest* XLVII), 1216 (IV. ii. 2, 3 on *Digest* XLVII), 1220 (XVIII. iv. 30 on *Digest* XLVIII), 1221 (XVIII. iv. 30 on *Digest* XLVIII), 1226 (II. v. 10

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- Matthew, see *Bible*.
- Maurocenus (Andrea Morosini; Venetian
 historian; 1558-1618).
Historia Veneta (Venice, 1623), 415 (V,
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- Maximus of Tyre (Greek philosopher; 2nd
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- Mela, Pomponius (Latin geographer; fl.
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- Melanchthon, Philip (German scholar;
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 1539), 1067 (general reference).
- Mémoires touchant les Ambassadeurs, see
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- Menagius (Gilles Menage; French scholar;
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- Menander (Athenian comic poet; born ca.
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- Meurs, Jan de (Dutch historian; 1579-
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- Michael of Ephesus (Byzantine monk and
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- Milton, John (English poet and essayist;
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- Modestinus, Herennius (Roman jurist; fl.
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- Monconys, Balthasar de (French traveller;
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- Montaigne, Michel (French essayist; 1533-
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- Moquet, John (French explorer; born
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- More, Thomas (English statesman; 1478-
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- Mornacius (Antoine Mornac, French jurist;
 †1620).
*On the Code (Observationes in XXIV
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- Mornay, Philippe de (French Protestant
 apologist and jurist; 1549-1623).
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- Moschus (Greek poet; 2nd century B.C.).
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- Naevius (Latin epic and dramatic poet; ca. 270-ca. 199 B.C.).
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- Naudeus or Naudé, Gabriel (French philosopher; 1600-53).
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- Nepos, Cornelius (Latin historian; ca. 100-ca. 24 B.C.).
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- Neuhof or Nieuhoff, Nyhof, Nyhov, Johann (Dutch statesman; 1618-72).
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- Nicephoras Gregoras, see Gregoras Nicephorus.
- Nicetas Choniates or Acominatus (Byzantine historian; †ca. 1216 A.D.).
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- Nicolaus of Damascus (Greek historian; born ca. 74 B.C.).
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- Nicole, Pierre (pseudonym, Willelmus Wendrockius; French essayist; 1625-95).
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- Nonius Marcellus (Latin grammarian; 4th century Christian Era).
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- Nonnus (Greek poet of Egypt; 4th and 5th centuries Christian Era).
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- Ocellus Lucanus (Greek philosopher; 1st century B.C.).
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- Olearius (Adam Oelschlaeger or Olearius; German traveller and scholar; ca. 1600-71).
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- Oppian (Greek poet of Cilicia; 2nd and 3rd centuries Christian Era).
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- Orosius, Paulus (Latin historian and Christian apologist; fl. 410).
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- Osiander, J. Adamus (German scholar; 1622-97).
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- Osorius, Hieronymus (Jeronimo Osorio da Fonseca; Portuguese bishop; 1506-80).
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- Ovid (Publius Ovidius Naso; Latin poet; 43 B.C.-17 A.D.).
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Palaephatus (Greek mythographer; 4th century B.C.).
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Palladius Rutilius Taurus Aemilianus (Latin writer on agriculture; 4th century Christian Era).
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 Piccart, Michael (German scholar; 1574-1620).
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- Pontano, Giovanni (Italian humanist; 1426-1503).
Neapolitan History (De Bello Neapolitano), Hagenau, 1530, 1097 (II).
- Porphry (Greek philosopher; 233-304).
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- Priolo, Benjamin (French historian; 1602-67).
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- Priscian (Latin grammarian; 5th and 6th centuries Christian Era).
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- Proclus (Greek philosopher; 5th century Christian Era).
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- Procopius (Byzantine historian; 6th century Christian Era).
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- Propertius, Sextus (Roman poet; ca. 48-ca. 16 B.C.).
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- Prudentius Clemens, Aurelius (Christian Latin poet; 348-ca. 410).
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- Pseudo-Aggenius Urbicus (Latin scholar; 5th or 6th century Christian Era).
Commentary on Frontinus, 597 (I. p. 16, II. 25 ff.; I. p. 17, II. 9 ff.).
- Pseudo-Asconius (4th and 5th centuries Christian Era).
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- Pseudo-Phocylides (Jewish - Christian period).
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- Publius Syrus (Roman writer of mimes; fl. 43 B.C.).
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- Pufendorf, Samuel (German jurist, author of the work here translated; 1632-94).
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- Quintilianus, Marcus Fabius (Roman rhetorician; ca. 35-ca. 100).
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Quintus Calaber Smyrnaeus (Greek epic poet; 4th century Christian Era).

Posthomerica, 151 (I. 464 f.), 981 (XIII. 269 f.), 1036 (V. 478 f.), 1238 (IX. 283), 1243 (V. 263 ff.), 1244 (V. 155 f.).

Rachel, Samuel (German jurist; 1628-91).

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Radevicus (continuator of Otto of Freising; 12th century).

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Rauwolf or Rauchwolf, Leonhard (German botanist; †1596).

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Richier or Richerius, Christophe (French diplomat; 1523(?)—53).

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Roger, Abraham (Dutch traveller; †1670).

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Romanus, Ludovicus (Italian jurist; 1409-39).

Navigatio (Novum Itinerarium Aethiopiae, &c., without date or place), 855 (V. vii), 865 (V. viii).

Rossi, Giovanni Vittorio (Italian scholar; 1577-1647).

Pinacotheca (Köln, 1643), 679 (II. xxix), 682 (III. xvii, xxiv).

Roy, Hugo de (Huguenot philosopher; 17th century).

De eo quod Iustum est (Utrecht, 1645), 650 (III. iii, iv), 652 (III. iii, iv; III. iv. 8).

Sadi (Persian poet; ca. 1184-1291).

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Sallust (Gaius Sallustius Crispus; Roman historian; 86-36 B.C.).

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 Sallustius (Roman philosopher; 4th century Christian Era).
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 Salmasius (Claude de Saumaise; French scholar; 1588-1653).
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 Sanderson, Robert (English divine; 1587-1663).
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 Sarpi, Pietro Paolo. - See Suavis, Petrus.
 Saxo Grammaticus (Danish historian; † ca. 1184).
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 Scaliger, Joseph Justus (French scholar; 1540-1609).
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 Scheffer, Johann Gerhard (German philologist; 1621-79).
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 Schouten, Joost (Dutch explorer; 17th century).
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 Scipio Ammiratus (Italian historian; 1531-1601).
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 Selden, John (English lawyer; 1584-1654).
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 Semonides (Greek poet; 7th and 6th centuries B.C.).
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 Seneca the Elder, Lucius Annaeus (Roman rhetorician; ca. 60 B.C.-ca. 37 A.D.).
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 Seneca the Younger, Lucius Annaeus (Roman philosopher; † 65 A.D.).
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- Silius Italicus, Gaius Catius (Latin epic poet; *ca.* 25–100).
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- Simler, Josias (Swiss Protestant clergyman and historian; 1530–76).
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- Simonides, *see Anthology, Greek*.
- Simplicius (Greek philosopher; 6th century Christian Era).
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- Sionite, Gabriel (Jewish scholar; †1677).
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- Siracides (Son of Sirach)*, *see Bible*.
- Sleidan, Johannes (German historian; 1506–56).
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- Socrates (ecclesiastical historian of Constantinople; born 379).
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- Sopater (Greek sophist; 4th century Christian Era), 924 (*cf.* note on that page).
- Sophocles (Athenian tragic poet; 496–406 B.C.).
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- Sozomen Hermias (Greek ecclesiastical historian; 5th century Christian Era).
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- Statius, Publius Papinius (Roman epic poet; *ca.* 61–*ca.* 96).
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- Stobaeus, Joannes (Greek anthologist; 5th century Christian Era).
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- Struve, Georg Adam (German jurist; 1619-92). *Exercitationes* (Helmstedt, 1643), 669 (XI, § 13); *Syntagma* (Jena, 1653), 534 (XI. lv).
- Suavis, Petrus (Pietro Paolo Sarpi, Pietro Soave, Paolo Servita, Father Paul, Paul of Venice; Italian theologian; 1552-1623). *De Inquisitione* (*Historia della Sacra Inquisitione*, Serravalle, 1638), 504 (pp. 55-7); *Historia de Concilio Tridentino* (London, 1619), 15 (II, pp. 214-15), 372 (I. lii), 500 (I; V, p. 358), 692 (II. xxxviii), 695 (II. xxi), 856 (II. xxxviii), 889 (II. xxxvii; II. xxxix), 906 (I. xv), 908 (I. lviii), 987 (IV, p. 788), 1006 (II, p. 213), 1009 (V, p. 354), 1251 (V, p. 402), 1255 (VIII).
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- Sylvius (Piccolomini), Aeneas (later Pope Pius II; 1405-64). *Historia Bohemica* (*De Ortu, Regione, et Gestis Bohemorum*, Rome, 1475), 505 (xviii).
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- Tacitus, Cornelius (Roman historian; ca. 55-post 117). *Agricola*, 63, note 1 (xxx), 898 (vi), 1142 (iv), 1250 (xiv), 1258 (xxxix), 1267 (general reference), 1284 (xix); *Annals*, 16 (IV. xxxvii-xxxviii), 36 (XIV. xlv), 77 (XI. iv), 80 (I. xxxv), 82 (III. xvii; IV. xx. 5), 107 (XIII. xlii), 112 (XII. vi), 218 (VI. vi), 261 (VI. xxix), 273 (II. i), 300 (XIV. xxxii-xxxiii), 336 (XII. xxxvii), 368 (XIII. lv), 371 (I. lv), 376 (IV. xviii), 393 (IV. xi. 40), 415 (XI. xix), 471 (XVI. i ff.), 506 (III. lxx), 510 (XII. xlvii), 574 (II. i), 648 (XIV. xviii), 659 (VI. xxxi. 3, 4), 688 (VI. xvii. 4), 713 (XIV. xiv), 802 (XII. xlvii), 813 (XV. xix), 814 (II. xxx; V. ix), 843 (II. lxxxv), 850 (II. xxxvii), 852 (III. xxxiii-xxxiv), 858 (II. lxxxv. 3), 860 (XIII. xxxii), 877 (II. lxxxvi), 907 (XII), 935 (VI. xx), 941 (XIV. xlv), 968 (I. xxxii), 1019 (I. xii), 1072 (XIII. iv. 2), 1107 (XII. xi), 1125 (III. lv), 1140 (VI. viii), 1142 (XIII. xlii), 1144, note 2 (IV. xxx), 1145 (III. xvi), 1163 (I. xlviii), 1168 (XII. liii), 1176 (III. liv), 1178 (XV. lxviii. i), 1185 (III. liii), 1189 (III. lxx), 1190 (III. i), 1193 (III. xxv, xxxvii), 1194 (III. liii and liv), 1198 (III. lxx), 1209 (III; III. liv), 1220 (I. xlv), 1226 (XIV. xlv), 1227 (III. xii), 1240 (XIV. lxii), 1258 (VI. viii), 1279 (XIII. i), 1282 (XIII. li bis), 1295, note 5 (XV. i), 1341 (XII. xviii), 1354 (I. lviii); *Germany*, 173 (xlv), 177 (xxxv), 178 (xxxvi), 324 (xxi), 405 (xxii), 570

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- Temple, Sir William (English statesman and author; 1628-99).
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- Terentius Afer, Publius (Roman comic poet; †159 B.C.).
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- Theages (late Pythagorean philosopher).
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- Theano (Pythagorean philosopher; early 5th century B.C., if historical at all).
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- Themistius (Greek rhetorician; ca. 315-ca. 390).
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- Theocritus (Greek pastoral poet; fl. 270 B.C.).
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- Theodoret (ecclesiastical historian; ca. 393-ca. 457).
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- Theodoric the Great (King of the Ostrogoths; ca. 454-526).
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- Theodosian Code*, 1151 (VII. xiii. 4 and 10; 5; xxii. 1), 1152 (VII. xiii. 8; 11; 16).
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- Tibullus, Albius (Roman elegiac poet; †19 B.C.).
- Elegies*, 236 (III. vi. 49-50), 440 (II. iv. 14), 542 (I. iii. 41 ff.), 1263 (IV. i. 25 ff.).
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Valerius Flaccus, Gaius (Latin epic poet; † ante 90 A.D.).

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Valla, Laurentius (Italian humanist; 1407-57).

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Varro, Marcus Terentius (Roman writer; 116-27 B.C.).

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Vasquez de Menchaca, Fernando (Spanish jurist; 1512-69).

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- Vegetius, Flavius Renatus (Latin writer; 4th and 5th centuries Christian Era).
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- Velleius Paterculus (Roman historian; 1st century B.C.—1st century Christian Era).
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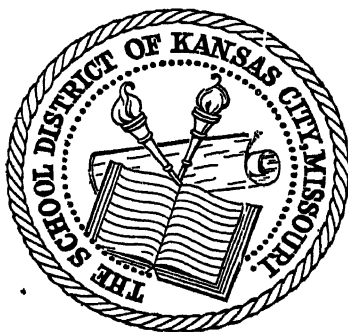
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